UNITED STATES REPORTS

VOLUME 355

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1957

OCTOBER 7, 1957, THROUGH MARCH 3, 1958

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Errata.

125 U. S. 692: Name of plaintiff in error should be "Bohanan." Corresponding changes should be made in Table of Cases Reported, pp. v, vii.

349 U. S. 948, No. 586, Misc.: "222 Miss. ——" should be "225 Miss. 436."

351 U. S. 910, No. 727: The citation to the official report should be "162 Tex. Cr. R. 398."

353 U. S. 957, No. 512, Misc.: The citations to the reports of the decision below should be "100 U. S. App. D. C. 302, 244 F. 2d 750."

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.
CHARLES E. WHITTAKER, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.[1]
SHERMAN MINTON, Associate Justice.[2]

HERBERT BROWNELL, Jr., Attorney General.[3]
WILLIAM P. ROGERS, Attorney General.[4]
J. LEE RANKIN, Solicitor General.
JOHN T. FEY, Clerk.
WALTER WYATT, Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HELEN NEWMAN, Librarian.

Notes on p. iv.

NOTES.

[1] MR. JUSTICE REED (retired) was designated and assigned to perform judicial duties in the United States Court of Claims (*post*, pp. 860, 886) and the United States Court of Appeals for the District of Columbia Circuit (*post*, p. 944) for limited periods, and was appointed Special Master in No. 12, Original, *Virginia* v. *Maryland* (*post*, p. 946).

[2] MR. JUSTICE MINTON (retired) was designated and assigned to perform judicial duties in the United States Court of Claims for a limited period. See *post*, p. 880.

[3] Attorney General Brownell resigned, effective November 8, 1957.

[4] Mr. William P. Rogers, who had been Deputy Attorney General since 1953, was appointed Attorney General by President Eisenhower, a recess appointment, on November 8, 1957, and took the oath on the same day. He was nominated by President Eisenhower on January 13, 1958; the nomination was confirmed by the Senate on January 27, 1958; he was recommissioned on the same day; and he took the oath again on February 4, 1958.

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.)

TABLE OF CASES REPORTED

NOTE: Cases reported before page 801 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on pages 801 *et seq.*, are those in which orders were entered.

	Page
Aabeta Co. *v.* Flintkote Co.	835
Abbate *v.* United States	902
Abbate Bros. *v.* Chicago	65
Aberlin *v.* Zisman	857
Abramowitz *v.* Brucker	579
Abrams, Four Maple Drive Realty Corp. *v.*	14
Accardo *v.* United States	898
Ackoff, National Drying Machine Co. *v.*	832
Acting Officer in Charge. See Immigration Officer.	
Adams Newark Theater Co. *v.* Newark	851
Administrator. See name of administrator; Rent Administrator.	
Afro-American Co. *v.* Owen	914
Aghnides, Kress & Co. *v.*	889
Agnew *v.* Gordon	918
Agnew *v.* Shain	919
Agricultural Workers *v.* Benton Harbor Industries	814
A. H. Bull S. S. Co. *v.* Seafarers' Union	932
A. H. Bull S. S. Co., Vargas *v.*	958
Aircraft Workers *v.* Benton Harbor Industries	814
Akin *v.* United States	956
Akron, C. & Y. R. Co. *v.* Frozen Food Express	6
Alabama, Beddow *v.*	930
Alabama, Reeves *v.*	368
Alabama *ex rel.* Patterson, Nat. Assn. of Colored People *v.*	860
Alabama Mills *v.* Mitchell	834
Aladdin Radio Industries, McCrary *v.*	8
Alaska Industrial Board *v.* Chugach Electric Assn.	810
Albanese *v.* Pierce	15
Alberts *v.* California	852
Albonico, Madera Irrigation District *v.*	803
Alcohol and Tobacco Tax Div. *v.* Magnolia Liquor Co.	24
Alcoholic Beverage Control Director *v.* Love	958

	Page
Alcorta *v.* Texas	28
Alexander *v.* United States	852
Alien Property Custodian, Bonetti *v.*	910
Alien Property Custodian, Nakashima *v.*	872
Alien Property Custodian, Oehmichen *v.*	842
Alien Property Custodian, Societe Internationale *v.*	812, 910
Alien Property Custodian, Von Opel *v.*	878
Alker *v.* Humphrey	841
Alker, Nichols *v.*	820
Alleghany Corp. *v.* Breswick & Co.	415, 802
Allen, County School Board *v.*	953
Allen *v.* Williamson	838
Allied Stores of Ohio, Inc., *v.* Bowers	911
All States Life Ins. Co., Sears, Roebuck & Co. *v.*	894
Alonzo *v.* United States	940
Alprin *v.* United States	924
Aluminum Co., Mineral Holding Trust *v.*	814
Aluminum Reserve Corp., Brownstein *v.*	863
A. Maschmeijer, Jr., Inc., *v.* Eastern Motor Express	959
Amaya *v.* United States	916
Amen, Black *v.*	600
American Airlines *v.* North American Airlines	465
American Bitumuls & Asphalt Co. *v.* United States	883
American Dredging Co., Kernan *v.*	426
American Emery Wheel Works *v.* Mason	815
American & European Agencies *v.* Gillilland	884
American Hospital & Ins. Co., Federal Trade Comm'n *v.*	867
American Monorail Co., Parks-Cramer Co. *v.*	893
American Pipe & Steel Corp. *v.* Commissioner	906
American Public Power Assn. *v.* Power Authority of N. Y.	64
American Transit Lines *v.* Smith	889
American Trucking Assns. *v.* Frisco Transportation Co.	938
American Trucking Assns. *v.* Frozen Food Express	6
American Trucking Assns. *v.* United States	141
Ames *v.* California	891
Anderson *v.* California	888
Anderson, Haas *v.*	854
Anderson *v.* Indiana	919
Anderson, Retail Clerks' Union *v.*	852
Anderson *v.* United States	822
Andrew G. Nelson, Inc., *v.* United States	554
Andrews *v.* Rhode Island	898
Angelet *v.* United States	859

Page
Anglin, Fuller Lumber Co. *v*. 821
Anonymous *v*. Anonymous. 854
Ansolabehere, Laborde *v*. 833
Appellate Division, Supreme Court of N. Y., Pinataro *v*. 922
Apuzzo *v*. United States. 831
Archer, Brown & Root, Inc., *v*. 825
Archer County, Sinclair Pipe Line Co. *v*. 862
Argento *v*. Horn. 818, 885
Argonaut Navigation Co. *v*. Kotsifakis. 865
Arizona, Gutierrez *v*. 17
Arizona Western Ins. Co., Constantin & Co. *v*. 905
Arkansas, Bailey *v*. 851
Arkansas-Missouri Power Corp. *v*. Paschal. 835
Arkansas Public Service Comm'n *v*. United States. 4
Armco Steel Corp. *v*. Baltimore & O. R. Co. 175
Arnold *v*. Tucker. 848
Arp *v*. United States. 826
Arthur Walter Seed Co. *v*. McClure. 906
Artukovic, Karadzole *v*. 393
Ashdown *v*. Utah. 853
Assessor of Contra Costa County, Speiser *v*. 880
Assessors of Riverhead *v*. Grumman Corp. 814, 885
Associated Third Class Mail Users *v*. United States. 895
Association. For labor unions, see name of trade.
Association for Advancement of Colored People *v*. Patterson. . 860
Association of Lithuanian Workers *v*. Brownell. 23
Association of Metal Contractors, Metal Workers *v*. 924
Astra S. S. Corp., Gwinett *v*. 828
Atchison, T. & S. F. R. Co. *v*. Dixie Carriers, Inc. 179
Atchley *v*. California. 899
Atkins, Central Transportation Co. *v*. 913
Atkins *v*. Ellis. 936
Atkins, School Board of Newport News *v*. 855
Atlantic Coast Line R. Co., Stinson *v*. 62, 910
Attenhofer *v*. Brownell. 842
Attorney General, Attenhofer *v*. 842
Attorney General, Board of Naturopathic Examiners *v*. . . . 870, 920
Attorney General, Bonetti *v*. 901, 910
Attorney General, Kaufman *v*. 842
Attorney General, Klig *v*. 605, 809, 937
Attorney General, Lithuanian Workers Assn. *v*. 23
Attorney General, Marcello *v*. 903
Attorney General, Massachusetts Co. *v*. 881

Page
Attorney General, Nakashima *v*. 872
Attorney General, Nani *v*. 870
Attorney General, National Assn. of Colored People *v*. 860
Attorney General, Oehmichen *v*. 842
Attorney General *v*. Quan. 861, 921, 937
Attorney General, Rasmussen *v*. 859
Attorney General, Reddick *v*. 832
Attorney General, Robinson *v*. 807
Attorney General, Societe Internationale *v*. 812, 910
Attorney General, Sweezy *v*. 852
Attorney General, Uphaus *v*. 16
Attorney General, Von Opel *v*. 878
Atwood, Humble Oil & Refining Co. *v*. 829
Auditor of Public Accounts, Thillens, Inc., *v*. 606
Austin *v*. United States. 898
Automobile Workers *v*. Benton Harbor Industries. 814
Avondale Mills, Labor Board *v*. 811
Avramovich *v*. Lehmann. 905, 925
Azulay *v*. Pepersack. 962
Badhwar *v*. Colorado Fuel & Iron Corp. 862
Bailey *v*. Arkansas. 851
Bailey *v*. United States. 919
Baird *v*. New York Central R. Co. 853, 943
Baker *v*. United States. 864, 886
Baker, Weeks & Co. *v*. Breswick & Co. 802
Balaam, Santa Barbara County Water Agency *v*. 803
Balkcom, Connelly *v*. 934
Ball, Murphy Auto Parts Co. *v*. 932
Ball Construction Co., United States *v*. 587
Ballf *v*. Public Welfare Department. 912, 967
Baltimore & O. R. Co., Armco Steel Corp. *v*. 175
Baltimore & O. R. Co., Delaware River Port Authority *v*. 175
Baltimore & O. R. Co., Erie R. Co. *v*. 175
Baltimore & O. R. Co., Interstate Commerce Comm'n *v*. 175
Baltimore & O. R. Co., New York Cent. R. Co. *v*. 175
Baltimore & O. R. Co., Pennsylvania R. Co. *v*. 175
Baltimore & O. R. Co. *v*. Premier Peat Corp. 13
Baltimore & O. R. Co., United States *v*. 175
Baltimore Public Welfare Department, Frantum *v*. 882
Bandeen *v*. Howard. 813
Bando *v*. United States. 844
Bandy *v*. Municipal Court. 896
Banmiller, Dion *v*. 899
Banmiller, Herge *v*. 934

Page
Banmiller, Luzzi *v*. 924
Banmiller, Maisenhelder *v*. 845
Bannan, Cammarata *v*. 928
Bannan, Clark *v*. 845
Bannan, Lambert *v*. 900
Bannan, McGhee *v*. 961
Bannan, O'Con *v*. 853
Bannan, Warner *v*. 900
Banta *v*. United States. 33, 34
Barber, Jimenez *v*. 903, 943
Barber, Leng May Ma *v*. 921
Barber, Rietmann *v*. 923
Barbers Union of Memphis *v*. Flatt. 904
Barclay *v*. Martin. 963
Barnes *v*. Columbia Broadcasting System. 608, 950
Barnes, Lititz Mutual Ins. Co. *v*. 931
Barnes *v*. National Broadcasting Co. 604, 950
Barnes *v*. United States. 927, 968
Barr, Lincoln Building Associates *v*. 12
Barr *v*. Matteo. 171
Barras *v*. Salt River Valley Water Users' Assn. 890
Barry *v*. California. 956
Barry *v*. Texas. 851
Bartenders Union *v*. Leedom. 951
Bartkus *v*. Illinois. 281
Bartlett *v*. Weimer. 858
Baughman, Green *v*. 819
Baxley City, Staub *v*. 313
Beaver *v*. Smyth. 807
Beck *v*. Illinois. 849
Beddow *v*. Alabama. 930
Behnke, Police Pension & Relief Board *v*. 958
Bell, Rose *v*. 805
Benanti *v*. United States. 96, 801
Bendix Aviation Corp. *v*. Indiana Revenue Dept. 607
Benton County *v*. Lafferty. 869
Benton Harbor Malleable Industries, Automobile Workers *v*. . 814
Bereslavsky *v*. United States. 841
Bess *v*. United States. 861
Bethea, World Ins. Co. *v*. 181
Bethel Borough, Swift *v*. 40
Bethel Unit of Jehovah's Witnesses *v*. Borough of Bethel. . . . 40
Better Monkey Grip Co. *v*. Labor Board. 864, 900
Beverly Hills Corp., Carr *v*. 852

Page

Biggs *v.* United States 922
Billie *v.* Seminole Indians of Florida 843
Bills *v.* Texas 955
Binion *v.* United States 834
Birch & Sons, Martin *v.* 837
Birmingham Fire Ins. Co. *v.* Tropical Marine Products 903
Birrell, *In re* 951
Black *v.* Amen 600
Black, Ginsburg *v.* 865
Black *v.* Magnolia Liquor Co. 24
Blackmon *v.* Michigan 961
Blackwell *v.* United States 838
Blanc *v.* United States 874
Blank *v.* New York 963
Blaski *v.* Davidson 872, 928
Bloch *v.* Foxgal, Inc. 858
Blount *v.* Gladden 900
Blue Ridge Rural Electric Coop., Byrd *v.* 950
Blumenthal *v.* Reiner 903
Board of Accountancy of Florida, Oosterhoudt *v.* 603
Board of Assessors of Riverhead *v.* Grumman Corp. 814, 885
Board of Control, Florida *ex rel.* Hawkins *v.* 839
Board of County Comm'rs, Leonardo *v.* 906, 967
Board of Health of Kentucky, Bandeen *v.* 813
Board of Medical Examiners, Furnish *v.* 827, 879
Board of Naturopathic Examiners *v.* Wilson 870, 920
Boidakowski *v.* Goodman 878
Bolinders Co. *v.* United States 953
Bomar, Tennessee *ex rel.* Melton *v.* 851
Bonetti *v.* Brownell 901, 910
Bonetti *v.* Rogers 910
Bonney *v.* Commissioner 906
Borgmeier *v.* Fleming 821
Borg-Warner Corp., Solar Corp. *v.* 836
Borough. See name of borough.
Boston, Rosengard *v.* 272
Boston Printing Pressmen's Union *v.* Potter Press 817
Bourgeois *v.* Mercantile National Bank 869, 920
Bowers, Allied Stores of Ohio, Inc., *v.* 911
Bowers, Youngstown Sheet & Tube Co. *v.* 911
Bowland *v.* Colorado 934
Bowman, Illinois Central R. Co. *v.* 837
Bow Quong Chew *v.* Cornell 892
Boyd, Massey-Harris-Ferguson Limited *v.* 806

Page
Boyd *v.* Murphy 935
Boyd, Niukkanen *v.* 905
Boyd, Rystad *v.* 912, 967
Boyd, United States *v.* 889
Boyes *v.* United States 844
Braddock, Seaboard Air Line R. Co. *v.* 892
Bramble *v.* California 942
Brennan *v.* United States 890
Breswick & Co., Alleghany Corp. *v.* 415, 802
Breswick & Co., Baker, Weeks & Co. *v.* 802
Breswick & Co., Gruss *v.* 415
Breswick & Co., Interstate Commerce Comm'n *v.* 415
Brewer, Kovacs *v.* 810
Briggs & Stratton Corp. *v.* Clinton Machine Co. 914
Bristow, Ericksen *v.* 805
Brittain, Kasper *v.* 834, 886
Broadus *v.* Lowry 858
Broker *v.* United States 837
Brooklyn Eagle, Inc., *v.* Potoker 883
Brooks, Hubbard *v.* 887
Brooks *v.* United States 866
Brotherhood. For labor unions, see name of trade.
Brown, Moore *v.* 882
Brown *v.* Panhandle & S. F. R. Co. 818
Brown, Walker *v.* 954
Brownell, Attenhofer *v.* 842
Brownell, Bonetti *v.* 901, 910
Brownell, Kaufman *v.* 842
Brownell, Klig *v.* 809, 937
Brownell, Lithuanian Workers Assn. *v.* 23
Brownell, Marcello *v.* 903
Brownell, Nakashima *v.* 872
Brownell, Nani *v.* 870
Brownell, Oehmichen *v.* 842
Brownell *v.* Quan 861, 921, 937
Brownell, Rasmussen *v.* 859
Brownell, Robinson *v.* 807
Brownell, Societe Internationale *v.* 812, 910
Brownell, Von Opel *v.* 878
Brownlow *v.* Florida 847
Brown & Root, Inc., *v.* Archer 825
Brownstein *v.* Aluminum Reserve Corp. 863
Brucker, Abramowitz *v.* 579
Brucker, Harmon *v.* 579

	Page
Brush Industrial Lumber Co., Eistrat *v.*	818
Bryant *v.* Missouri	899
Bryson *v.* United States	817, 879
Buchkoe, Harris *v.*	935
Buchkoe, Lanzetta *v.*	918
Bullard, Duff *v.*	818
Bull S. S. Co. *v.* Seafarers' Union	932
Bull S. S. Co., Vargas *v.*	958
Burford, Powell *v.*	888
Burgess-Norton Mfg. Co. *v.* Lyons	65
Burke *v.* Denno	849
Burke, Goodchild *v.*	915
Burke, Hansen *v.*	844
Burwell *v.* Teets	896, 927
Bush *v.* Ellis	907
Buster, Phillips Petroleum Co. *v.*	816
Byrd *v.* Blue Ridge Electric Coop	950
California, Alberts *v.*	852
California, Ames *v.*	891
California, Anderson *v.*	888
California, Atchley *v.*	899
California, Barry *v.*	956
California, Bramble *v.*	942
California, Caritativo *v.*	853, 947
California, Carroll *v.*	960
California, Chapman *v.*	916
California, De Casaus *v.*	890
California, Hughes *v.*	964
California, Lambert *v.*	225, 937
California, Mills *v.*	841, 886
California, Montgomery *v.*	872, 908
California, Randazzo *v.*	865
California, Snowden *v.*	841
California, Tanner *v.*	859
California, Tipton *v.*	846
California, Williams *v.*	961
California Batching Equipment Co., Johnson Co. *v.*	816
California Board of Medical Examiners, Furnish *v.*	827, 879
California Department of Employment, Lines *v.*	857
California District Court of Appeal, Rousseau *v.*	847
California Industrial Accident Comm'n, Michel *v.*	917
California Utilities Comm'n *v.* United States	534
Cameron *v.* United States	917
Cammarano *v.* United States	952

Page

Cammarata *v.* Bannan 928
Campisi *v.* United States 892
Canadian Pacific Steamships, Ltd., *v.* McAfoos 823
Cano *v.* Pennsylvania 182
Caritativo *v.* California 853, 947
Carlson *v.* Washington 607
Carmen *v.* Dickson 924
Carminati *v.* United States 883
Carnation Co., Nashville Milk Co. *v.* 373, 967
Carpenter *v.* Michigan 850
Carpenters Council of Los Angeles *v.* McCarroll 932
Carpenters Union *v.* Labor Board 808
Carr *v.* Beverly Hills Corp 852
Carroll *v.* California 960
Carroll *v.* United States 857
Carson *v.* Washington Court House 270
Carter Products, Inc., Colgate-Palmolive Co. *v.* 823
Caruso *v.* New York 942
Casey, Lerner *v.* 803, 887
Casey Bearing Co., Stallman *v.* 864
Cassidy, FitzGerald *v.* 958
Cavell, Cobb *v.* 933
Cavell, Dunkle *v.* 917
Cavell, Henderson *v.* 885
Cavell, Johnson *v.* 919
Cavell, Lowery *v.* 843
Cavett Co., Machinists Association *v.* 39
C. B. Cottrell & Sons Co., Cottrell *v.* 12
C. E. Niehoff & Co. *v.* Federal Trade Comm'n 941
C. E. Niehoff & Co., Federal Trade Comm'n *v.* 411, 968
Centennial Ins. Co., Schneider *v.* 931
Center *v.* United States 857
Central Eureka Mining Co., United States *v.* 887
Central Transportation Co. *v.* Atkins 913
Central Zone Property Corp., Eisenberg *v.* 884
Cephas *v.* Tucker 847
Chain Institute, Inc., *v.* Federal Trade Comm'n 895
Chapman *v.* California 916
Chas. Kurz & Co. *v.* South Carolina Highway Dept 826
Chauffeurs Union *v.* Labor Board 958
Chauffeurs Union, Labor Board *v.* 808
Cheeks *v.* Maryland 929
Chernick *v.* Missouri 918
Cherokee Indians, Haile *v.* 893

Page
Cherpakov *v.* United States..... 873
Chesser *v.* Nash..... 845
Chicago, Abbate Brothers *v*..... 65
Chicago *v.* Thiele..... 957
Chicago, Times Film Corp. *v*..... 35
Chicago, B. & Q. R. Co. *v.* N. W. Auto Parts Co..... 815
Chicago Land Clearance Comm'n, Kostner *v*..... 820
Chicago Land Clearance Comm'n, O'Donnell *v*..... 856
Chicago, M., St. P. & P. R. Co. *v.* Illinois..... 300
Chicago, M., St. P. & P. R. Co. *v.* N. W. Auto Parts Co..... 815
Chicago, R. I. & P. R. Co., Hugh Breeding, Inc., *v*..... 880
Chicago, R. I. & P. R. Co. *v.* Williams..... 855
Chief Judge of U. S. Court of Appeals, Williams *v*..... 49, 860
Chin Bick Wah *v.* United States..... 870
Chow Bing Kew *v.* United States..... 889, 901
Chugach Electric Assn., Alaska Industrial Board *v*..... 810
Ciehala *v.* New York..... 848
Cincinnati Bell Tel. Co., Keco Industries, Inc., *v*..... 182
Cincinnati Gas & Electric Co. *v.* Federal Power Comm'n..... 930
Cities Service Co. *v.* Securities & Exchange Comm'n..... 912
Cities Service Defense Corp., Dutton *v*..... 828
Cities Service Gas Co. *v.* State Corporation Comm'n..... 391, 967
Citizens Bank & Trust Co. *v.* United States..... 825, 885
Citizens Utilities Co., Los Angeles *v*..... 892
Citizens Utilities Co., United States *v*..... 892
Cito *v.* United States..... 844
City. See name of city.
Civil Aeronautics Board, Hard *v*..... 960
Civil Aeronautics Board, Wilson *v*..... 870
Clark *v.* Bannan..... 845
Clay *v.* United States..... 863
Clemmer, Gaylord *v*..... 846
Clinton Machine Co., Briggs & Stratton Corp. *v*..... 914
Coakley *v.* Texas..... 917
Coastal Oil Co., Strathmore Shipping Co. *v*..... 836
Cobb *v.* Cavell..... 933
Coffing, Kelley, Glover & Vale, Inc., *v*..... 834
Cold Metal Products Co. *v.* Crucible Steel Co..... 940
Colgate-Palmolive Co. *v.* Carter Products, Inc..... 823
Collector of Internal Revenue, Goodman *v*..... 835
Collinge *v.* New York..... 936
Collins *v.* Kentucky..... 816
Collins *v.* King..... 934

Page
Collins *v.* New York 888
Collins *v.* Pennsylvania *ex rel.* Williams 936
Colonial Life & Accident Ins. Co. *v.* Wilson 927
Colony, Inc., *v.* Commissioner 811
Colorado, Bowland *v.* 934
Colorado Fuel & Iron Corp., Badhwar *v.* 862
Colorado Springs, Lee *v.* 955
Columbia Broadcasting System, Barnes *v.* 608, 950
Columbia Gas System, Committee for Debentures *v.* 838
Columbia Gas System, Vanston Bondholders Committee *v.* ... 838
Columbus & Southern Ohio Electric Co. *v.* Commissioner 822
Comfy Mfg. Co. *v.* United States 5, 901
Commissioner, American Pipe & Steel Corp. *v.* 906
Commissioner, Bonney *v.* 906
Commissioner, Colony, Inc., *v.* 811
Commissioner, Columbus & Southern Ohio Electric Co. *v.* 822
Commissioner, Gunn *v.* 830
Commissioner, Haskins Estate *v.* 955
Commissioner, Knipp *v.* 827
Commissioner, Latendresse *v.* 830
Commissioner, Lingham-Pritchard *v.* 846, 886
Commissioner, Magness *v.* 931
Commissioner, Magnolia Liquor Co. *v.* 24
Commissioner, May Seed & Nursery Co. *v.* 839
Commissioner, McIntosh Estate *v.* 923
Commissioner, Meyer *v.* 862
Commissioner, Miller *v.* 939
Commissioner, Paster *v.* 876
Commissioner, Pipe Estate *v.* 814
Commissioner, Riker *v.* 839
Commissioner, Romm *v.* 862
Commissioner *v.* Stern 810
Commissioner, Towers *v.* 914
Commissioner, Williamson *v.* 838
Commissioner, Wilshire Holding Corp. *v.* 815, 879
Commissioner, Zack *v.* 823
Commissioner of Alcohol Tax Div. *v.* Magnolia Liquor Co. 24
Commissioner of Finance of Tennessee, Atkins *v.* 913
Commissioner of Harness Racing, Murtha *v.* 891
Commissioner of Immigration, Mendoza-Martinez *v.* 804
Commissioner of Internal Revenue. See Commissioner.
Commissioner of Patents, Petrocarbon Limited *v.* 955
Commissioners of St. Mary's County, Leonardo *v.* 906, 967
Commission of Tidewater Fisheries, Corsa *v.* 37

438765 O—58——2

Page

Committee for Debentures *v.* Columbia Gas System..... 838
Commodity Credit Corp., Rosenberg Bros. & Co. *v*..... 837
Commonwealth. See name of Commonwealth.
Compagnie Generale Transatlantique, Kermarec *v*..... 902
Compania Aerea Viajes, U. S. Overseas Airlines *v*..... 893
Compania Ithaca de Vapores *v.* United States..... 817
Comptroller of New York, Grant Co. *v*..... 869
Conley *v.* Gibson..... 41
Connelly *v.* Balkcom..... 934
Constantin & Co. *v.* Arizona Western Ins. Co..... 905
Consul General of Yugoslavia *v.* Artukovic..... 393
Continental Assurance Co., Stokes *v*..... 890
Continental Illinois Bank, Federal Deposit Ins. Corp. *v*..... 877
Continental Motors Corp. *v.* Muskegon Township..... 484
Contra Costa County Assessor, Speiser *v*..... 880
Cooper *v.* Jackson..... 965
Cooper *v.* New Jersey..... 829
Copeland *v.* Rhay..... 845
Corder, Hickinbotham *v*..... 841
Cores, United States *v*..... 866, 887
Cornell, Tseung Chu *v*..... 892
Corporation Comm'n, Cities Service Gas Co. *v*..... 391, 967
Corporation Comm'n, Michigan Wis. Pipe Line Co. *v*..... 425
Corporation Comm'n, Phillips Petroleum Co. *v*..... 425
Corsa *v.* Tawes..... 37
Cosgrove *v.* New York, C. & St. L. R. Co..... 817
Cottrell *v.* Pawcatuck Co..... 12
Council of Carpenters *v.* McCarroll..... 932
Count *v.* Randolph..... 899
County. See name of county.
County Lawyers Assn., Roel *v*..... 604
County Medical Society, Riggall *v*..... 954
County School Board *v.* Allen..... 953
Court of Appeals Chief Judge, Williams *v*..... 49, 860
Cowlitz Tribe of Indians *v.* Tacoma..... 955
Crafts, Federal Trade Comm'n *v*..... 9, 885
Cravens *v.* Klinger..... 845
Creditors Collection Service, Agnew *v*..... 919
Cross *v.* Tustin..... 899
Crucible Steel Co., Cold Metal Products Co. *v*..... 940
C. S. Johnson Co. *v.* Stromberg..... 816
Culver, *In re*..... 899
Culver, McBride *v*..... 925
Curley *v.* New York..... 858

	Page
Cuyahoga County Treasurer *v.* United States	890
Daigle *v.* United States	913
Daley *v.* United States	832
Dallas *v.* Tubbs Mfg. Co	868, 920
Daly *v.* Finnegan	883
Daly *v.* United States	826, 885
Dandridge *v.* United States	866
Daniel *v.* Hall	911
Daniels *v.* Tucker	916
Daniels *v.* United States	852
Darlington, Inc., Federal Housing Administration *v.*	929
Darneille *v.* United States	873
Dave Schneider Wholesale Jewelry *v.* Centennial Co.	931
David *v.* United States	863
Davidson, Blaski *v.*	872, 928
Davis, Dickenson *v.*	918
Davis *v.* Illinois	820
Davis, Thomas *v.*	927
Day, Pennsylvania *ex rel.* Thompson *v.*	843
Dayton *v.* Dulles	911
Dayton *v.* Gillilland	813
Dean *v.* Jelsma	954
De Casaus *v.* California	890
Deere Plow Co., Meredith *v.*	831
Delaware River Port Authority *v.* Baltimore & O. R. Co.	175
Del Guercio, Gil *v.*	863
Deneen *v.* Tucker	964
Dennis *v.* United States	936
Denno, U. S. *ex rel.* Burke *v.*	849
De Normand *v.* United States	917, 942
Department of Employment of California, Lines *v.*	857
Department of Public Safety of Illinois, Peckham *v.*	859
Department of Public Safety of Illinois, Sabo *v.*	935
Department of Public Welfare, Ballf *v.*	912, 967
Department of Public Welfare, Frantum *v.*	882
Department of State Revenue, Bendix Aviation Corp. *v.*	607
D'Espinay-Durtal *v.* Harris	891
Dessalernos *v.* Savoretti	809
Desser, Rau & Hoffman *v.* Goggin	813
Detroit *v.* Murray Corp	489
Detroit, United States *v.*	466
Devidayal (Sales) Ltd. *v.* Iida & Co., New York, Inc.	896
Devine, Patteson *v.*	821
DeVita, McCorkle *v.*	873, 908

	Page
DeVivo *v.* United States	874
De Wagenknecht *v.* Stinnes	830
Dicanio *v.* United States	874
Dick *v.* Moore	850
Dickenson *v.* Davis	918
Dickson, Carmen *v.*	924
Dickson, Reese *v.*	929
Dickson, Rupp *v.*	948
Dickson, Tipton *v.*	934
Dillard *v.* New York	917
Dion *v.* Banmiller	899
Di Palermo *v.* United States	836
Director of Alcoholic Beverage Control *v.* Love	958
Director of Federal Mediation Service, Daly *v.*	883
Director of Immigration. See Immigration Director.	
Director of Internal Revenue. See Collector of Internal Revenue; Commissioner.	
Di Silvestro *v.* U. S. Veterans Administration	935, 968
District Court Judge, New Mexico *ex rel.* Grinnell Co. *v.*	825
District Court of Appeal, Rousseau *v.*	847
District Director of Immigration. See Immigration Director.	
District 50, United Mine Workers, Labor Board *v.*	453
District Judge. See also U. S. District Judge.	
District Judge, Young *v.*	878
District Lodge. For labor unions, see name of trade.	
Dixie Carriers, Inc., Atchison, T. & S. F. R. Co. *v.*	179
Dixie Carriers, Inc., Interstate Commerce Comm'n *v.*	179
Dixie Carriers, Inc., United States *v.*	179
Dobbs *v.* Lykes Bros. S. S. Co.	835
Dobson *v.* Missouri	964
Dobson *v.* Warden of Maryland Penitentiary	966
Dominguez *v.* United States	858
Dong Wing Ott *v.* Murff	928
Dong Wing Ott *v.* Shaughnessy	921, 928
Donohue *v.* Fox Point Village	867, 920
Donovan Construction Co. *v.* United States	826
Dragon Cement Co., United States *v.*	833
Drivers Union, Labor Board *v.*	808
Duff *v.* Bullard	818
Duggan *v.* Green	864
Dulles, Dayton *v.*	911
Dulles, Kent *v.*	881
Dulles, Lee You Fee *v.*	61
Dunbar *v.* McNeill	935

Page
Duncan *v.* United States 875
Dunham, Jaffke *v.* 835, 886
Dunkle *v.* Cavell 917
Du Pont de Nemours & Co., Nishida *v.* 915
Dushon *v.* United States 933
Dutton *v.* Cities Service Defense Corp 828
Duval Jewelry Co., Labor Board *v.* 809
Eagle Lion Studios *v.* Loew's Inc 925
Easter *v.* Gates 895, 928
Eastern Band of Cherokee Indians, Haile *v.* 893
Eastern Motor Express, Maschmeijer, Inc., *v.* 959
Eaton *v.* Missouri 912
Edelmann & Co. *v.* Federal Trade Comm'n 941
Edgewood American Legion Post *v.* United States 926
Edwards *v.* United States 36
E. Edelmann & Co. *v.* Federal Trade Comm'n 941
E. I. du Pont de Nemours & Co., Nishida *v.* 915
Eisenberg *v.* Central Zone Property Corp 884
Eisenschiml *v.* Fawcett Publications, Inc 907
Eistrat *v.* Brush Industrial Lumber Co 818
Elbert *v.* United States 897
Electrical Workers, Signal-Stat Corp. *v.* 852
Elgin, J. & E. R. Co. *v.* Gibson 897
Elkhorn Coals, Inc., *v.* Mitchell 953
Elliott & Sons Co., Nuodex Products Co. *v.* 823
Ellis, Atkins *v.* 936
Ellis, Bush *v.* 907
Ellis, Henry *v.* 928
Ellis, Hollis *v.* 875, 962
Ellis, Mullins *v.* 849
Ellis, Slusser *v.* 898
Ellis Trucking Co., May *v.* 816
El Paso *v.* El Paso Water Improvement District 820
El Paso County Water District, El Paso *v.* 820
El Paso Natural Gas Co. *v.* United States 950
Emerling *v.* United States 907
Emerson Electric Mfg. Co., Swope *v.* 894
Emily Shops, Inc., Inter-State Truck Line *v.* 827
Emray Realty Corp. *v.* Weaver 395
Ennis *v.* Florida 868
Epstein *v.* United States 868
Ericksen *v.* Bristow 804
Erie R. Co. *v.* Baltimore & O. R. Co 175
Ervin, Massachusetts Co. *v.* 881

Page
Eskridge *v.* Schneckloth 947
Esso Camden, The, Moore-McCormack Lines *v.* 822
Esso Shipping Co., Mississippi Valley Barge Line Co. *v.* 820
Esso Standard Oil Co. *v.* Secatore's, Inc 834
Estate. See name of estate.
Etherton *v.* United States 919
Eubanks *v.* Louisiana 812
Everett *v.* Florida 941
Farrell Lines, Miller *v.* 912
Faulkner *v.* Illinois 965
Fawcett Publications, Inc., Eisenschiml *v.* 907
Fay *v.* U. S. *ex rel.* Johnson 915
Fay *v.* U. S. *ex rel.* Marcial 915
Fayette No. 4, Inc., *v.* Lexington Tobacco Board of Trade 824
Federal Deposit Ins. Corp. *v.* Continental Illinois Bank Co 877
Federal Housing Administration *v.* Darlington, Inc 929
Federal Maritime Board *v.* Isbrandtsen Co 804
Federal Mediation Service, Daly *v.* 883
Federal People's Republic of Yugoslavia *v.* Artukovic 393
Federal Power Comm'n, Cincinnati Gas Co. *v.* 930
Federal Power Comm'n, Humble Oil & Rfg. Co. *v.* 930
Federal Power Comm'n *v.* Memphis Light Division 938, 949
Federal Power Comm'n, Michigan Consolidated Gas Co. *v.* 894
Federal Power Comm'n, Mississippi River Fuel Corp. *v.* 876, 904
Federal Power Comm'n, Saturn Oil & Gas Co. *v.* 956
Federal Power Comm'n, Shell Oil Co. *v.* 930, 967
Federal Trade Comm'n *v.* American Hospital Ins. Co 867
Federal Trade Comm'n, Chain Institute, Inc., *v.* 895
Federal Trade Comm'n *v.* Crafts 9, 885
Federal Trade Comm'n, Edelmann & Co. *v.* 941
Federal Trade Comm'n, Harlem Paper Products Corp. *v.* 820
Federal Trade Comm'n, Metropolitan Bag & Paper Assn. *v.* ... 819
Federal Trade Comm'n, Moog Industries, Inc., *v.* 411
Federal Trade Comm'n *v.* National Casualty Co 867
Federal Trade Comm'n *v.* Niehoff & Co 411, 968
Federal Trade Comm'n, Niehoff & Co. *v.* 941
Federal Trade Comm'n, P. & D. Mfg. Co. *v.* 884
Federal Trade Comm'n, Reed *v.* 823
Federal Trade Comm'n, Renaire Corp. *v.* 829
Federal Trade Comm'n, Scientific Living, Inc., *v.* 940
Federal Trade Comm'n *v.* Standard Oil Co 396
Federal Trade Comm'n, Wise Co. *v.* 856
Fehlhaber Corp., United States *v.* 877
Finnegan, Daly *v.* 883

Page
Firemen and Enginemen, Oliphant *v*. 893
Firmstone *v*. Myers 962
First Federal Savings & Loan Assn., Wisconsin *v*. 957
First Iowa Hydro Electric Coop. *v*. Iowa-Ill. Gas Co. 871, 921
First National Bank & Trust Co., Walsh *v*. 183
First Unitarian Church *v*. Los Angeles County 853, 948
Fisch, Gould *v*. 914
Fitch *v*. Tucker 963
FitzGerald *v*. Cassidy 958
Flatt, Barbers Union of Memphis *v*. 904
Fleming, Borgmeier *v*. 821
Flintkote Co., Lysfjord *v*. 835
Flora *v*. United States 881
Florida, Brownlow *v*. 847
Florida, Ennis *v*. 868
Florida, Everett *v*. 941
Florida, Lewis *v*. 16, 879
Florida, Massachusetts Co. *v*. 881
Florida, Meade *v*. 920
Florida Board of Accountancy, Oosterhoudt *v*. 603
Florida *ex rel*. Hawkins *v*. Board of Control 839
Florida Road Department, Lewis *v*. 907
Fooks *v*. United States 806
Ford *v*. United States 38
Foreign Claims Settlement Comm'n, Dayton *v*. 813
Foreign Claims Settlement Comm'n, Gillilland *v*. 884
Foster *v*. Georgia 967
Four Maple Drive Realty Corp. *v*. Abrams 14
Foxgal, Inc., Bloch *v*. 858
Fox Point Village, Donohue *v*. 867, 920
Frank *v*. United States 819
Franken *v*. United States 956
Franklin *v*. Shelton 959
Frantum *v*. Public Welfare Department 882
Freeman *v*. Tinsley 843
Frierson *v*. Looney 928
Frisco Transportation Co., American Trucking Assns. *v*. 938
Frisco Transportation Co., Interstate Commerce Comm'n *v*. . 938
Frisco Transportation Co., Railway Labor Exec. Assn. *v*. . 938
Frost *v*. U. S. Marshal 915, 942
Frozen Food Express, Akron, C. & Y. R. Co. *v*. 6
Frozen Food Express, American Trucking Assns. *v*. 6
Frozen Food Express, Interstate Commerce Comm'n *v*. 6
Fuller Lumber Co. *v*. Anglin 821

Page
Furnish *v.* Board of Medical Examiners 827, 879
Galgano *v.* United States 883
Gallant Fabrics, Inc., Ideal Mercantile Corp. *v.* 856
Gamble-Skogmo, Inc., *v.* Borg-Warner Corp. 836
Gamez *v.* United States 934
Garbe *v.* Humiston, Keeling & Co. 846
Garner *v.* United States 832
Gas Service Co., Wood *v.* 885, 920
Gates, Easter *v.* 895, 928
Gates, Schlesinger *v.* 939
Gay *v.* Utah 899
Gaylord *v.* Clemmer 846
General Council Seminole Nation *v.* Seminole Indians 843
General Drivers Union, Labor Board *v.* 808
General Electric Co. *v.* Masters Mail Order Co. 824
General Outdoor Advertising Co. *v.* United States 891
General Sessions Court Judge, Knapp *v.* 804
George *v.* United States 843, 879
Georgia, Foster *v.* 967
Georgia, Williams *v.* 858
Gershon *v.* United States 873
Gibraltar Factors Corp. *v.* Slapo 13
Gibson, Conley *v.* 41
Gibson, Elgin, J. & E. R. Co. *v.* 897
Gibson *v.* Thompson 18, 900
Giglio *v.* United States 339, 967
Gil *v.* Del Guercio 863
Gilliam *v.* Michigan 866
Gillilland, American & European Agencies *v.* 884
Gillilland, Dayton *v.* 813
Gilpin *v.* United States 911
Ginsburg *v.* Black 865
Ginsburg *v.* Gregg 875
Giordenello *v.* United States 811, 875
Giroux *v.* Providence Superior Court 919
Gladden, Blount *v.* 900
Gladden, Gosso *v.* 807
Gladden, Pritchard *v.* 911
Gladden, Sherwood *v.* 963
Glenn *v.* Nash 898
Goggin, Desser, Rau & Hoffman *v.* 813
Goins *v.* Louisiana 847
Goldberg, Meade *v.* 941
Golden West, T/V, Instituto Cubano del Azucar *v.* 884

Page
Golla *v.* Rhodes 965
Gomez *v.* United States 863, 900
Goodchild *v.* Burke 915
Goodman, Boidakowski *v.* 878
Goodman *v.* Granger 835
Goodman, Mulvaney *v.* 853
Goody *v.* Shapiro, Bernstein & Co 952
Gordon, Agnew *v.* 918
Gordon *v.* Texas 369, 967
Gore *v.* United States 903, 909
Gosso *v.* Gladden 807
Gostovich *v.* Valore 608
Gough, Lee *v.* 874
Gould *v.* Fisch 914
Government Operations Legislative Committee, Lanza *v.* 856
Governor of Michigan *v.* Simons 49, 860
Grace Line, Inc., *v.* Panama Canal Co 810
Graham, Wood *v.* 916
Granger, Goodman *v.* 835
Grant, Penn *v.* 837
Grant Co. *v.* Joseph 869
Grass Creek Oil & Gas Co. *v.* Musselshell County 840
Gray, Pearson *v.* 807
Great Northern R. Co. *v.* Hyde 872
Great Northern R. Co. *v.* N. W. Auto Parts Co 815
Green *v.* Baughman 819
Green, Duggan *v.* 864
Green *v.* United States 184, 871
Greenshields *v.* Warren Petroleum Corp 907
Gregg, Ginsburg *v.* 875
Grimes *v.* Raymond Concrete Pile Co 867
Grinnell Co. *v.* MacPherson 825
Gross Income Tax Division, Bendix Corp. *v.* 607
Grossman *v.* United States 285, 942
Grumman Aircraft Corp., Board of Assessors *v.* 814, 885
Gruss *v.* Breswick & Co 415
Guerlain, Inc., *v.* United States 937
Gullahorn *v.* United States 806
Gunn *v.* Commissioner 830
Gunzburg, Schaefer *v.* 831
Gutierrez *v.* Arizona 17
Gwinett *v.* Astra S. S. Corp 828
Gwynne, Toll *v.* 926
Gypsum Co. *v.* National Gypsum Co 901

	Page
Haas *v.* Anderson	854
Haas *v.* United States	924
Hack, Local 140 Security Fund *v.*	833
Hackendorf *v.* United States	826
Haile *v.* Eastern Band of Cherokee Indians	893
Haines *v.* Randolph	966
Hall, Daniel *v.*	911
Hall, Trotter *v.*	285
Hall *v.* United States	821
Hancock Mutual Life Ins. Co., Miley *v.*	828
Hand, Richardson *v.*	950
Hand, Wilson *v.*	916
Hansen *v.* Burke	844
Harber *v.* Commissioner	955
Hard *v.* Civil Aeronautics Board	960
Harlem Paper Products Corp. *v.* Federal Trade Comm'n	820
Harless *v.* Iowa	965
Harmar Drive-In Theatre, Inc., *v.* Warner Bros.	824
Harmon *v.* Brucker	579
Harness Racing Comm'r, Murtha *v.*	891
Harper *v.* Murphy	807
Harpole, Wetzel *v.*	848, 900
Harris *v.* Buchkoe	935
Harris, D'Espinay-Durtal *v.*	891
Harris *v.* Illinois	845
Harris *v.* United States	817
Harrison *v.* Nash	848
Harrison *v.* Settle	807
Harry C. Daniels & Co. *v.* United States	852
Hartfield *v.* Ragen	845
Hartford Accident & Indemnity Co. *v.* Lizza & Sons	906
Hartwig *v.* United States	890
Haskins Estate *v.* Commissioner	955
Hawkins *v.* Board of Control	839
Hawkins, Mills Mill *v.*	605
Hawkins *v.* United States	925
Hecht *v.* United States	940
Heidman *v.* Illinois	931
Heikkinen *v.* United States	273
Heinze, Lempia *v.*	807
Heinze, Millwood *v.*	917, 942
Heinze, Papagni *v.*	966
Heinze, Ponce *v.*	858
Heiselmoyer *v.* Pennsylvania R. Co.	833

Page

Helmig *v.* Rockwell Mfg. Co. 832, 885
Henderson *v.* Cavell 885
Henry *v.* Ellis 928
Herge *v.* Banmiller 934
Herlihy Mid-Continent Co., Northern Ind. Serv. Co. *v.* 894
Hickinbotham *v.* Corder 841
Hickman *v.* United States 874
Hicks *v.* Mayo 915
Highway Commissioner of New Jersey, Cooper *v.* 829
Highway Department of South Carolina, Kurz & Co. *v.* 826
Hill *v.* Mississippi Valley Barge Line Co 878
Hill *v.* Settle 807
Hilo Dairy Co. *v.* Du Pont de Nemours & Co 915
Hixon, Smith *v.* 967
Hobart *v.* Hobart 21
Hobart *v.* O'Brien 830, 879
Hodson, Smallwood *v.* 862
Hoefer *v.* Parker 833
Holliday *v.* Long Mfg. Co 926
Hollingsworth *v.* Iowa 851, 886
Hollis *v.* Ellis 875, 962
Holwin Corp., United Mfg. & Service Co. *v.* 830
Home Comfort Co., United States *v.* 808, 948
Home Oil Co., Schultz *v.* 877
Honeycutt *v.* Wabash R. Co 424
Hoppe *v.* United States 816
Horn, Argento *v.* 818, 885
Horne *v.* United States 878
Hotel Employees Union *v.* Leedom 951
Hotel Employees Union *v.* Levy 902
Hotel Employees Union *v.* Sax Enterprises, Inc 902
House *v.* Mayo 920
Howard, Bandeen *v.* 813
Hsuan Wei *v.* Robinson 879
Hubbard *v.* Brooks 887
Hudson *v.* Wylie 828
Hudson Sales Corp., Schwing Motor Co. *v.* 823
Hugh Breeding, Inc., *v.* Chicago, R. I. & P. R. Co 880
Hughes *v.* California 964
Hughes, North American Aviation *v.* 914
Hughes, Young *v.* 878
Hullom *v.* Michigan 916
Humble Oil & Rfg. Co. *v.* Atwood 829
Humble Oil & Rfg. Co. *v.* Federal Power Comm'n 930

Page
Humiston, Keeling & Co., Garbe *v*. 846
Humphrey, Alker *v*. 841
Hupman *v*. United States. 949
Hurt *v*. Oklahoma. 22, 900
Hvass, United States *v*. 570
Hyde, Great Northern R. Co. *v*. 872
Hyde *v*. New York. 916
Ideal Mercantile Corp. *v*. Gallant Fabrics, Inc. 856
Iida & Co., New York, Inc., Devidayal (Sales) Ltd. *v*. 896
Illinois, Bartkus *v*. 281
Illinois, Beck *v*. 849
Illinois, Chicago, M., St. P. & P. R. Co. *v*. 300
Illinois, Davis *v*. 820
Illinois, Faulkner *v*. 965
Illinois, Harris *v*. 845
Illinois, Heidman *v*. 931
Illinois, Interstate Commerce Comm'n *v*. 300
Illinois, Johnson *v*. 965
Illinois, Kirsch *v*. 961
Illinois, Martin *v*. 966
Illinois, McKeag *v*. 936
Illinois, Michigan *v*. 909, 944
Illinois, New York *v*. 909, 944
Illinois, Rolie *v*. 845
Illinois, Smith *v*. 807
Illinois, Supero *v*. 961
Illinois, Townsend *v*. 850, 886
Illinois, United States *v*. 300
Illinois, Warren *v*. 965
Illinois, Wisconsin *v*. 909, 944
Illinois, Zielinski *v*. 845
Illinois Auditor of Accounts, Thillens, Inc., *v*. 606
Illinois Central R. Co. *v*. Bowman. 837
Illinois Department of Public Safety, Peckham *v*. 859
Illinois Department of Public Safety, Sabo *v*. 935
Illinois Treasurer, Turner *v*. 65
Immigration and Naturalization Service. See Immigration Commissioner; Immigration Director; Immigration Officer.
Immigration Commissioner, Mendoza-Martinez *v*. 804
Immigration Director, Dessalernos *v*. 809
Immigration Director, Dong Wing Ott *v*. 921, 928
Immigration Director, Gil *v*. 863
Immigration Director, Hsuan Wei *v*. 879
Immigration Director, Jimenez *v*. 903, 943

Page
Immigration Director, Leng May Ma *v*..... 921
Immigration Director, Mackie *v*..... 905
Immigration Director, Niukkanen *v*..... 905
Immigration Director, Paris *v*..... 926
Immigration Director, Rietmann *v*..... 923
Immigration Director, Rystad *v*..... 912, 967
Immigration Director, U. S. *ex rel.* Lee Kum Hoy *v*..... 169, 802
Immigration Officer, Rowoldt *v*..... 115
Immigration Officer, Tseung Chu *v*..... 892
Immigration Officer, U. S. *ex rel.* Avramovich *v*..... 905, 925
Indemnity Ins. Co., Smith *v*..... 906
Indiana, Anderson *v*..... 919
Indiana, Joseph *v*..... 812, 948
Indiana, Mays *v*..... 919
Indiana, Shively *v*..... 898
Indiana Revenue Dept., Bendix Aviation Co. *v*..... 607
Industrial Accident Comm'n, Michel *v*..... 917
Industrial Board of Alaska *v.* Chugach Electric Assn..... 810
Industrial Comm'r of New York, Lyons & Co. *v*..... 284
In re. See name of party.
Instituto Cubano del Azucar *v.* T/V Golden West..... 884
Insurance Co., McAllister Lighterage Line *v*..... 872
Internal Revenue Service. See Collector of Internal Revenue; Commissioner.
International Industries, Inc., Warren Corp. *v*..... 943
International Life Ins. Co., McGee *v*..... 220
International Terminal Operating Co., Romero *v*..... 807, 887
International Union. See name of trade.
Interstate Commerce Comm'n *v.* Baltimore & O. R. Co..... 175
Interstate Commerce Comm'n *v.* Breswick & Co..... 415
Interstate Commerce Comm'n *v.* Dixie Carriers, Inc..... 179
Interstate Commerce Comm'n *v.* Frisco Transportation Co... 938
Interstate Commerce Comm'n *v.* Frozen Food Express..... 6
Interstate Commerce Comm'n *v.* Illinois..... 300
Interstate Commerce Comm'n *v.* Premier Peat Moss Corp.... 13
Inter-State Truck Line *v.* Emily Shops, Inc..... 827
Iowa, Harless *v*..... 965
Iowa, Hollingsworth *v*..... 851, 886
Iowa, Triplett *v*..... 811
Iowa-Illinois Gas Co., First Iowa Hydro Coop. *v*..... 871, 921
Irby *v.* United States..... 961
Isbrandtsen Co., Federal Maritime Board *v*..... 804
Isthmian S. S. Co., Rotondo *v*..... 834
Ivanhoe Irrigation District *v.* McCracken..... 803

	Page
Jackson, Cooper *v.*	965
Jackson, Lee *v.*	950
Jackson, Rodriguez *v.*	916
Jackson *v.* Steiner	928
Jackson, Williams *v.*	898
Jacobs, Lowe *v.*	842
Jaffke *v.* Dunham	835, 886
James *v.* United States	866
James & Co., Mississippi Valley Barge Line *v.*	871
Jamieson *v.* Woodward & Lothrop	855
Japan-Atlantic Freight Conference *v.* United States	804
Jedwabny *v.* Philadelphia Transportation Co.	966
Jefferson *v.* Teets	967
Jehovah's Witnesses *v.* Bethel Borough	40
Jelsma, Dean *v.*	954
Jennings, Miller *v.*	827, 885
Jimenez *v.* Barber	903, 943
Jimenez *v.* Murphy	874
John Deere Plow Co., Meredith *v.*	831
John Hancock Mutual Life Ins. Co., Miley *v.*	828
Johnson *v.* Cavell	919
Johnson, Fay *v.*	915
Johnson *v.* Illinois	965
Johnson *v.* Schneckloth	848
Johnson *v.* United States	850, 867
Johnson Co. *v.* Stromberg	816
Johnston, Pennsylvania *ex rel.* Simcox *v.*	933
Jones *v.* Missouri	842
Jones *v.* Moore	899
Jones *v.* New York	848
Jones *v.* Richmond	846
Jones *v.* United States	810, 936
Jorgensen *v.* United States	840
Joseph, Grant Co. *v.*	869
Joseph *v.* Indiana	812, 948
Judge of General Sessions Court, Knapp *v.*	804
Justices of Superior Court, MacNeil Bros. Co. *v.*	805
Justices of Supreme Court of Illinois, Ericksen *v.*	805
Kahla *v.* United States	832
Kansas Corporation Comm'n, Cities Service Gas Co. *v.*	391, 967
Karadzole *v.* Artukovic	393
Kasper *v.* Brittain	834, 886
Kaufman *v.* Brownell	842
Keco Industries, Inc., *v.* Cincinnati Bell Tel. Co.	182

Page
Kelley, Glover & Vale, Inc., *v.* Coffing 834
Kelly *v.* Pennsylvania R. Co 892
Kennedy *v.* Martin 966
Kent *v.* Dulles 881
Kenton, Soviero *v.* 919
Kentucky, Collins *v.* 816
Kentucky, Taylor *v.* 394, 968
Kentucky Board of Health, Bandeen *v.* 813
Kentucky Fuel Corp. Committee *v.* Columbia System 838
Kermarec *v.* Compagnie Generale Transatlantique 902
Kern *v.* Williamson 838, 879
Kernan *v.* American Dredging Co 426
Keshner *v.* Wick 855
Kidd *v.* Merck & Co 814
Kiever *v.* Michigan 960
Kimbrough *v.* United States 925, 968
King, Collins *v.* 934
Kirsch *v.* Illinois 961
Kitsap Automatic Dispenser Co. *v.* Washington 10
Kivette *v.* United States 935
Klein *v.* United States 924
Kleinman *v.* Kobler 865
Klig *v.* Brownell 809, 937
Klig *v.* Rogers 605
Klinger, Cravens *v.* 845
Knapp *v.* Schweitzer 804
Knipp *v.* Commissioner 827
Knox County Treasurer, Walter Seed Co. *v.* 906
Kobler, Kleinman *v.* 865
Koffel *v.* Myers 918
Koppers Co. *v.* Otto 939
Kostner *v.* Chicago Land Clearance Comm'n 820
Kotsifakis, Argonaut Navigation Co. *v.* 865
Kovacs *v.* Brewer 810
Kowalski *v.* Ragen 847
Krantman *v.* Liberty Loan Corp 905
Krasnov *v.* United States 5, 908
Kream *v.* Public Service Transport 864
Kregger *v.* Michigan 929
Kress & Co. *v.* Aghnides 889
Kurz & Co. *v.* South Carolina Highway Dept 826
Kyne, Leedom *v.* 922
Labor Board *v.* Avondale Mills 811
Labor Board, Better Monkey Grip Co. *v.* 864, 900

Page
Labor Board, Carpenters Union *v*. 808
Labor Board *v*. District 50, United Mine Workers. 453
Labor Board *v*. Drivers Union. 808
Labor Board *v*. Duval Jewelry Co. 809
Labor Board, Hotel Employees Union *v*. 951
Labor Board *v*. Kyne. 922
Labor Board, Lannom Mfg. Co. *v*. 822
Labor Board, Lewis *v*. 929
Labor Board, Machinists Association *v*. 808
Labor Board *v*. Mine Workers. 453
Labor Board, Montgomery Ward & Co. *v*. 829
Labor Board, Proof Co. *v*. 831
Labor Board *v*. Southern Silk Mills. 821
Labor Board, Sunrise Lumber & Trim Corp. *v*. 818
Labor Board, Truck Drivers Union *v*. 958
Laborde *v*. Ansolabehere. 833
Labor Union. See name of trade.
Ladner *v*. United States. 282
Lafferty, Benton County *v*. 869
Lake Charles Stevedores, Inc., *v*. Richard. 952
La Marca *v*. New York. 920
Lambert *v*. Bannan. 900
Lambert *v*. California. 225, 937
Lambert *v*. United States. 63
Lamkin, *In re*. 59, 908
Lancaster *v*. Michigan. 848
Lannom Mfg. Co. *v*. Labor Board. 822
Lantz, Ohio Farmers Ins. Co. *v*. 883, 920
Lanvin Parfums, Inc., *v*. United States. 951
Lanza *v*. New York Legislative Committee. 856
Lanzetta *v*. Buchkoe. 918
La Salle National Bank, Macdonald *v*. 271
Las Palmas Food Co. *v*. Ramirez & Feraud Co. 927
Latendresse *v*. Commissioner. 830
Latham *v*. United States. 874
Latimer, *In re*. 82
Latrobe Construction Co. *v*. United States. 890
Lawn *v*. United States. 339, 967
Lawson *v*. United States. 963
Lawyers Association of N. Y. County, Roel *v*. 604
L. C. Fuller Lumber Co. *v*. Anglin. 821
Lee *v*. Colorado Springs. 955
Lee *v*. Gough. 874
Lee *v*. Jackson. 950

Page
Lee *v.* Rhay 843
Leedom, Hotel Employees Union *v.* 951
Leedom *v.* Kyne 922
Lee Kum Hoy *v.* Murff 169, 802
Lee Kum Hoy *v.* Shaughnessy 802
Lee You Fee *v.* Dulles 61
Legg *v.* Mutual Benefit Health Assn. 879
Legislative Committee of New York, Lanza *v.* 856
Lehmann, U. S. *ex rel.* Avramovich *v.* 905, 925
Lempia *v.* Heinze 807
Leng May Ma *v.* Barber 921
Lennon *v.* United States 836
Leonardo *v.* Board of County Comm'rs 906, 967
Lerner *v.* Casey 803, 887
Levy, Hotel Employees Union *v.* 902
Lewis *v.* Florida 16, 879
Lewis *v.* Labor Board 929
Lewis, Quality Coal Corp. *v.* 882
Lewis *v.* State Road Dept. of Florida 907
Lewis & Sons Garage *v.* State Road Dept. 907
Lexington Tobacco Board of Trade, Fayette No. 4, Inc., *v.* 824
Liberty Loan Corp., Krantman *v.* 905
Lieberman-Koren Corp. *v.* United States 818
Lieblich *v.* United States 896
Lightfoot *v.* United States 2
Lincoln Building Associates *v.* Barr 12
Lindquist *v.* Towle 933
Linea Aeropostal Venezolana, Noel *v.* 907
Lines *v.* California Dept. of Employment 857
Lingham-Pritchard *v.* Commissioner 846, 886
Lister *v.* McLeod 807
Lithuanian Workers Assn. *v.* Brownell 23
Lititz Mutual Ins. Co. *v.* Barnes 931
Litman *v.* United States 869
Litterio *v.* United States 849
Lizza & Sons, Hartford Accident & Indemnity Co. *v.* 906
L. L. Constantin & Co. *v.* Arizona Western Ins. Co. 905
Local Draft Board, Tamarkin *v.* 825
Local 140 Security Fund *v.* Hack 833
Local Union. See name of trade.
Locomotive Firemen, Oliphant *v.* 893
Lodge. For labor unions, see name of trade.
Loew's Inc., Eagle Lion Studios *v.* 925
Loew's Inc., Melrose Realty Co. *v.* 900

438765 O—58——3

Page
Loew's Inc., Wilson *v*. 597, 802
Long *v*. Pennsylvania. 899
Long *v*. United States. 878
Long Mfg. Co., Holliday *v*. 926
Looney, Frierson *v*. 928
Looney, McIntosh *v*. 935
Looney, Winston *v*. 807
Los Angeles *v*. Citizens Utilities Co. 892
Los Angeles Council of Carpenters *v*. McCarroll. 932
Los Angeles County, First Unitarian Church *v*. 853, 948
Los Angeles County, People's Church *v*. 854, 888
Los Angeles County, Valley Unitarian Church *v*. 888, 947, 948
Louisiana, Eubanks *v*. 812
Louisiana, Goins *v*. 847
Louisiana, Poret *v*. 879
Louisiana, United States *v*. 859, 876, 945
Louisiana & Arkansas R. Co. *v*. Robinson. 959
Louisiana Bridge Co. *v*. Archer. 825
Love, Murphy *v*. 958
Love *v*. Newbury. 889, 928
Lowe *v*. Jacobs. 842
Lowery *v*. Cavell. 843
Lowery *v*. Murphy. 928
Lowey, Pledger *v*. 807
Lowry, Broadus *v*. 858
L. P. Cavett Co., Machinists Association *v*. 39
Lubin, Lyons & Co. *v*. 284
Luciano *v*. Wilkinson. 807
Luckenbach S. S. Co., Palermo *v*. 20, 886, 910
Luzzi *v*. Banmiller. 924
Lykes Bros. S. S. Co., Dobbs *v*. 835
Lyons, Burgess-Norton Mfg. Co. *v*. 65
Lyons & Co. *v*. Lubin. 284
Lysfjord *v*. Flintkote Co. 835
Mac. See also Mc.
MacCurdy *v*. United States. 933
Macdonald *v*. La Salle National Bank. 271
Machine Workers, Signal-Stat Corp. *v*. 852
Machinists Association *v*. Cavett Co. 39
Machinists Association *v*. Labor Board. 808
MacKenna *v*. Texas. 851, 886
Mackey, Mendoza-Martinez *v*. 804
Mackey *v*. Sears, Roebuck & Co. 865
Mackie *v*. Boyd. 905

Page

Mackrow *v.* Ragen 873
MacNeil Bros. Co. *v.* Superior Court Justices 804
MacPherson, New Mexico *ex rel.* Grinnell Co. *v.* 825
Macris *v.* Sociedad Maritima San Nicholas 922
Madera Irrigation District *v.* Albonico 803
Madera Irrigation District *v.* Steiner 803
Magness *v.* Commissioner 931
Magnolia Liquor Co., Black *v.* 24
Maisenberg *v.* United States 802
Maisenhelder *v.* Banmiller 845
Majesic *v.* United States 826
Manhattan Life Ins. Co., Stopper *v.* 815
Manko *v.* Tucker 962
Manufacturers Casualty Ins. Co., Martin-Lebreton Agency *v.* 870
Manufacturers Casualty Ins. Co., Sucher Co. *v.* 956
Manzanillo *v.* United States 809, 951
Marcello *v.* Brownell 903
Marin County *v.* United States 866
Maritime Board *v.* Isbrandtsen Co 804
Maroy *v.* United States 931
Martin, Barclay *v.* 963
Martin *v.* Birch & Sons 837
Martin *v.* Illinois 966
Martin, Kennedy *v.* 966
Martin, Reynolds *v.* 885
Martin *v.* Tindell 959
Martin, Tiscio *v.* 807, 950
Martin-Lebreton Ins. Agency *v.* Mfrs. Casualty Ins. Co. 870
Maryland, Cheeks *v.* 929
Maryland, Virginia *v.* 3, 269, 880, 946
Maryland Commission of Tidewater Fisheries, Corsa *v.* 37
Maryland *ex rel.* Sybert, Reddick *v.* 832
Maschmeijer, Jr., Inc., *v.* Eastern Motor Express 959
Mason, American Emery Wheel Works *v.* 815
Massachusetts Co. *v.* Florida 881
Massei, United States *v.* 595
Massey-Harris-Ferguson Limited *v.* Boyd 806
Masters Mail Order Co., General Electric Co. *v.* 824
Matteo, Barr *v.* 171
May *v.* Ellis Trucking Co 816
Mayo, Hicks *v.* 915
Mayo, House *v.* 920
Mayo, Nethery *v.* 961
Mays *v.* Indiana 919

Page

May Seed & Nursery Co. *v.* Commissioner..... 839

Mc. See also Mac.

McAbee *v.* United States..... 964

McAfoos, Canadian Pacific Steamships, Ltd., *v.*..... 823

McAllister *v.* Pinto..... 916

McAllister Lighterage Line *v.* Insurance Co..... 872

McAllister Lighterage Line, Scott Paper Co. *v.*..... 871

McBride *v.* Culver..... 925

McBride *v.* New Jersey..... 844

McBride *v.* Toledo Terminal R. Co..... 852, 910

McCarroll, Los Angeles Council of Carpenters *v.*..... 932

McClure, Walter Seed Co. *v.*..... 906

McCorkle *v.* DeVita..... 873, 908

McCoy *v.* Tucker..... 847

McCracken, Ivanhoe Irrigation District *v.*..... 803

McCrary *v.* Aladdin Radio Industries..... 8

McDaniel *v.* Tucker..... 962

McDonald *v.* United States..... 863

McFarlin, Stone *v.*..... 955

McGee *v.* International Life Ins. Co..... 220

McGee *v.* Michigan..... 961

McGee *v.* New York..... 844

McGee *v.* United States..... 17

McGhee *v.* Bannan..... 961

McIntosh *v.* Looney..... 935

McIntosh Estate *v.* Commissioner..... 923

McKeag *v.* Illinois..... 936

McKibben, Moroney *v.*..... 840, 886

McKinley *v.* Ragen..... 960

McKinney *v.* Missouri-Kansas-Texas R. Co..... 861

McLeod, Lister *v.*..... 807

McNeill, Dunbar *v.*..... 935

McNinch, United States *v.*..... 808, 948

Meade *v.* Florida..... 920

Meade *v.* Goldberg..... 941

Meadors *v.* Nash..... 962

Mediation and Conciliation Service, Daly *v.*..... 883

Medical Examiners Board, Furnish *v.*..... 827, 879

Medical Society of Washington County, Riggall *v.*..... 954

Melrose Realty Co. *v.* Loew's Inc..... 900

Melton *v.* Bomar..... 851

Memphis Light & Water Div., Fed. Power Comm'n *v.*..... 938, 949

Memphis Light & Water Div., Texas Gas Corp. *v.*..... 938, 949

Memphis Light & Water Div., United Gas Co. *v.*..... 938, 949

Page
Mendoza-Martinez *v.* Mackey 804
Mercantile National Bank, Bourgeois *v.* 869, 920
Merchants National Bank Co. *v.* United States 881, 920
Merck & Co., Kidd *v.* 814
Meredith *v.* Deere Plow Co 831
Merry Brothers Brick & Tile Co., United States *v.* 824
Metropolitan Bag & Paper Assn. *v.* Federal Trade Comm'n .. 819
Meyer *v.* Commissioner 862
M. G. Lewis Sons Garage *v.* State Road Dept 907
Miccosukee Seminole Nation *v.* Seminole Indians 843
Michel *v.* Industrial Accident Comm'n 917
Michigan, Blackmon *v.* 961
Michigan, Carpenter *v.* 850
Michigan, Gilliam *v.* 866
Michigan, Hullom *v.* 916
Michigan *v.* Illinois 909, 944
Michigan, Kiever *v.* 960
Michigan, Kregger *v.* 929
Michigan, Lancaster *v.* 848
Michigan, McGee *v.* 961
Michigan, Mohler *v.* 961
Michigan, Moore *v.* 155
Michigan, Mullreed *v.* 807
Michigan, Pungratz *v.* 899
Michigan, Ramirez *v.* 900
Michigan, Richardson *v.* 960
Michigan, Rogers *v.* 963
Michigan, Savaiano *v.* 961
Michigan, Shannon *v.* 935
Michigan, Sweet *v.* 848
Michigan, Walker *v.* 960
Michigan, Wyers *v.* 875
Michigan Consolidated Gas Co. *v.* Federal Power Comm'n ... 894
Michigan Governor *v.* Simons 49, 860
Michigan Wisconsin Pipe Line Co. *v.* Corporation Comm'n ... 425
Miley *v.* Hancock Mutual Life Ins. Co 828
Miller *v.* Commissioner 939
Miller *v.* Farrell Lines, Inc 912
Miller *v.* Jennings 827, 885
Miller *v.* Rhay 966
Miller *v.* Thorn 965
Miller *v.* United States 833, 905
Mills *v.* California 841, 886
Mills Mill *v.* Hawkins 605

	Page
Millwood *v.* Heinze	917, 942
Milom *v.* New York Central R. Co.	953
Mineral Holding Trust *v.* Aluminum Co.	814
Mine Workers, Labor Board *v.*	453
Mine Workers, Quality Coal Corp. *v.*	882
Mine Workers *v.* Tungsten Mining Corp.	821
Minneapolis & St. L. R. Co. *v.* N. W. Auto Parts Co.	815
Minnesota, Northwestern Portland Cement Co. *v.*	911
Minnesota, Savage *v.*	918
Minnesota Mng. & Mfg. Co. *v.* Sears, Roebuck & Co.	932
Minnesota Mng. & Mfg. Co., Technical Tape Corp. *v.*	952
Mississippi River Fuel Corp., Federal Power Comm'n *v.*	876, 904
Mississippi River Fuel Corp., United Gas Line Co. *v.*	904
Mississippi Valley Barge Line *v.* Esso Shipping Co.	820
Mississippi Valley Barge Line, Hill *v.*	878
Mississippi Valley Barge Line *v.* James & Co.	871
Mississippi Valley Barge Line, Swain *v.*	933
Missouri, Bryant *v.*	899
Missouri, Chernick *v.*	918
Missouri, Dobson *v.*	964
Missouri, Eaton *v.*	912
Missouri, Jones *v.*	842
Missouri, Walker *v.*	965
Missouri-Kansas-Texas R. Co., McKinney *v.*	861
Missouri Pacific R. Co., Sinkler *v.*	809
Mitchell, Alabama Mills *v.*	834
Mitchell, Rivera *v.*	862
Mitchell, Ruth Elkhorn Coals, Inc., *v.*	953
Moccio *v.* United States	852
Mohler *v.* Michigan	961
Monaghan, Murtha *v.*	891
Monroe *v.* United States	875
Monson Dray Line *v.* Murphy Motor Freight Lines	11
Montgomery *v.* California	872, 908
Montgomery Ward & Co. *v.* Labor Board	829
Moog Industries, Inc., *v.* Federal Trade Comm'n	411
Moon *v.* Pennsylvania	908
Moore *v.* Brown	882
Moore, Dick *v.*	850
Moore, Jones *v.*	899
Moore *v.* Michigan	155
Moore *v.* New York	849
Moore-McCormack Lines *v.* The Esso Camden	822
Morey, Thillens, Inc., *v.*	606

Page

Morgan *v.* New York 847, 859
Morgan, Oosterhoudt *v.* 603
Moroney *v.* McKibben 840, 886
Mounce *v.* United States 180
Moylan *v.* United States 923
Muench-Kreuzer Candle Co., Wilson *v.* 882
Mulhern *v.* Ragen 961
Mulkraj Bros. & Badhwar *v.* Colorado Fuel Corp. 862
Mullins *v.* Ellis 849
Mullreed *v.* Michigan 807
Mulvaney *v.* Goodman 853
Municipal Court, Bandy *v.* 896
Murff, Dong Wing Ott *v.* 928
Murff, Paris *v.* 926
Murff, U. S. *ex rel.* Lee Kum Hoy *v.* 169, 802
Murphy, Boyd *v.* 935
Murphy, Harper *v.* 807
Murphy *v.* Love 958
Murphy, Lowery *v.* 928
Murphy *v.* New York 932
Murphy, New York *ex rel.* Jimenez *v.* 874
Murphy, Rheim *v.* 898, 928
Murphy, Romano *v.* 951
Murphy, Watkins *v.* 858
Murphy Auto Parts Co. *v.* Ball 932
Murphy Motor Freight Lines, Monson Dray Line *v.* 11
Murray Corp., Detroit *v.* 489
Murtha *v.* Monaghan 891
Muskegon Township, Continental Motors Corp. *v.* 484
Muskegon Township, United States *v.* 484
Musselshell County, Grass Creek Oil & Gas Co. *v.* 840
Mutual Benefit Health Assn., Legg *v.* 879
Myers, Firmstone *v.* 962
Myers, Koffel *v.* 918
Nacirema Operating Co., Weyerhaeuser S. S. Co. *v.* 563
Nakashima *v.* Brownell 872
Nani *v.* Brownell 870
Nash, Chesser *v.* 845
Nash, Glenn *v.* 898
Nash, Harrison *v.* 848
Nash, Meadors *v.* 962
Nash, Patrick *v.* 844
Nashville *v.* United States 63
Nashville Milk Co. *v.* Carnation Co. 373, 967

Page
National Assn. of Colored People *v.* Ala. *ex rel.* Patterson.... 860
National Broadcasting Co., Barnes *v*..... 604, 950
National Casualty Co., Federal Trade Comm'n *v*..... 867
National Drying Machine Co. *v.* Ackoff..... 832
National Gypsum Co., U. S. Gypsum Co. *v*..... 901
National Labor Relations Board. See Labor Board.
National Specialty Co., Worley *v*..... 844, 886
Nationwide Trailer Rental System *v.* United States..... 10
Naturopathic Board of Examiners *v.* Wilson..... 870, 920
Naus *v.* Rigg..... 884
Neal *v.* New York..... 963
Nelson *v.* Tennessee..... 271
Nelson, Inc., *v.* United States..... 554
Nethery *v.* Mayo..... 961
Newark, Adams Newark Theater Co. *v*..... 851
Newark, Pollack *v*..... 964
Newbury, Love *v*..... 889, 928
New Cut Rate Liquors, Inc., Seagram-Distillers Corp. *v*..... 837
New Hampshire, Sweezy *v*..... 852
New Jersey, Cooper *v*..... 829
New Jersey, McBride *v*..... 844
New Jersey, Petrolia *v*..... 942
New Jersey, Quatro *v*..... 850
New Jersey, Sudol *v*..... 965
New Jersey, Sullivan *v*..... 840
New Mexico *ex rel.* Grinnell Co. *v.* MacPherson..... 825
New Orleans Ins. Exchange *v.* United States..... 22, 908
Newport News School Board *v.* Atkins..... 855
Newsom *v.* Smyth..... 964
New York. See also New York *ex rel.*
New York, Blank *v*..... 963
New York, Caruso *v*..... 942
New York, Ciehala *v*..... 848
New York, Collinge *v*..... 936
New York, Collins *v*..... 888
New York, Curley *v*..... 858
New York, Dillard *v*..... 917
New York, Hyde *v*..... 916
New York *v.* Illinois..... 909, 944
New York, Jones *v*..... 848
New York, La Marca *v*..... 920
New York, McGee *v*..... 844
New York, Moore *v*..... 849
New York, Morgan *v*..... 847, 859

Page

New York, Murphy *v*. . . . 932
New York, Neal *v*. . . . 963
New York, Patrek *v*. . . . 885
New York, Peguese *v*. . . . 849
New York, Pollino *v*. . . . 966
New York, Wilburn *v*. . . . 918
New York Central R. Co., Baird *v*. . . . 853, 943
New York Central R. Co. *v*. Baltimore & O. R. Co. . . . 175
New York Central R. Co., Milom *v*. . . . 953
New York Central R. Co., Railroad Trainmen *v*. . . . 877
New York, C. & St. L. R. Co., Cosgrove *v*. . . . 817
New York City Comptroller, Grant Co. *v*. . . . 869
New York City Transit Authority, Lerner *v*. . . . 803, 887
New York County Lawyers Assn., Roel *v*. . . . 604
New York *ex rel.* Jimenez *v*. Murphy . . . 874
New York Harness Racing Comm'r, Murtha *v*. . . . 891
New York Industrial Comm'r, Lyons & Co. *v*. . . . 284
New York Legislative Committee, Lanza *v*. . . . 856
New York Mail Transportation Co. *v*. United States . . . 904
New York, N. H. & H. R. Co., United States *v*. . . . 253
New York Power Authority, Am. Public Power Assn. *v*. . . . 64
New York Rent Adm'r, Emray Realty Corp. *v*. . . . 395
New York Rent Adm'r, Four Maple Corp. *v*. . . . 14
New York State University, Strauss *v*. . . . 394, 968
N. H. Lyons & Co. *v*. Lubin . . . 284
Nichols *v*. Alker . . . 820
Niehoff & Co. *v*. Federal Trade Comm'n . . . 941
Niehoff & Co., Federal Trade Comm'n *v*. . . . 411, 968
Nishida *v*. Du Pont de Nemours & Co . . . 915
Niukkanen *v*. Boyd . . . 905
Noel *v*. Linea Aeropostal Venezolana . . . 907
Norfolk & P. B. L. R. Co., Railroad Trainmen *v*. . . . 914
North American Airlines, American Airlines *v*. . . . 465
North American Aviation *v*. Hughes . . . 914
North Carolina, Stickland *v*. . . . 831
North Central Pub. Serv. Co. *v*. Northern Nat. Gas Co . . . 869
North Counties Hydro-Electric Co. *v*. United States . . . 882
Northern Indiana Pub. Serv. Co., Herlihy Co. *v*. . . . 894
Northern Natural Gas Co., North Central Pub. Serv. Co. *v*. . . 869
Northwestern Auto Parts Co., C., B. & Q. R. Co. *v*. . . . 815
Northwestern Auto Parts Co., C., M., St. P. & P. R. Co. *v*. . . 815
Northwestern Auto Parts Co., Great Northern R. Co. *v*. . . . 815
Northwestern Auto Parts Co., Minneapolis & St. L. R. Co. *v*. . 815
Northwestern States Portland Cement Co. *v*. Minnesota . . . 911

Page
Nowak *v.* United States 802
Nuodex Products Co. *v.* Elliott & Sons Co 823
O'Brien, Hobart *v.* 830, 879
O'Con *v.* Bannan 853
O'Donnell *v.* Chicago Land Clearance Comm'n 856
Oehmichen *v.* Brownell 842
Officer in Charge. See Immigration Officer.
Offutt *v.* United States 856
Ohio, Rucker *v.* 954
Ohio, Striker *v.* 857
Ohio Farmers Ins. Co. *v.* Lantz 883, 920
Ohio Tax Comm'r, Allied Stores of Ohio, Inc., *v.* 911
Ohio Tax Comm'r, Youngstown Tube Co. *v.* 911
Oil Transport Co., Wilson *v.* 835
Oklahoma, Hurt *v.* 22, 900
Oklahoma Corporation Comm'n, Mich. Wis. Pipe Line Co. *v.* . . 425
Oklahoma Corporation Comm'n, Phillips Co. *v.* 425
Olesen, One, Inc., *v.* 371
Olesen *v.* Trust Co. of Chicago 896
Oliphant *v.* Locomotive Firemen 893
Olsen, Ortega *v.* 960
One, Inc., *v.* Olesen 371
Oosterhoudt *v.* Morgan 603
Oppenheimer *v.* United States 5
Ortega *v.* Olsen 960
Otto, Koppers Co. *v.* 939
Owen, Afro-American Co. *v.* 914
Packard Motor Car Co., Webster Motor Car Co. *v.* 822, 900
Paisner *v.* United States 941
Palermo *v.* Luckenbach S. S. Co 20, 886, 910
Panama Canal Co. *v.* Grace Line, Inc 810
Pan American Casualty Co. *v.* Reed 819
Pan American Petroleum Corp. *v.* Seaton 819
Pan American Production Co. *v.* Texas City 603
Panhandle & S. F. R. Co., Brown *v.* 818
Papagni *v.* Heinze 966
Parfums Corday, Inc., *v.* United States 951
Paris *v.* Murff 926
Parker, Hoefer *v.* 833
Parker *v.* United States 836, 963
Parks-Cramer Co. *v.* American Monorail Co 893
Paschal, Arkansas-Missouri Power Corp. *v.* 835
Paster *v.* Commissioner 876
Patrek *v.* New York 885

Page

Patrick *v.* Nash 844
Patterson, Nat. Assn. for Advancement of Colored People *v.* .. 860
Patterson *v.* Rood 950
Patteson *v.* Devine 821
Pawcatuck Co., Cottrell *v.* 12
Payne *v.* United States 923
P. & D. Mfg. Co. *v.* Federal Trade Comm'n 884
Pearson *v.* Gray 807
Peckham *v.* Department of Public Safety 859
Pedone *v.* United States 829
Peguese *v.* New York 849
Penn *v.* Grant 837
Pennsylvania, Cano *v.* 182
Pennsylvania, Long *v.* 899
Pennsylvania, Moon *v.* 908
Pennsylvania, Pierce *v.* 897
Pennsylvania, Randall *v.* 954
Pennsylvania, Thompson *v.* 849
Pennsylvania *ex rel.* Simcox *v.* Johnston 933
Pennsylvania *ex rel.* Thompson *v.* Day 843
Pennsylvania *ex rel.* Williams, Collins *v.* 936
Pennsylvania Public Utility Comm'n, Willits *v.* 11
Pennsylvania R. Co. *v.* Baltimore & O. R. Co. 175
Pennsylvania R. Co., Heiselmoyer *v.* 833
Pennsylvania R. Co., Kelly *v.* 892
People's Church *v.* Los Angeles County 854, 888
Pepersack, Azulay *v.* 962
Pepersack, Rayne *v.* 963
Pepersack, Rice *v.* 966
Pepersack, Roberts *v.* 966
Pepersack, Snyder *v.* 851
Perfetto, Rowoldt *v.* 115
Perry, Strickland *v.* 847
Petrocarbon Limited *v.* Watson 955
Petrolia *v.* New Jersey 942
Pettway *v.* United States 918
Philadelphia Transportation Co., Jedwabny *v.* 966
Phillips, United Towing Co. *v.* 861
Phillips Petroleum Co. *v.* Buster 816
Phillips Petroleum Co. *v.* Corporation Comm'n 425
Pierce, Albanese *v.* 15
Pierce *v.* Pennsylvania 897
Pinataro *v.* Appellate Division, Supreme Court of N. Y. 922
Pinto, McAllister *v.* 916

	Page
Pipe Estate *v.* Commissioner	814
Plastic Glass Corp., U. S. Chemical Corp. *v.*	836
Plater *v.* Steiner	807
Pledger *v.* Lowry	807
Police Pension & Relief Board *v.* Behnke	958
Pollack *v.* Newark	964
Pollino *v.* New York	966
Ponce *v.* Heinze	858
Poret *v.* Louisiana	879
Poret *v.* Sigler	60, 879
Postmaster General, Sunshine Book Co. *v.*	372
Postmaster of Los Angeles, One, Inc., *v.*	371
Potoker, Brooklyn Eagle, Inc., *v.*	883
Potter Press, Boston Printing Pressmen's Union *v.*	817
Powell *v.* Burford	888
Power Authority of New York, Am. Public Power Assn. *v.*	64
Power Comm'n. See Federal Power Comm'n.	
Premier Peat Moss Corp., Baltimore & O. R. Co. *v.*	13
Premier Peat Moss Corp., Interstate Commerce Comm'n *v.*	13
Prevatt, Wags Transportation System, Inc., *v.*	957
Price *v.* United States	964
Prince *v.* San Francisco	880
Prince Edward County School Board *v.* Allen	953
Pritchard *v.* Gladden	911
Private Brands, Inc., *v.* United States	957
Proof Co. *v.* Labor Board	831
Providence Superior Court, Giroux *v.*	919
Public Power Assn. *v.* Power Authority of New York	64
Public Safety Department of Illinois, Peckham *v.*	859
Public Service Coordinated Transport, Kream *v.*	864
Public Utilities Comm'n *v.* United States	534
Public Utility Comm'n, Willits *v.*	11
Public Welfare Department, Ballf *v.*	912, 967
Public Welfare Department, Frantum *v.*	882
Pungratz *v.* Michigan	899
Purdom *v.* United States	913
Putnam Tool Co. *v.* United States	825
Quality Coal Corp. *v.* Lewis	882
Quality Mfg. Co. *v.* United States	941
Quan, Brownell *v.*	861, 921, 937
Quatro *v.* New Jersey	850
Radio & Machine Workers, Signal-Stat Corp. *v.*	852
Ragen, Hartfield *v.*	845
Ragen, Kowalski *v.*	847

Page

Ragen, Mackrow *v*. 873
Ragen, McKinley *v*. 960
Ragen, Mulhern *v*. 961
Ragen, Sieg *v*. 900
Ragen, Smith *v*. 900
Ragen, Stevens *v*. 846
Ragen, Yost *v*. 807
Railroad Trainmen *v*. New York Central R. Co. 877
Railroad Trainmen *v*. Norfolk & P. B. L. R. Co. 914
Railway Express Agency *v*. United States. 270
Railway Labor Executives' Assn. *v*. Frisco Transp. Co. 938
Railway Labor Executives' Assn. *v*. United States. 141
Rainfair, Inc., Youngdahl *v*. 131
Rainwater *v*. United States. 811
Ramirez *v*. Michigan. 900
Ramirez & Feraud Chili Co., Las Palmas Co. *v*. 927
Randall *v*. Pennsylvania. 954
Randall, Speiser *v*. 880
Randazzo *v*. California. 865
Randolph, Count *v*. 899
Randolph, Haines *v*. 966
Randolph, Ryan *v*. 935
Randolph, Whitcomb *v*. 900
Range, Tennessee Burley Tobacco Growers' Assn. *v*. 813
Rasmussen *v*. Brownell. 859
Rathbun *v*. United States. 107, 880, 925
Raymond Concrete Pile Co., Grimes *v*. 867
Rayne *v*. Pepersack. 963
Reading Co., Sabo *v*. 847
Reddick *v*. Maryland *ex rel*. Sybert. 832
Reed *v*. Federal Trade Comm'n. 823
Reed, Pan American Casualty Co. *v*. 819
Reed, Stevenson *v*. 877
Reese *v*. Dickson. 929
Reeves *v*. Alabama. 368
Regional Commissioner *v*. Magnolia Liquor Co. 24
Reiner, Blumenthal *v*. 903
Renaire Corp. *v*. Federal Trade Comm'n. 829
Rent Administrator, Emray Realty Corp. *v*. 395
Rent Administrator, Four Maple Corp. *v*. 14
Republic of Yugoslavia *v*. Artukovic. 393
Restaurant Employees Union *v*. Leedom. 951
Retail Clerks' Union *v*. Anderson. 852
Reteneller, *In re*. 183

	Page
Rexrode *v.* Tucker	964
Reynolds *v.* Martin	885
Reynolds Tobacco Co. *v.* United States	893
R. F. Ball Construction Co., United States *v.*	587
Rhay, Copeland *v.*	845
Rhay, Lee *v.*	843
Rhay, Miller *v.*	966
Rhay, Thompson *v.*	848
Rhay, Williams *v.*	846
Rheim *v.* Murphy	898, 928
Rhode Island, Andrews *v.*	898
Rhodes, Golla *v.*	964
Rice *v.* Pepersack	966
Richard, Lake Charles Stevedores, Inc., *v.*	952
Richardson *v.* Hand	950
Richardson *v.* Michigan	960
Richmond, Jones *v.*	846
Rietmann *v.* Barber	923
Rigg, Naus *v.*	884
Riggall *v.* Washington County Medical Society	954
Riker *v.* Commissioner	839
Ripperger *v.* United States	940
Rivera *v.* Mitchell	862
Riverhead Board of Assessors *v.* Grumman Corp	814, 885
R. J. Reynolds Tobacco Co. *v.* United States	893
Road Department of Florida, Lewis *v.*	907
Roberts *v.* Pepersack	966
Robey *v.* Sun Record Co	816
Robinson *v.* Brownell	807
Robinson, Hsuan Wei *v.*	879
Robinson, Louisiana & Arkansas R. Co. *v.*	959
Robison, Sidebotham *v.*	867
Rockwell Mfg. Co., Helmig *v.*	832, 885
Rodriguez *v.* Jackson	916
Roel *v.* New York County Lawyers Assn	604
Rogers, Bonetti *v.*	910
Rogers, Klig *v.*	605
Rogers *v.* Michigan	963
Rogers, Societe Internationale *v.*	910
Rogers *v.* Teets	896, 928
Roker *v.* United States	924
Rolie *v.* Illinois	845
Romano *v.* Murphy	951
Romero *v.* International Terminal Operating Co	807, 887

Page

Romm *v.* Commissioner 862
Rood, Patterson *v.* 950
Roper *v.* South Carolina Tax Comm'n 913
Rose *v.* Bell 805
Rosenberg Bros. & Co. *v.* Commodity Credit Corp. 837
Rosenbloom *v.* United States 80
Rosengard *v.* Boston 272
Roth *v.* United States 852
Rotondo *v.* Isthmian S. S. Co. 834
Rousseau *v.* District Court of Appeal 847
Rowland *v.* Texas 606
Rowoldt *v.* Perfetto 115
R. S. Rainwater & Sons *v.* United States 811
Rucker *v.* Ohio 954
Rupp *v.* Teets 854, 948
Russo *v.* United States 816, 874
Ruth Elkhorn Coals, Inc., *v.* Mitchell 953
Ryan *v.* Randolph 935
Rystad *v.* Boyd 912, 967
Sabo *v.* Department of Public Safety 935
Sabo *v.* Reading Co. 847
Safeway Stores *v.* Vance 389, 949
St. Mary's County Comm'rs, Leonardo *v.* 906, 967
Salt River Valley Water Users' Assn., Barras *v.* 890
San Francisco, Prince *v.* 880
San Francisco Public Welfare Dept., Ballf *v.* 912, 967
Santa Barbara County Water Agency *v.* Balaam 803
Saturn Oil & Gas Co. *v.* Federal Power Comm'n 956
Saunders *v.* United States 913
Savage *v.* Minnesota 918
Savaiano *v.* Michigan 961
Savoie *v.* Texas Co. 840, 885
Savoretti, Dessalernos *v.* 809
Sawyer *v.* United States 868
Sax Enterprises, Inc., Hotel Employees Union *v.* 902
S. Birch & Sons, Martin *v.* 837
Scales *v.* United States 1
Schaefer *v.* Gunzburg 831
Schaffer Transportation Co. *v.* United States 83
Schlesinger *v.* Gates 939
Schmittroth, Strand *v.* 886
Schneckloth, Eskridge *v.* 947
Schneckloth, Johnson *v.* 848
Schneider *v.* Centennial Ins. Co. 931

	Page
Schneider Wholesale Jewelry *v.* Centennial Ins. Co.	931
School Board of Newport News *v.* Atkins	855
School Board of Prince Edward County *v.* Allen	953
Schultz *v.* Home Oil Co	877
Schweitzer, Knapp *v.*	804
Schwing Motor Co. *v.* Hudson Sales Corp.	823
Scientific Living, Inc., *v.* Federal Trade Comm'n	940
Scott *v.* United States	962
Scott Paper Co. *v.* McAllister Lighterage Line	871
Seaboard Air Line R. Co. *v.* Braddock	892
Seafarers' Union, Bull S. S. Co. *v.*	932
Seagram-Distillers Corp. *v.* New Cut Rate Liquors, Inc.	837
Sears *v.* United States	602
Sears, Roebuck & Co. *v.* All States Life Ins. Co.	894
Sears, Roebuck & Co., Mackey *v.*	865
Sears, Roebuck & Co., Minnesota Mng. & Mfg. Co. *v.*	932
Seaton, Pan American Petroleum Corp. *v.*	819
Seaton, U. S. *ex rel.* Shoshone Indian Tribe *v.*	923
Seatrain Lines, Inc., *v.* United States	181
Secatore's, Inc., Esso Standard Oil Co. *v.*	834
Secretary of Army, Abramowitz *v.*	579
Secretary of Army, Harmon *v.*	579
Secretary of Interior, Pan American Petroleum Corp. *v.*	819
Secretary of Interior, Shoshone Indian Tribe *v.*	923
Secretary of Labor, Alabama Mills *v.*	834
Secretary of Labor, Rivera *v.*	862
Secretary of Labor, Ruth Elkhorn Coals, Inc., *v.*	953
Secretary of Navy, Easter *v.*	895, 928
Secretary of Navy, Schlesinger *v.*	939
Secretary of State, Dayton *v.*	911
Secretary of State, Kent *v.*	881
Secretary of State, Lee You Fee *v.*	61
Secretary of Treasury, Alker *v.*	841
Secretary of Treasury, Haas *v.*	854
Securities & Exchange Comm'n, Cities Service Co. *v.*	912
Security Fund Local 140 *v.* Hack	833
Segal *v.* United States	894
Selective Service System, Tamarkin *v.*	825
Seminole Indians of Florida, Billie *v.*	843
Seminole Nation *v.* Seminole Indians	843
Settle, Harrison *v.*	807
Settle, Hill *v.*	807
Shain, Agnew *v.*	919
Shannon *v.* Michigan	935

Page
Shapiro, Bernstein & Co., Goody *v*..... 952
Sharpnack, United States *v*..... 286
Shaughnessy, Dong Wing Ott *v*..... 921, 928
Shaughnessy, U. S. *ex rel.* Lee Kum Hoy *v*..... 802
Shaver *v*. Texas..... 864
Sheba Bracelets, Inc., *v*. United States..... 904
Sheet Metal Contractors, Sheet Metal Workers *v*..... 924
Sheet Metal Workers *v*. Sheet Metal Contractors..... 924
Shell Oil Co. *v*. Federal Power Comm'n..... 930, 967
Shelton, Franklin *v*..... 959
Shepherd *v*. Tucker..... 962
Shepherd *v*. United States..... 934
Sherman *v*. Sherman..... 957
Sherman *v*. United States..... 852
Sherry Frontenac Hotel, Hotel Employees Union *v*..... 902
Sherwood *v*. Gladden..... 963
Shively *v*. Indiana..... 898
S. H. Kress & Co. *v*. Aghnides..... 889
Shoshone Indian Tribe, Seaton *v*..... 923
Shotwell Mfg. Co., United States *v*..... 233
Sidebotham *v*. Robison..... 867
Sieg *v*. Ragen..... 900
Sigler, Poret *v*..... 60, 879
Signal-Stat Corp. *v*. Electrical Workers..... 852
Silverman, United States *v*..... 942
Simcox *v*. Johnston..... 933
Simons, Williams *v*..... 49, 860
Simpson *v*. United States..... 7
Sinclair Pipe Line Co. *v*. Archer County..... 862
Sing Kee *v*. United States..... 954
Sinkler *v*. Missouri Pacific R. Co..... 809
Skender *v*. United States..... 931
Slapo, Gibraltar Factors Corp. *v*..... 13
Slusser *v*. Ellis..... 898
Smallwood *v*. Hodson..... 862
Smith *v*. Hixon..... 967
Smith *v*. Illinois..... 807
Smith *v*. Indemnity Ins. Co..... 906
Smith *v*. Ragen..... 900
Smith *v*. Steele..... 933
Smith *v*. United States..... 965
Smyth, Beaver *v*..... 807
Smyth, Newsom *v*..... 964
Smyth, Snider *v*..... 954

438765 O—58——4

Page
Smyth, Wyatt *v*..... 927
Snider *v.* Smyth..... 954
Snowden *v.* California..... 841
Snyder *v.* Pepersack..... 851
Sobell *v.* United States..... 860, 873, 920
Sociedad Maritima San Nicholas, Macris *v*..... 922
Societe Internationale *v.* Brownell..... 812, 910
Societe Internationale *v.* Rogers..... 910
Solar Corp. *v.* Borg-Warner Corp..... 836
South Carolina Highway Dept., Kurz & Co. *v*..... 826
South Carolina Tax Comm'n, Roper *v*..... 913
Southern R. Co. *v.* United States..... 283, 370
Southern Silk Mills, Labor Board *v*..... 821
Soviero *v.* Kenton..... 919
Sparks, Western Union Telegraph Co. *v*..... 828
Speiser *v.* Randall..... 880
Spevack *v.* Strauss..... 601
Stallman *v.* Casey Bearing Co..... 864
Standard Oil Co., Federal Trade Comm'n *v*..... 396
Standard-Vacuum Oil Co. *v.* United States..... 893
State. See name of State.
State Board of Accountancy, Oosterhoudt *v*..... 603
State Board of Health, Bandeen *v*..... 813
State Board of Naturopathic Examiners *v.* Wilson..... 870, 920
State Corporation Comm'n, Cities Service Gas Co. *v*..... 391, 967
State Highway Comm'r, Cooper *v*..... 829
State Highway Department, Kurz & Co. *v*..... 826
State Rent Administrator, Emray Realty Corp. *v*..... 395
State Rent Administrator, Four Maple Corp. *v*..... 14
State Revenue Dept., Bendix Aviation Corp. *v*..... 607
State Road Department of Florida, Lewis *v*..... 907
Staub *v.* City of Baxley..... 313
Stay-Rite Supply Co. *v.* Fisch..... 914
Steele, Smith *v*..... 933
Steele *v.* United States..... 828, 875
Steiner, Jackson *v*..... 928
Steiner, Madera Irrigation District *v*..... 803
Steiner, Plater *v*..... 807
Stern, Commissioner *v*..... 810
Stevens *v.* Ragen..... 846
Stevenson *v.* Reed..... 877
Stewart *v.* Tucker..... 849
Stewart *v.* United States..... 964
Stinnes, De Wagenknecht *v*..... 830

	Page
Stinson *v.* Atlantic Coast Line R. Co.	62, 910
Stokes *v.* Continental Assurance Co.	890
Stone *v.* McFarlin	955
Stoneking *v.* United States	852
Stopper *v.* Manhattan Life Ins. Co.	815
Strand *v.* Schmittroth	886
Strathmore Shipping Co. *v.* Coastal Oil Co.	836
Strauss, Spevack *v.*	601
Strauss *v.* University of New York	394, 968
Strickland *v.* North Carolina	831
Strickland *v.* Perry	847
Striker *v.* Ohio	857
Stromberg, Johnson Co. *v.*	816
Sucher Packing Co. *v.* Manufacturers Ins. Co.	956
Sudol *v.* New Jersey	964
Sullivan *v.* New Jersey	840
Sullivan *v.* Utah	848
Summerfield, Sunshine Book Co. *v.*	372
Sun Bearing Supply *v.* United States	826
Sun Record Co., Robey *v.*	816
Sunrise Lumber Corp. *v.* Labor Board	818
Sunshine Book Co. *v.* Summerfield	372
Superior Court, Giroux *v.*	919
Superior Court Justices, MacNeil Bros. Co. *v.*	805
Supero *v.* Illinois	961
Supreme Court Justices of Illinois, Ericksen *v.*	805
Supreme Court of New York, Pinataro *v.*	922
Suter, United States *v.*	926
Swain *v.* Mississippi Valley Barge Line Co.	933
Sweet *v.* Michigan	848
Sweezy *v.* New Hampshire	852
Swift *v.* Borough of Bethel	40
Swim for Health Assn., Lincoln Bldg. Associates *v.*	12
Swope *v.* Emerson Electric Mfg. Co.	894
Sword Line, Inc., *v.* United States	841
Sybert, Reddick *v.*	832
Tacoma, Cowlitz Tribe of Indians *v.*	955
Tacoma *v.* Taxpayers of Tacoma	888
Tamarkin *v.* Selective Service System	825
Tanner *v.* California	859
Tatko Bros. Slate Co. *v.* Vt. Slate Co.	949
Tawes, Corsa *v.*	37
Tax Comm'n of South Carolina, Roper *v.*	913
Tax Comm'r of Ohio, Allied Stores of Ohio, Inc., *v.*	911

Page

Tax Comm'r of Ohio, Youngstown Tube Co. *v*..... 911
Taxpayers of Tacoma, Tacoma *v*..... 888
Taylor *v*. Kentucky..... 394, 968
Taylor *v*. United States..... 801
Taylor, United States *v*..... 942
Teamsters Union *v*. Labor Board..... 958
Technical Tape Corp. *v*. Minnesota Mng. & Mfg. Co..... 952
Teets, Burwell *v*..... 896, 927
Teets, Jefferson *v*..... 967
Teets, Rogers *v*..... 896, 928
Teets, Rupp *v*..... 854, 948
Teets, Watson *v*..... 846
Tennessee, Nelson *v*..... 271
Tennessee Burley Tobacco Growers' Assn. *v*. Range..... 813
Tennessee Comm'r of Finance, Atkins *v*..... 913
Tennessee *ex rel*. Melton *v*. Bomar..... 851
Territory. See name of Territory.
Texas, Alcorta *v*..... 28
Texas, Barry *v*..... 851
Texas, Bills *v*..... 955
Texas, Coakley *v*..... 917
Texas, Gordon *v*..... 369, 967
Texas, MacKenna *v*..... 851, 886
Texas, Rowland *v*..... 606
Texas, Shaver *v*..... 864
Texas, White *v*..... 936
Texas, Williams *v*..... 850
Texas Board of Naturopathic Examiners *v*. Wilson..... 870, 920
Texas City, Texas *ex rel*. Pan American Co. *v*..... 603
Texas Co., Savoie *v*..... 840, 885
Texas Co. *v*. United States..... 817
Texas *ex rel*. Pan American Co. *v*. Texas City..... 603
Texas Gas Transmission Corp. *v*. Memphis Light Div..... 938, 949
Texas & Pacific R. Co. *v*. Watkins..... 868
Thiele, Chicago *v*..... 957
Thillens, Inc., *v*. Morey..... 606
Third Class Mail Users *v*. United States..... 895
Thomas *v*. Davis..... 927
Thomas *v*. United States..... 936
Thomas Bowquong Chew *v*. Cornell..... 892
Thompson *v*. Day..... 843
Thompson, Gibson *v*..... 18, 900
Thompson *v*. Pennsylvania..... 849
Thompson *v*. Rhay..... 848

Page
Thompson, Tippet *v*. 943
Thorn, Miller *v*. 965
Tidewater Fisheries of Maryland, Corsa *v*. 37
Times Film Corp. *v*. Chicago. 35
Tindell, Martin *v*. 959
Tinsley, Freeman *v*. 843
Tippet *v*. Thompson. 943
Tipton *v*. California. 846
Tipton *v*. Dickson. 934
Tiscio *v*. Martin. 807, 950
T. L. James & Co., Mississippi Valley Barge Line *v*. 871
Tohulka, Voelkel *v*. 891
Toledo Terminal R. Co., McBride *v*. 852, 910
Toll *v*. Gwynne. 926
Towers *v*. Commissioner. 914
Towle, Lindquist *v*. 933
Town. See name of town.
Townsend *v*. Illinois. 850, 886
Township. See name of township.
Trade Commission. See Federal Trade Comm'n.
Treasurer of Cuyahoga County *v*. United States. 890
Treasurer of Illinois, Turner *v*. 65
Treasurer of Knox County, Walter Seed Co. *v*. 906
Treasury Department, Young *v*. 845
Triplett *v*. Iowa. 811
Tropical Marine Products, Birmingham Ins. Co. *v*. 903
Trotter *v*. Hall. 285
Truck Drivers Union *v*. Labor Board. 958
Trust Co. of Chicago, Olesen *v*. 896
Trustees of Welfare Fund, Quality Coal Corp. *v*. 882
Tseung Bowquong Chew *v*. Cornell. 892
Tseung Chu *v*. Cornell. 892
Tubbs *v*. United States. 935
Tubbs Mfg. Co., Dallas *v*. 868, 920
Tucker, Arnold *v*. 848
Tucker, Cephas *v*. 847
Tucker, Daniels *v*. 916
Tucker, Deneen *v*. 964
Tucker, Fitch *v*. 963
Tucker, Manko *v*. 962
Tucker, McCoy *v*. 847
Tucker, McDaniel *v*. 962
Tucker, Rexrode *v*. 964
Tucker, Shepherd *v*. 962

Page
Tucker, Stewart *v*. 849
Tungsten Mining Corp., Mine Workers *v*. 821
Turner *v*. Wright. 65
Tustin, Cross *v*. 899
T/V Golden West, Instituto Cubano del Azucar *v*. 884
Twin Towers Commissary, Chicago *v*. 957
Tyler Gas Service Co., United Gas Pipe Line Co. *v*. 895
Una Water District Comm'n, Mills Mill *v*. 605
Unilectric, Inc., *v*. Holwin Corp. 830
Union. See name of trade.
United. For labor unions, see name of trade.
United Brotherhood. For labor unions, see name of trade.
United Gas Pipe Line Co. *v*. Memphis Light Division. 938, 949
United Gas Pipe Line Co. *v*. Mississippi River Fuel Corp. . . . 904
United Gas Pipe Line Co. *v*. Tyler Gas Service Co. 895
United Mfg. & Service Co. *v*. Holwin Corp. 830
United States. See also U. S. *ex rel.*
United States, Abbate *v*. 902
United States, Accardo *v*. 898
United States, Akin *v*. 956
United States, Alexander *v*. 852
United States, Alonzo *v*. 940
United States, Alprin *v*. 924
United States, Amaya *v*. 916
United States, American Bitumuls Co. *v*. 883
United States, American Trucking Assns. *v*. 141
United States, Anderson *v*. 822
United States, Andrew G. Nelson, Inc., *v*. 554
United States, Angelet *v*. 859
United States, Apuzzo *v*. 831
United States, Arkansas Public Service Comm'n *v*. 4
United States, Arp *v*. 826
United States, Associated Third Class Mail Users *v*. 895
United States, Austin *v*. 898
United States, Bailey *v*. 919
United States, Baker *v*. 864, 886
United States *v*. Ball Construction Co. 587
United States *v*. Baltimore & O. R. Co. 175
United States, Bando *v*. 844
United States, Banta *v*. 33, 34
United States, Barnes *v*. 927, 968
United States, Benanti *v*. 96, 801
United States, Bereslavsky *v*. 841
United States *v*. Bess. 861

Page
United States, Biggs *v*. 922
United States, Binion *v*. 834
United States, Blackwell *v*. 838
United States, Blanc *v*. 874
United States, Bolinders Co. *v*. 953
United States *v*. Boyd. 889
United States, Boyes *v*. 844
United States, Brennan *v*. 890
United States, Broker *v*. 837
United States, Brooks *v*. 866
United States, Bryson *v*. 817, 879
United States, Cameron *v*. 917
United States, Cammarano *v*. 952
United States, Campisi *v*. 892
United States, Carminati *v*. 883
United States, Carroll *v*. 857
United States, Center *v*. 857
United States *v*. Central Eureka Mining Co. 887
United States, Cherpakov *v*. 873
United States, Chin Bick Wah *v*. 870
United States, Chow Bing Kew *v*. 889, 901
United States, Citizens Bank & Trust Co. *v*. 825, 885
United States *v*. Citizens Utilities Co. 892
United States, Cito *v*. 844
United States, Clay *v*. 863
United States, Comfy Mfg. Co. *v*. 5, 901
United States, Compania Ithaca de Vapores *v*. 817
United States *v*. Cores. 866, 887
United States, Daigle *v*. 913
United States, Daley *v*. 832
United States, Daly *v*. 826, 885
United States, Dandridge *v*. 866
United States, Daniels *v*. 852
United States, Darneille *v*. 873
United States, David *v*. 863
United States, Dennis *v*. 936
United States, De Normand *v*. 917, 942
United States *v*. Detroit. 466
United States, DeVivo *v*. 874
United States, Dicanio *v*. 874
United States, Di Palermo *v*. 836
United States *v*. Dixie Carriers, Inc. 179
United States, Dominguez *v*. 858
United States, Donovan Construction Co. *v*. 826

Page

United States *v.* Dragon Cement Co. 833
United States, Duncan *v.* 875
United States, Dushon *v.* 933
United States, Edgewood American Legion Post *v.* 926
United States, Edwards *v.* 36
United States, Elbert *v.* 897
United States, El Paso Natural Gas Co. *v.* 950
United States, Emerling *v.* 907
United States, Epstein *v.* 868
United States, Etherton *v.* 919
United States *v.* Fehlhaber Corp. 877
United States, Flora *v.* 881
United States, Fooks *v.* 806
United States, Ford *v.* 38
United States, Frank *v.* 819
United States, Franken *v.* 956
United States, Galgano *v.* 883
United States, Gamez *v.* 934
United States, Garner *v.* 832
United States, General Outdoor Advertising Co. *v.* 891
United States, George *v.* 843, 879
United States, Gershon *v.* 873
United States, Giglio *v.* 339, 967
United States, Gilpin *v.* 911
United States, Giordenello *v.* 811, 875
United States, Gomez *v.* 863, 900
United States, Gore *v.* 903, 909
United States, Green *v.* 184, 871
United States, Grossman *v.* 285, 942
United States, Guerlain, Inc., *v.* 937
United States, Gullahorn *v.* 806
United States, Haas *v.* 924
United States, Hackendorf *v.* 826
United States, Hall *v.* 821
United States, Harris *v.* 817
United States, Harry C. Daniels & Co. *v.* 852
United States, Hartwig *v.* 890
United States, Hawkins *v.* 925
United States, Hecht *v.* 940
United States, Heikkinen *v.* 273
United States, Hickman *v.* 874
United States, Hoppe *v.* 816
United States, Horne *v.* 878
United States, Hupman *v.* 949

Page
United States *v.* Hvass 570
United States *v.* Illinois 300
United States, Irby *v.* 961
United States, James *v.* 866
United States, Japan-Atlantic Freight Conference *v.* 804
United States, Johnson *v.* 850, 867
United States, Jones *v.* 810, 936
United States, Jorgensen *v.* 840
United States, Kahla *v.* 832
United States, Kimbrough *v.* 925, 968
United States, Kivette *v.* 935
United States, Klein *v.* 924
United States, Krasnov *v.* 5, 908
United States, Ladner *v.* 282
United States, Lambert *v.* 63
United States, Lanvin Parfums, Inc., *v.* 951
United States, Latham *v.* 874
United States, Latrobe Construction Co. *v.* 890
United States, Lawn *v.* 339, 967
United States, Lawson *v.* 963
United States, Lennon *v.* 836
United States, Lieberman-Koren Corp. *v.* 818
United States, Lieblich *v.* 896
United States, Lightfoot *v.* 2
United States, Litman *v.* 869
United States, Litterio *v.* 849
United States, Long *v.* 878
United States *v.* Louisiana 859, 876, 945
United States, MacCurdy *v.* 933
United States, Maisenberg *v.* 802
United States, Majesic *v.* 826
United States, Manzanillo *v.* 809, 951
United States, Marin County *v.* 866
United States, Maroy *v.* 931
United States *v.* Massei 595
United States, McAbee *v.* 964
United States, McDonald *v.* 863
United States, McGee *v.* 17
United States *v.* McNinch 808, 948
United States, Merchants National Bank Co. *v.* 881, 920
United States *v.* Merry Bros. Brick & Tile Co 824
United States, Miller *v.* 833, 905
United States, Moccio *v.* 852
United States, Monroe *v.* 875

Page

United States, Mounce *v*. 180
United States, Moylan *v*. 923
United States *v*. Muskegon Township. 484
United States, Nashville *v*. 63
United States, Nationwide Trailer Rental System *v*. 10
United States, Nelson, Inc., *v*. 554
United States, New Orleans Ins. Exchange *v*. 22, 908
United States, New York Mail Transportation Co. *v*. 904
United States *v*. New York, N. H. & H. R. Co. 253
United States, North Counties Hydro-Electric Co. *v*. 882
United States, Nowak *v*. 802
United States, Offutt *v*. 856
United States, Oppenheimer *v*. 5
United States, Paisner *v*. 941
United States, Parfums Corday, Inc., *v*. 951
United States, Parker *v*. 836, 963
United States, Payne *v*. 923
United States, Pedone *v*. 829
United States, Pettway *v*. 918
United States, Price *v*. 964
United States, Private Brands, Inc., *v*. 957
United States, Public Utilities Comm'n *v*. 534
United States, Purdom *v*. 913
United States, Putnam Tool Co. *v*. 825
United States, Railway Express Agency *v*. 270
United States, Railway Labor Executives' Assn. *v*. 141
United States, Rainwater *v*. 811
United States, Rathbun *v*. 107, 880, 925
United States, Reynolds Tobacco Co. *v*. 893
United States *v*. R. F. Ball Construction Co. 587
United States, Ripperger *v*. 940
United States, R. J. Reynolds Tobacco Co. *v*. 893
United States, Roker *v*. 924
United States, Rosenbloom *v*. 80
United States, Roth *v*. 852
United States, R. S. Rainwater & Sons *v*. 811
United States, Russo *v*. 816, 874
United States, Saunders *v*. 913
United States, Sawyer *v*. 868
United States, Scales *v*. 1
United States, Schaffer Transportation Co. *v*. 83
United States, Scott *v*. 962
United States, Sears *v*. 602
United States, Seatrain Lines, Inc., *v*. 181

Page
United States, Segal *v*. 894
United States *v*. Sharpnack 286
United States, Sheba Bracelets, Inc., *v*. 904
United States, Shepherd *v*. 934
United States, Sherman *v*. 852
United States *v*. Shotwell Mfg. Co. 233
United States *v*. Silverman 942
United States, Simpson *v*. 7
United States, Sing Kee *v*. 954
United States, Skender *v*. 931
United States, Smith *v*. 965
United States, Sobell *v*. 860, 873, 920
United States, Southern R. Co. *v*. 283, 370
United States, Standard-Vacuum Oil Co. *v*. 893
United States, Steele *v*. 828, 875
United States, Stewart *v*. 964
United States, Stoneking *v*. 852
United States *v*. Suter 926
United States, Sword Line, Inc., *v*. 841
United States *v*. Taylor 942
United States, Taylor *v*. 801
United States, Texas Co. *v*. 817
United States, Thomas *v*. 936
United States *v*. Township of Muskegon 484
United States, Tubbs *v*. 935
United States *v*. Vorreiter 15
United States, Wainer *v*. 815
United States *v*. Washington 801
United States, Watson *v*. 14
United States, Weinstein *v*. 868
United States, Wentz *v*. 806
United States *v*. Wilkinson 839
United States, Williams *v*. 857, 953
United States, Wometco Television Co. *v*. 40
United States, Woodford *v*. 861
United States, Wright *v*. 831
United States, Yates *v*. 66
United States, Yoknapatawpha Drainage Dist. *v*. 882
United States, Young *v*. 917
United States, Zavada *v*. 392
U. S. Chemical Corp. *v*. Plastic Glass Corp. 836
U. S. Court of Appeals Chief Judge, Williams *v*. 49, 860
U. S. District Judge, Blaski *v*. 872, 928
U. S. District Judge, Daniel *v*. 911

Page
U. S. District Judge, Hubbard *v*. 887
U. S. District Judge, Massey-Harris-Ferguson Limited *v*. 806
U. S. *ex rel.* Avramovich *v*. Lehmann. 905, 925
U. S. *ex rel.* Burke *v*. Denno. 849
U. S. *ex rel.* Johnson, Fay *v*. 915
U. S. *ex rel.* Lee Kum Hoy *v*. Murff. 169, 802
U. S. *ex rel.* Lee Kum Hoy *v*. Shaughnessy. 802
U. S. *ex rel.* Marcial, Fay *v*. 915
U. S. *ex rel.* Shoshone Indian Tribe *v*. Seaton. 923
U. S. *ex rel.* Wisconsin *v*. First Fed. Loan Assn. 957
U. S. Foreign Claims Comm'n, Dayton *v*. 813, 884
U. S. Gypsum Co. *v*. National Gypsum Co. 901
U. S. Marshal, Frost *v*. 915, 942
U. S. Overseas Airlines *v*. Compania Aerea Viajes. 893
U. S. Treasury Department, Young *v*. 845
U. S. Veterans Administration, Di Silvestro *v*. 935, 968
U. S. Veterans Administration, Gostovich *v*. 608
United Towing Co. *v*. Phillips. 861
University of New York, Strauss *v*. 394, 968
Uphaus *v*. Wyman. 16
Utah, Ashdown *v*. 853
Utah, Gay *v*. 899
Utah, Sullivan *v*. 848
Utilities Comm'n of California *v*. United States. 534
Utility Comm'n of Pennsylvania, Willits *v*. 11
Valley Unitarian Church *v*. Los Angeles County. 888, 947, 948
Valore, Gostovich *v*. 608
Vance, Safeway Stores *v*. 389, 949
Vanston Bondholders Committee *v*. Columbia Gas System. . . 838
Vargas *v*. Bull S. S. Co. 958
Vermont Structural Slate Co., Tatko Slate Co. *v*. 949
Veterans Administration, Di Silvestro *v*. 935, 968
Veterans Administration, Gostovich *v*. 608
Village. See name of village.
Virginia *v*. Maryland. 3, 269, 880, 946
Voelkel *v*. Tohulka. 891
Von Opel *v*. Brownell. 878
Vorreiter, United States *v*. 15
Wabash R. Co., Honeycutt *v*. 424
Wags Transportation System, Inc., *v*. Prevatt. 957
Wainer *v*. United States. 815
Walker *v*. Brown. 954
Walker *v*. Michigan. 960
Walker *v*. Missouri. 965

Page
Walsh *v.* First National Bank & Trust Co. 183
Walter Seed Co. *v.* McClure 906
Warden of Maryland Penitentiary, Dobson *v.* 966
Warehousemen's Union *v.* Labor Board 958
Warehousemen's Union, Labor Board *v.* 808
Warner *v.* Bannan 900
Warner Bros. Pictures, Inc., Harmar Theatre, Inc., *v.* 824
Warren *v.* Illinois 965
Warren Petroleum Corp., Greenshields *v.* 907
Warren Petroleum Corp. *v.* Int. Industries, Inc. 943
Washington, Carlson *v.* 607
Washington, United States *v.* 801
Washington, White *v.* 10
Washington County Medical Society, Riggall *v.* 954
Washington Court House, Carson *v.* 270
Washington State Board of Prison Terms, Eskridge *v.* 947
Watkins *v.* Murphy 858
Watkins, Texas & Pacific R. Co. *v.* 868
Watson, Petrocarbon Limited *v.* 955
Watson *v.* Teets 846
Watson *v.* United States 14
Weaver, Emray Realty Corp. *v.* 395
Webster Motor Car Co. *v.* Packard Motor Car Co. 822, 900
Weimer, Bartlett *v.* 858
Weinstein *v.* United States 868
Welfare Department of Baltimore, Frantum *v.* 882
Welfare Department of San Francisco, Ballf *v.* 912, 967
Welfare Fund Trustees, Quality Coal Corp. *v.* 882
Wentz *v.* United States 806
Western Union Telegraph Co. *v.* Sparks 828
West Point Market, Retail Clerks' Union *v.* 852
Wetzel *v.* Harpole 848, 900
Weyerhaeuser S. S. Co. *v.* Nacirema Operating Co. 563
W. H. Elliott & Sons Co., Nuodex Products Co. *v.* 823
Whitcomb *v.* Randolph 900
White *v.* Texas 936
White *v.* Washington 10
Wick *v.* Keshner 855
Wilburn *v.* New York 918
Wilkinson, Luciano *v.* 807
Wilkinson, United States *v.* 839
Wm. H. Wise Co. *v.* Federal Trade Comm'n 856
Williams *v.* California 961
Williams, Chicago, R. I. & P. R. Co. *v.* 855

	Page
Williams, Collins *v.*	936
Williams *v.* Georgia	858
Williams *v.* Jackson	898
Williams *v.* Rhay	846
Williams *v.* Simons	49, 860
Williams *v.* Texas	850
Williams *v.* United States	857, 953
Williamson, Allen *v.*	838
Williamson *v.* Commissioner	838
Williamson, Kern *v.*	838, 879
Willits *v.* Pennsylvania Public Utilities Comm'n	11
Wilshire Holding Corp. *v.* Commissioner	815, 879
Wilson, Board of Naturopathic Examiners *v.*	870, 920
Wilson *v.* Civil Aeronautics Board	870
Wilson, Colonial Life & Accident Ins. Co. *v.*	927
Wilson *v.* Hand	916
Wilson *v.* Loew's Inc	597, 802
Wilson *v.* Muench-Kreuzer Candle Co	882
Wilson *v.* Oil Transport Co	835
Winston *v.* Looney	807
Wisconsin *v.* First Fed. Loan Assn	957
Wisconsin *v.* Illinois	909, 944
Wise Co. *v.* Federal Trade Comm'n	856
Wometco Television & Theatre Co. *v.* United States	40
Wood *v.* Gas Service Co	885, 920
Wood *v.* Graham	916
Woodford *v.* United States	861
Woodward & Lothrop, Jamieson *v.*	855
World Ins. Co. *v.* Bethea	181
Worley *v.* National Specialty Co	844, 886
Wright, Turner *v.*	65
Wright *v.* United States	831
W. T. Grant Co. *v.* Joseph	869
Wyatt *v.* Smyth	927
Wyers *v.* Michigan	875
Wylie, Hudson *v.*	828
Wyman, Sweezy *v.*	852
Wyman, Uphaus *v.*	16
Yates *v.* United States	66
Yoknapatawpha Drainage Dist. No. 2 *v.* United States	882
Yost *v.* Ragen	807
Young *v.* Hughes	878
Young *v.* United States	917

Page
Young *v.* U. S. Treasury Department 845
Youngdahl *v.* Rainfair, Inc 131
Youngstown Sheet & Tube Co. *v.* Bowers 911
Yugoslavia Republic *v.* Artukovic 393
Zack *v.* Commissioner 823
Zavada *v.* United States 392
Zielinski *v.* Illinois 845
Zisman, Aberlin *v.* 857

TABLE OF CASES CITED

Page

Ace Grain Co. v. Am. Eagle Ins. Co., 95 F. Supp. 784 223
Administrator. See name of administrator.
Aetna Life Ins. Co. v. Haworth, 300 U. S. 227 536
Aetna Life Ins. Co. v. Wharton, 63 F. 2d 378 252
Aircraft & Diesel Corp. v. Hirsch, 331 U. S. 752 539
Air Terminal Services v. Rentzel, 81 F. Supp. 611 293
Alabama v. King & Boozer, 314 U. S. 1 469, 472, 487, 499, 509, 520, 528, 530, 543, 548
Alabama Fed. of Labor v. McAdory, 325 U. S. 450 539, 552, 553
Alberts v. California, 354 U. S. 476 35
Alcoa S. S. Co. v. United States, 338 U. S. 421 263
Alleghany Corp. v. Breswick & Co., 353 U. S. 151 416–419
Allen v. Grand Cent. Aircraft Co., 347 U. S. 535 539
Allen-Bradley Local v. Board, 315 U. S. 740 138
Alton R. Co. v. United States, 315 U. S. 15 561
Amalgamated Meat Cutters v. Fairlawn, Inc., 353 U. S. 20 39
Amalgamated St. R. Employees v. Board, 340 U. S. 416 58
American Airlines v. No. Am. Airlines, 351 U. S. 79 465
American Boiler Works, In re, 220 F. 2d 319 524
American Motors Corp. v. Kenosha, 274 Wis. 315 524
American President Lines v. Marine Corp., 234 F. 2d 753 567

Page

American School of Healing v. McAnnulty, 187 U. S. 94 582
American Security & Tr. Co. v. Comm'rs, 224 U. S. 491 109
American Trucking Assns. v. United States, 355 U. S. 141 93
Anderson v. Wilson, 289 U. S. 20 126
Anthony v. Atlanta, 66 Ga. App. 504 327
Arizona v. California, 283 U. S. 423 544, 548
Arnold v. P. & S. F. R. Co., 353 U. S. 360 18
Ashwander v. T. V. A., 297 U. S. 288 330
Atlantic Coast Line v. Mims, 242 U. S. 532 329
Atlantic Coast Line v. United States, 136 Ct. Cl. 1 263
Atlantic Loan Co. v. Peterson, 181 Ga. 266 320, 334
Attorney-General, The, v. Bertrand, 1 L. R. P. C. 520 203
Baldwin v. Kansas, 129 U. S. 52 329
Baltimore & A. R. Co. v. Lichtenberg, 176 Md. 383 543
Beckham v. State, 141 Tex. Cr. R. 438 218
Benanti v. United States, 355 U. S. 96 108, 109, 113
Bernheimer v. Converse, 206 U. S. 516 224
Betts v. Brady, 316 U. S. 455 159
Billeci v. United States, 87 U. S. App. D. C. 274 109
Bohanan v. State, 18 Neb. 57 217
Boston Hose Co. v. Kendall, 178 Mass. 232 568

Page

Boston Metals Co. v. Compania de Astral, 348 U. S. 943 223
Bradley, Ex parte, 48 Ind. 548 216
Brady v. Terminal R. Assn., 303 U. S. 10 444
Bram v. United States, 168 U. S. 532 247
Brantley v. Georgia, 217 U. S. 284 194, 213, 216
Brantley v. State, 132 Ga. 573 216
Brennan v. People, 15 Ill. 511 218
Brewster v. Swope, 180 F. 2d 984 189
Brooks v. Labor Board, 348 U. S. 96 460
Brotherhood of Trainmen v. B. & O. R. Co., 331 U. S. 519 144
Brotherhood of Trainmen v. Howard, 343 U. S. 768 42
Brown v. Allen, 344 U. S. 443 897
Brown v. Massachusetts, 144 U. S. 573 335
Brown v. State, 99 Tex. Cr. R. 19 218
Bruce's Juices v. Am. Can Co., 330 U. S. 743 376, 383
Bryant v. Zimmerman, 278 U. S. 63 229
Buch Express v. United States, 132 Ct. Cl. 772 263
Burton v. United States, 202 U. S. 344 213
Bute v. Illinois, 333 U. S. 640 159
Butler v. State, 177 Miss. 91 217
Byrd, Ex parte, 157 Tex. Cr. R. 595 218
Caha v. United States, 152 U. S. 211 575, 576
Callan v. Bransford, 139 U. S. 197 335
Callanan Road Co. v. United States, 345 U. S. 507 562
Canizio v. New York, 327 U. S. 82 159
Cantwell v. Connecticut, 310 U. S. 296 322–325

Page

Capitol Greyhound Lines v. Brice, 339 U. S. 542 493
Carpenter v. Shaw, 280 U. S. 363 477, 508
Carroll v. United States, 267 U. S. 132 245
Carstairs v. Cochran, 193 U. S. 10 493
Carter v. A. & St. A. B. R. Co., 338 U. S. 430 444, 448
Carter v. Illinois, 329 U. S. 173 159, 161
Carter v. United States, 168 F. 2d 310 81
Carter v. Virginia, 321 U. S. 131 369
C. F. Smith Co. v. Fitzgerald, 270 Mich. 659 524
Chandler v. Fretag, 348 U. S. 3 159
Chaplinsky v. New Hampshire, 315 U. S. 568 138
Charles v. United States, 19 Ct. Cl. 316 256
Chastleton Corp. v. Sinclair, 264 U. S. 543 330
Chesapeake & O. R. Co. v. McDonald, 214 U. S. 191 335
Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559 228
Christensen, In re, 166 Kan. 671 216
Christianson v. King County, 239 U. S. 356 296
Cities Service Co. v. Comm'n, 355 U. S. 391 425
City. See name of city.
Clark Distilling Co. v. W. Md. R. Co., 242 U. S. 311 294
Cline v. Frink Dairy Co., 274 U. S. 445 378
Cogen v. United States, 278 U. S. 221 353
Cohens v. Virginia, 6 Wheat. 264 197, 327
Collins v. Yosemite Co., 304 U. S. 518 288
Commonwealth. See also name of Commonwealth.
Commonwealth v. Deitrick, 221 Pa. 7 218

Page

Commonwealth v. Flax, 331 Pa. 145 218
Communist Party v. Board, 351 U. S. 115 241, 242, 250
Compania de Astral, S. A., v. Boston Co., 205 Md. 237 223
Conard v. Atlantic Ins. Co., 1 Pet. 386 593
Continental Collieries v. Shober, 130 F. 2d 631 46
Coray v. Southern Pac. Co., 335 U. S. 520 435
Cornec v. B. & O. R. Co., 48 F. 2d 497 568
Costello v. United States, 350 U. S. 359 349, 350
County. See name of county.
Covey v. Town of Somers, 351 U. S. 141 228
Cox v. Roth, 348 U. S. 207 430
Craig v. Ingalls Corp., 192 Miss. 254 524
Crapp v. State, 148 Ga. 150 331
Crawford v. Koch, 169 Mich. 372 526
Crawford v. Pope & Talbot, 206 F. 2d 784 568
Cross v. Commonwealth, 195 Va. 62 189
Curry v. United States, 314 U. S. 14 470, 479, 480, 487, 506–509, 531
Dade County v. State, 201 Ga. 241 331
Dart Transit Co. v. Comm'n, 345 U. S. 980; 110 F. Supp. 876 558
Davis v. Wechsler, 263 U. S. 22 318, 333
Davis v. Wolfe, 263 U. S. 239 434, 444
Deen v. G., C. & S. F. R. Co., 353 U. S. 925 18
De Meerleer v. Michigan, 329 U. S. 663 157, 159
Detroit v. Gray, 314 Mich. 516 493
Detroit v. Murray Corp., 355 U. S. 489 488, 552
Detroit v. Phillip, 313 Mich. 211 526
Detroit Shipbuilding Co. v. Detroit, 228 Mich. 145 493

Page

Dillard v. C. & O. R. Co., 199 F. 2d 948 46
Dioguardi v. Durning, 139 F. 2d 774 46
Distilled Brands v. Dunigan, 222 F. 2d 867 24
District of Columbia v. Brooke, 214 U. S. 138 228
District of Columbia v. Thompson Co., 346 U. S. 100 296
Dixie Carriers v. United States, 351 U. S. 56 88–91
Doherty & Co. v. Goodman, 294 U. S. 623 223
Dorchy v. Kansas, 264 U. S. 286 330
Dotson v. Theatrical Employees, 34 Cal. 2d 362 599
Douglas Aircraft Co. v. Byram, 57 Cal. App. 2d 311 524
Downes v. Bidwell, 182 U. S. 244 195
D. R. Wilder Co. v. Corn Co., 236 U. S. 165 377
Duignan v. United States, 274 U. S. 195 362
Eastern-Central Carriers v. United States, 321 U. S. 194 88
Eastport S. S. Co. v. United States, 131 Ct. Cl. 210 263
Eccles v. Peoples Bank, 333 U. S. 426 172
Edelman v. California, 344 U. S. 357 329
Educational Films Corp. v. Ward, 282 U. S. 379 471, 472, 479, 506
Endicott Johnson Corp. v. Perkins, 317 U. S. 501 9
Erie R. Co. v. Tompkins, 304 U. S. 64 950
Esso Standard Co. v. Evans, 345 U. S. 495 470, 479, 494, 506–509, 530, 543
Eugene F. Moran, The, 212 U. S. 466 442
Ever Krisp Food Products Co., In re, 307 Mich. 182 526
Ex parte. See name of party.

Page

Far East Conference v. United States, 342 U. S. 570 539
Farley v. United States, 354 U. S. 521 36
Federal Power Comm'n v. Colorado Gas Co., 348 U. S. 492 464
Federal Trade Comm'n v. Am. Tobacco Co., 274 U. S. 543 400
Federal Trade Comm'n v. Cement Institute, 333 U. S. 683 401, 404–408
Federal Trade Comm'n v. Nat. Lead Co., 352 U. S. 419 401, 404, 406
Federal Trade Comm'n v. Staley Mfg. Co., 324 U. S. 746 401, 404–408
Ferguson v. Moore-McCormack Lines, 352 U. S. 521 18, 424
Ferguson v. Shell Corp., 81 F. 2d 193 252
First Nat. Bank v. Anderson, 269 U. S. 341 318, 329
Flanders v. United States, 222 F. 2d 163 109
Florida v. United States, 282 U. S. 194 305–311
Florida v. United States, 292 U. S. 1 306, 309
Flynn v. State, 209 Ga. 519 320, 334
Foster v. Illinois, 332 U. S. 134 159
Fox Film Corp. v. Muller, 296 U. S. 207 59
Franklin v. United States, 216 U. S. 559 291, 299
Funkhouser v. Preston Co., 290 U. S. 163 224
Futrelle v. Atlantic Coast Line, 353 U. S. 920 18
Galvan v. Press, 347 U. S. 522 119–126
Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217 505
Garner v. Teamsters Union, 346 U. S. 485 39
Gayes v. New York, 332 U. S. 145 159

Page

Gibbs v. Burke, 337 U. S. 773 159
Gibson v. Thompson, 355 U. S. 18 424
Glasser v. United States, 315 U. S. 60 161
Glickstein v. United States, 222 U. S. 139 575
Glover v. Rome, 173 Ga. 239 327, 332
Goldstein v. United States, 316 U. S. 114 103
Gompers v. Bucks Co., 221 U. S. 418 72
Gompers v. United States, 233 U. S. 604 199
Gonzalez v. United States, 233 F. 2d 825 81
Goodall v. United States, 86 U. S. App. D. C. 148 194
Gorris v. Scott, L. R. 9 Ex. 125 442, 445
Gouled v. United States, 255 U. S. 298 353
Graham v. Brotherhood, 338 U. S. 232 42
Grand Trunk W. R. Co. v. United States, 252 U. S. 112 264
Gratiot v. United States, 15 Pet. 336 261
Graves v. O'Keefe, 306 U. S. 466 469, 472, 528, 530
Great Lakes Dredge Co. v. Kierejewski, 261 U. S. 479 429
Green v. United States, 355 U. S. 184 250
Green v. United States, 95 U. S. App. D. C. 45 194
Gridley v. United States, 44 F. 2d 716 360
Griffin v. Illinois, 351 U. S. 12 189
Gryger v. Burke, 334 U. S. 728 159
Hague v. C. I. O., 307 U. S. 496 323, 324
Hall v. State, 145 Tex. Cr. R. 192 218
Hallowell v. United States, 197 F. 2d 926 165
Hamilton, The, 207 U. S. 398 429

Page

Hanover Nat. Bank v. Moyses, 186 U. S. 181 296
Hardy v. United States, 186 U. S. 224 248
Harisiades v. Shaughnessy, 342 U. S. 580 126, 276
Harmon v. Brucker, 100 U. S. App. D. C. 190 583, 586
Harris v. Nat. Union of Cooks, 98 Cal. App. 2d 733 599
Harrisburg, The, 119 U. S. 199 429
Hatch v. Reardon, 204 U. S. 152 330
Hawk v. Olson, 326 U. S. 271 159
Hayes v. Union P. R. Co., 340 U. S. 942; 184 F. 2d 337 44
Hearn v. State, 212 Ark. 360 217
Helvering v. Gerhardt, 304 U. S. 405 472, 530
Helvering v. Mountain Corp., 303 U. S. 376 472
Hemans v. United States, 163 F. 2d 228 295
Henderson v. United States, 218 F. 2d 14 360
Henneford v. Mason Co., 300 U. S. 577 470, 474, 479, 493
Henry L. Doherty & Co. v. Goodman, 294 U. S. 623 223
Herman v. Claudy, 350 U. S. 116 159–161
Hess, In re, 45 Cal. 2d 171 218
Hess v. Pawloski, 274 U. S. 352 223
Hill v. Florida, 325 U. S. 538 106
Hill v. State, 126 Tex. Cr. R. 79 218
Hines v. Davidowitz, 312 U. S. 52 106
Hirabayashi v. United States, 320 U. S. 81 359, 362
Hoffman v. United States, 341 U. S. 479 7
Holiday v. Johnston, 313 U. S. 342 392
Holland v. Steag, Inc., 143 F. Supp. 203 430
Holland v. United States, 348 U. S. 121 595

Page

Holt v. United States, 218 U. S. 245 349
Holy Trinity Church v. United States, 143 U. S. 457 109
Home Ins. Co. v. New York, 134 U. S. 594 471
Hopt v. Utah, 104 U. S. 631; 110 U. S. 574; 114 U. S. 488; 120 U. S. 430 204
Hornbuckle v. Toombs, 18 Wall. 648 296
Hoskins v. Commonwealth, 152 Ky. 805 217
House v. Mayo, 324 U. S. 42 159
Houston, E. & W. T. R. Co. v. United States, 234 U. S. 342 308
Howes Co. v. Milling Co., 277 P. 2d 655 223
Huff v. United States, 192 F. 2d 911 81
Hughes Tool Co. v. Labor Board, 147 F. 2d 69 46
Hulbert v. Chicago, 202 U. S. 275 335
Humble Oil Co. v. United States, 198 F. 2d 753 295
Humphrey's Executor v. United States, 295 U. S. 602 197
Hunt v. United States, 278 U. S. 96 293
Husty v. United States, 282 U. S. 694 363
Illinois v. United States, 342 U. S. 930; 101 F. Supp. 36 311
Illinois Cent. R. Co. v. Williams, 242 U. S. 462 446
Illinois Commerce Comm'n v. United States, 292 U. S. 474 306, 309
In re. See name of party.
Intermountain Rate Cases, 234 U. S. 476 93
International Salt Co. v. United States, 332 U. S. 392 25
International Shoe Co. v. Washington, 326 U. S. 310 222

Page

Interstate Commerce Comm'n v. Consolidated Freightways, 41 F. Supp. 651 562
Interstate Commerce Comm'n v. Mechling, 330 U. S. 567 89
Interstate Commerce Comm'n v. Parker, 326 U. S. 60 88, 90
Irvine v. California, 347 U. S. 128 363
Jacobi v. Alabama, 187 U. S. 133 335
James v. Dravo Co., 302 U. S. 134 469, 472, 487, 496–499, 503, 509, 528, 530, 543, 548
James v. Marinship Corp., 25 Cal. 2d 721 598
James v. United States, 89 U. S. App. D. C. 201 109
James Stewart & Co. v. Sadrakula, 309 U. S. 94 293, 294, 543
Jencks v. United States, 353 U. S. 657 1, 2
John v. Paullin, 231 U. S. 583 335
Johnson v. Maryland, 254 U. S. 51 544, 548
Johnson v. State, 29 Ark. 31 217
Johnson v. United States, 352 U. S. 565 36
Johnson v. Yellow Cab Co., 321 U. S. 383 293
Johnson v. Zerbst, 304 U. S. 458 161, 191
Joint Anti-Fascist Comm'n v. McGrath, 341 U. S. 123 582
Jones v. Opelika, 316 U. S. 584; 319 U. S. 103 319, 324
Jones v. State, 273 U. S. 639; 144 Miss. 52 217
Jones v. State, 13 Tex. 168 218
Joubert v. State, 136 Tex. Cr. R. 219 218
Just v. Chambers, 312 U. S. 383 430
Kansas City S. R. Co. v. Anderson, 233 U. S. 325 330

Page

Kavanagh, In re (Misc. No. 83258, C. C. Mich.) 50
Keen v. Overseas Corp., 194 F. 2d 515 353
Kent v. Porto Rico, 207 U. S. 113 249
Kepner v. United States, 195 U. S. 100 188, 192, 196, 209–211, 250
Kern-Limerick, Inc., v. Scurlock, 347 U. S. 110 499, 518–524, 531
King v. United States, 344 U. S. 254 306–309
King, The, v. Emden, 9 East 437 200
King, The, v. Mawbey, 6 T. R. 619 203
Knickerbocker Ice Co. v. Stewart, 253 U. S. 149 294, 298
Krasner v. Rutledge, 204 Ga. 380 320, 334
Kring v. Missouri, 107 U. S. 221 194
Kunz v. New York, 340 U. S. 290 324
Labor Board v. Am. Nat. Ins. Co., 343 U. S. 395 401
Labor Board v. Bradford Assn., 310 U. S. 318 458
Labor Board v. Cheney Lbr. Co., 327 U. S. 385 464
Labor Board v. Dant, 344 U. S. 375 461
Labor Board v. Link-Belt Co., 311 U. S. 584 458
Labor Board v. Mackay Radio Co., 304 U. S. 333 458
Labor Board v. Newport News Drydock Co., 308 U. S. 241 459, 461
Labor Board v. Penn. Greyhound Lines, 303 U. S. 261 458, 461
Labor Board v. Pittsburgh S. S. Co., 340 U. S. 498 401
Labor Board v. Seven-Up Co., 344 U. S. 344 458, 464
Labor Board v. Wemyss, 212 F. 2d 465 459
Landis v. Lewis, 118 Fla. 910 218

Page

Land O'Lakes Co. v. Wadena, 338 U. S. 897; 229 Minn. 263 492
Lange, Ex parte, 18 Wall. 163 187, 204
Largent v. Texas, 318 U. S. 418 324
Latva v. Nicolls, 106 F. Supp. 658 123
Lawrence v. Comm'n, 286 U. S. 276 492
Leimer v. State Life Co., 108 F. 2d 302 46
Leiter Minerals v. United States, 352 U. S. 220 539, 552, 553
Leslie Miller, Inc., v. Arkansas, 352 U. S. 187 542, 544
Leviton v. United States, 343 U. S. 946 249
Lewis v. United States, 74 F. 2d 173 249
Lilly v. Grand Trunk R. Co., 317 U. S. 481 444, 575
Lindgren v. United States, 281 U. S. 38 429
Liverpool, N. Y. & P. S. S. Co. v. Comm'rs, 113 U. S. 33 330
Lopez v. Killegrew, 202 Ind. 397 216
Louisville & N. R. Co. v. Layton, 243 U. S. 617 433, 444
Lovell v. Griffin, 303 U. S. 444 318–325
Lustig v. United States, 338 U. S. 74 102
Mac. See also Mc.
Macallen Co. v. Massachusetts, 279 U. S. 620 472, 479
Macomber v. State, 137 Neb. 882 217
Marino v. Ragen, 332 U. S. 561 159
Martin v. Hunter's Lessee, 1 Wheat. 304 327
Massachusetts v. Mellon, 262 U. S. 447 330
Massey v. Moore, 348 U. S. 105 159

Page

Maty v. Grasselli Co., 303 U. S. 197 48
Mc. See also Mac.
McAffee v. United States, 70 App. D. C. 142 249
McBride v. Toledo T. R. Co., 354 U. S. 517 18
McClellan v. Carland, 217 U. S. 268 354
McCulloch v. Maryland, 4 Wheat. 316 469–483, 495, 496, 509, 530, 544
McLean Trucking Co. v. United States, 321 U. S. 67 88
McLeod v. State, 128 Fla. 35 218
McNabb v. United States, 318 U. S. 332 242, 365
Mercoid Corp. v. Minn.-Honeywell Co., 320 U. S. 680 25
Mesarosh v. United States, 352 U. S. 1 237–245, 250, 365
Mesta Machine Co. Case, 347 Pa. 191 501
Metcalf & Eddy v. Mitchell, 269 U. S. 514 472
Milk Drivers v. Meadowmoor Dairies, 312 U. S. 287 139
Miller v. Head, 186 Ga. 694 320, 334
Miller v. Milwaukee, 272 U. S. 713 479
Miller, Inc., v. Arkansas, 352 U. S. 187 542, 544
Minneapolis & St. L. R. Co. v. Gotschall, 244 U. S. 66 433, 444
Mooney v. Holohan, 294 U. S. 103 31
Moore, In re, 29 Cal. App. 2d 56 218
Moore v. Chesapeake & O. R. Co., 291 U. S. 205 447
Moore v. Mead's Co., 348 U. S. 115 376, 383
Morgan v. Comm'r, 309 U. S. 78 593
Mullane v. Cent. Hanover Co., 339 U. S. 306 228

Page

Murdock v. Memphis, 20 Wall. 590 328
Murphy v. Massachusetts, 177 U. S. 155 205
Muskrat v. United States, 219 U. S. 346 330, 331
Nardone v. United States, 302 U. S. 379 99–105, 112, 113
Nardone v. United States, 308 U. S. 338 100–105, 112, 347, 355
Nashville Milk Co. v. Carnation Co., 355 U. S. 373 389, 390
Nashville Milk Co. v. Carnation Co., 238 F. 2d 86 389
National Labor Relations Board. See Labor Board.
National Surety Co. v. Architectural Co., 226 U. S. 276 224
Natural Gas Co. v. Panoma Corp., 349 U. S. 44 392
New Brunswick v. United States, 276 U. S. 547 492, 529
Newman v. Gates, 204 U. S. 89 335
New York v. United States, 257 U. S. 591 309
New York ex rel. Bryant v. Zimmerman, 278 U. S. 63 229
New York ex rel. Hatch v. Reardon, 204 U. S. 152 330
New York ex rel. No. Finance Corp. v. Lynch, 290 U. S. 601 472
Ng Fung Ho v. White, 259 U. S. 276 120
Nickel v. Cole, 256 U. S. 222 329
Niemotko v. Maryland, 340 U. S. 268 322, 324
Nilva v. United States, 352 U. S. 385 76
Nilva v. United States, 212 F. 2d 115 295
Noble v. United States, 319 U. S. 88 558
North Carolina v. United States, 325 U. S. 507 305–309
North Carolina v. United States, 350 U. S. 805; 125 F. Supp. 718 311

Page

Northern Finance Corp. v. Lynch, 290 U. S. 601 472
O'Donnell v. E., J. & E. R. Co., 338 U. S. 384 444
Offutt v. United States, 348 U. S. 11 77
Offutt Housing Co. v. Sarpy, 351 U. S. 253 492
Oklahoma City v. Sanders, 94 F. 2d 323 293
Oklahoma Press Co. v. Walling, 327 U. S. 186 9
Olmstead v. United States, 277 U. S. 438 111
Orloff v. Willoughby, 345 U. S. 83 586
Osceola, The, 189 U. S. 158 430
O'Sullivan v. Noarlunga Ltd., 94 C. L. R. 367 326
Oxley Stave Co. v. Butler, 166 U. S. 648 329
Pacific Co. v. Johnson, 285 U. S. 480 471, 472
Palko v. Connecticut, 302 U. S. 319 194, 216
Palmer v. Ashe, 342 U. S. 134 159
Parker v. Illinois, 333 U. S. 571 329
Penfield Co. v. S. E. C., 330 U. S. 585 79
Penn Dairies v. Comm'n, 318 U. S. 261 474, 543–549
Pennoyer v. Neff, 95 U. S. 714 222, 223
Pennsylvania v. Nelson, 350 U. S. 497 106
Pennsylvania ex rel. Herman v. Claudy, 350 U. S. 116 159–161
People v. Farrell, 146 Mich. 264 218
People v. Gessinger, 238 Mich. 625 218
People v. Gilmore, 4 Cal. 376 218
People v. Goodwin, 18 Johns (N. Y.) 187 201
People v. Gordon, 99 Cal. 227 218
People v. Keefer, 65 Cal. 232 218
People v. McGrath, 202 N. Y. 445 217

Page

People v. McNeer, 14 Cal. App. 2d 22 218
People v. Moore, 344 Mich. 137 157
People v. Morrison, 1 Parker's Crim. Rep. (N. Y.) 625 203
People v. Newman, 360 Ill. 226 218
People v. Palmer, 109 N. Y. 413 217
People v. Voisine (No. 34092, C. C. Mich.) 51
Perdue v. State, 134 Ga. 300 216
Peru, Ex parte, 318 U. S. 578 441
Peters v. Hobby, 349 U. S. 331 188, 192
Philadelphia Co. v. Stimson, 223 U. S. 605 582
Phillips Petrol. Co. v. Wisconsin, 347 U. S. 672 392
Pierce v. State, 96 Okla. Cr. 76 217
Pierce v. United States, 224 F. 2d 281 109
Pingree v. Auditor General, 120 Mich. 95 524, 526
Pinkerton v. United States, 328 U. S. 640 359, 362
Plummer v. Coler, 178 U. S. 115 471, 506
Pope & Talbot v. Hawn, 346 U. S. 406 21
Poret v. Louisiana, 355 U. S. 879 60
Poret v. Sigler, 355 U. S. 879 60
Powell v. Alabama, 287 U. S. 45 159
Public Service Comm'n v. Wycoff Co., 344 U. S. 237 538, 552
Puissegur v. Yarbrough, 29 Cal. 2d 409 592
Pyle v. Kansas, 317 U. S. 213 31
Queen, The, v. Murphy, 2 L. R. P. C. 535 203
Queen, The, v. Scaife, 17 Q. B. 238 203
Quicksall v. Michigan, 339 U. S. 660 156–159, 165
Radej v. State, 152 Wis. 503 218

Page

Railroad Co. v. Peniston, 18 Wall. 5 497, 498
Railroad Comm'n v. Pullman Co., 312 U. S. 496 552
Rayson v. United States, 238 F. 2d 160 109
Rea v. United States, 350 U. S. 214 102
Read-York, Inc., In re, 152 F. 2d 313 524
Reagan v. State, 155 Tenn. 397 218
Reece v. Georgia, 350 U. S. 85 160
Regina v. Tancock, 13 Cox C. C. 217 200
Reitmeister v. Reitmeister, 162 F. 2d 691 109, 114
Rex Trailer Co. v. United States, 350 U. S. 148 74
Reynolds v. United States, 292 U. S. 443 263
Rice v. Olson, 324 U. S. 786 159, 160
Richmond Concrete Co. v. Ward, 212 Ga. 773 332
Ringhiser v. C. & O. R. Co., 354 U. S. 901 18
Rogers v. Missouri P. R. Co., 352 U. S. 500 18–21, 62, 63, 424, 432, 440
Rooks v. Tindall, 138 Ga. 863 331
Roth v. United States, 354 U. S. 476 180, 371, 372
Ryan Stevedoring Co. v. Pan-Atl. S. S. Co., 350 U. S. 124 564–569
St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281 443
St. Louis & S. F. R. Co. v. Conarty, 238 U. S. 243 444
Salvino v. United States, 119 F. Supp. 277 561
San Antonio & A. P. R. Co. v. Wagner, 241 U. S. 476 431, 443, 447
S. A. R., Inc., In re, 213 Minn. 487; 219 Minn. 493 492
Schechter Corp. v. United States, 295 U. S. 495 298
Schneider v. State, 308 U. S. 147 323, 324

Page

Schulz v. Pennsylvania R. Co., 350 U. S. 523 62
Schuylkill Tr. Co. v. Pennsylvania, 296 U. S. 113 318
Schwartz v. Texas, 344 U. S. 199 99, 101, 106
Sea Gull, The, 21 Fed. Cas. 910 429
Securities & Exchange Comm'n v. Joiner Corp., 320 U. S. 344 26
Sedalia ex rel. Ferguson v. Shell Corp., 81 F. 2d 193 252
Selma, R. & D. R. Co. v. United States, 139 U. S. 560 256
Service v. Dulles, 354 U. S. 363 14
Shaw v. Atlantic Coast Line, 353 U. S. 920 18
Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57 228
S. Howes Co. v. Milling Co., 277 P. 2d 655 223
Silverthorne Lbr. Co. v. United States, 251 U. S. 385 103
Simmons v. State, 156 Fla. 353 218
Sinclair v. United States, 279 U. S. 263 359, 362
Skovgaard v. The Tungus, 252 F. 2d 14 430
Slaughter v. State, 6 Humph. 410 218
Slocum v. D., L. & W. R. Co., 339 U. S. 239 44
Smith v. Cahoon, 283 U. S. 553 319
Smith v. Davis, 323 U. S. 111 543
Smith v. O'Grady, 312 U. S. 329 159
Smith v. State, 196 Wis. 102 189
Smith v. United States, 348 U. S. 147 248, 249
Smith Co. v. Fitzgerald, 270 Mich. 659 524
Smyth v. Twin State Co., 116 Vt. 569 223
Society for Savings v. Bowers, 349 U. S. 143 509

Page

Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424 21
Somers, In re, 31 Nev. 531 217
Southern Pac. Co. v. United States, 272 U. S. 445 256
Southern R. Co. v. Lunsford, 297 U. S. 398 444
Southern Surety Co. v. Bering Co., 295 S. W. 337 593
Spector Motor Service v. McLaughlin, 323 U. S. 101 552
Sperbeck v. Burbank & Co., 190 F. 2d 449 430
Spies v. United States, 317 U. S. 492 279
S. R. A. v. Minnesota, 327 U. S. 558 492, 529
Standard Oil Co. v. Comm'n, 340 U. S. 231 397, 408
Standard Oil Co. v. Comm'n, 233 F. 2d 649 399
Standard Oil Co. v. Johnson, 316 U. S. 481 543
Standard Oil Co. v. United States, 337 U. S. 293 25
Stark v. Wickard, 321 U. S. 288 582
State. See also name of State; State ex rel.
State v. Ash, 68 Wash. 194 217
State v. Aus, 105 Mont. 82 189
State v. B——, 173 Wis. 608 218
State v. Behimer, 20 Ohio St. 572 217
State v. Bradley, 67 Vt. 465 217
State v. Coleman, 226 Iowa 968 218
State v. Correll, 229 N. C. 640 217
State v. Evjue, 254 Wis. 581 218
State v. Franklin, 139 W. Va. 43 218
State v. Gillis, 73 S. C. 318 217
State v. Harville, 171 La. 256 218
State v. Hiatt, 187 Wash. 226 217
State v. Kessler, 15 Utah 142 217
State v. Lee, 65 Conn. 265 216
State v. Leo, 34 N. J. L. J. 340 217
State v. Matthews, 142 N. C. 621 217

Page

State v. McCord, 8 Kan. 232 189, 216
State v. Naylor, 28 Del. 99 218
State v. Palko, 122 Conn. 529 216
State v. Pianfetti, 79 Vt. 236 217
State v. Robinson, 100 Ohio App. 466 217
State v. Simms, 71 Mo. 538 217
State v. Stallings, 334 Mo. 1 217
State v. Steadman, 216 S. C. 579 217
State v. Steeves, 29 Ore. 85 218
State v. Teeter, 65 Nev. 584 217
State v. Tweedy, 11 Iowa 350 218
State v. Welch, 37 N. M. 549 218
State v. White, 61 N. M. 109 218
State v. Wilson, 172 Ore. 373 218
State v. Witte, 243 Wis. 423 218
State ex rel. Landis v. Lewis, 118 Fla. 910 218
State ex rel. Lopez v. Killigrew, 202 Ind. 397 216
State ex rel. Superior Co. v. Beckley, 175 Wis. 272 524
Staub v. Baxley, 355 U. S. 313 540
Staub v. Mayor of Baxley, 211 Ga. 1 317
Steele v. L. & N. R. Co., 323 U. S. 192 42, 46
Stegall v. S. W. Ga. Authority, 197 Ga. 571 320, 334
Stephan v. United States, 319 U. S. 423 380
Stewart & Co. v. Sadrakula, 309 U. S. 94 293, 294, 543
Storey v. United Ins. Co., 64 F. Supp. 896 223
Stroud v. United States, 251 U. S. 15 195, 213
Stuart v. Commonwealth, 28 Gratt. 950 218
Sullivan v. United States, 95 U. S. App. D. C. 78 109
Suncook Mills v. United States, 44 F. Supp. 744 263
Superior Shipbuilding Co. v. Beckley, 175 Wis. 272 524

Page

Sweezy v. New Hampshire, 354 U. S. 234 16
Swift & Co. v. Hocking V. R. Co., 243 U. S. 281 172
Swinson v. C., St. P., M. & O. R. Co., 294 U. S. 529 434, 444
Syres v. Oil Workers, 350 U. S. 892 42
Taylor v. Commonwealth, 186 Va. 587 218
Teamsters Union v. Kerrigan Works, 353 U. S. 968 8
Tenner v. Dullea, 314 U. S. 692 59
Terry, Ex parte, 128 U. S. 289 71
Texas & N. O. R. Co. v. Railway Clerks, 281 U. S. 548 463
Thomas v. Collins, 323 U. S. 516 322, 540
Thomas v. State, 255 Ala. 632 217
Thomson v. Texas & P. R. Co., 353 U. S. 926 18
Tiller v. Atlantic Coast Line, 318 U. S. 54 431
Tomkins v. Missouri, 323 U. S. 485 159
Townsend v. Burke, 334 U. S. 736 159
Transfer No. 4, The, 61 F. 364 429
Travelers Health Assn. v. Va. ex rel. State Corp. Comm'n, 339 U. S. 643 224
Trinityfarm Co. v. Grosjean, 291 U. S. 466 530
Trono v. United States, 199 U. S. 521 186, 194–196, 205–208, 215–219
Tuckerman v. United States, 291 F. 958 360
Tunstall v. Brotherhood, 323 U. S. 210 42
United Auto Workers v. Board, 351 U. S. 266 138
United Carpenters v. United States, 330 U. S. 395 363
United Mine Workers v. Arkansas Co., 351 U. S. 62 462

Page

United States v. Alabama, 313 U. S. 274 499
United States v. Allegheny County, 322 U. S. 174 471, 477–482, 488, 494, 499–509, 524, 528–533
United States v. Ansonia Brass Co., 218 U. S. 452 522, 523
United States v. Arrow Stevedoring Co., 175 F. 2d 329 567
United States v. Atchison, T. & S. F. R. Co., 234 U. S. 476 93
United States v. Balint, 258 U. S. 250 228, 230
United States v. Ball, 163 U. S. 662 187–192, 204, 207, 243
United States v. Baltimore & A. R. Co., 308 U. S. 525 543
United States v. Battiato, 204 F. 2d 717 360
United States v. Bookie, 229 F. 2d 130 109
United States v. Borden Co., 308 U. S. 188 574
United States v. C. I. O., 335 U. S. 106 172
United States v. Cohen Grocery Co., 255 U. S. 81 378
United States v. Costello, 198 F. 2d 200 73, 77
United States v. Debrow, 346 U. S. 374 574
United States v. Denver & R. G. R. Co., 191 U. S. 84 256
United States v. Detroit, 355 U. S. 466 485, 487, 494, 495
United States v. Detroit & C. Nav. Co., 326 U. S. 236 88
United States v. Dotterweich, 320 U. S. 277 228
United States v. Fries, 3 Dall. 515 203
United States v. Gates, 176 F. 2d 78 73
United States v. Gibert, 25 Fed. Cas. 1287 189, 202–205

Page

United States v. Giglio, 16 F. R. D. 268 347, 348, 354, 355
United States v. Gilbert Associates, 345 U. S. 361 593
United States v. Harding, 26 Fed. Cas. 131 204, 205
United States v. Harriss, 347 U. S. 612 229
United States v. Hill, 248 U. S. 420 295
United States v. Hill, 149 F. Supp. 83 109
United States v. Holt, 108 F. 2d 365 360
United States v. Johnson, 327 U. S. 106 243
United States v. Kahriger, 345 U. S. 22 229
United States v. Keen, 26 Fed. Cas. 686 203
United States v. Lawn, 115 F. Supp. 674 345, 363
United States v. Leviton, 193 F. 2d 848 249
United States v. Lewis, 87 F. Supp. 970 109
United States v. Liverpool & London Ins. Co., 348 U. S. 215 588
United States v. Louisiana, 290 U. S. 70 306, 309
United States v. Morehead, 243 U. S. 607 577
United States v. Munsingwear, 340 U. S. 36 600
United States v. Murdock, 290 U. S. 389 279
United States v. New Britain, 347 U. S. 81 587–591
United States v. Orman, 207 F. 2d 148 73, 78
United States v. Paramount Pictures, 334 U. S. 131 25
United States v. Paul, 6 Pet. 141 290, 291, 299
United States v. Perez, 9 Wheat. 579 203
United States v. Pierce, 124 F. Supp. 264 109
United States v. Polakoff, 112 F. 2d 888 109, 110, 114

Page

United States v. Press Pub. Co., 219 U. S. 1 289
United States v. Rock Island Motor Co., 340 U. S. 419 145–154
United States v. Roth, 208 F. 2d 467 345, 346
United States v. Sanges, 144 U. S. 310 188, 192
United States v. Security Trust Bank, 340 U. S. 47 15, 587–593
United States v. Shoreline Apts., 338 U. S. 897 296
United States v. Shotwell Mfg. Co., 355 U. S. 233 366
United States v. Smull, 236 U. S. 405 575–577
United States v. Spector, 343 U. S. 169 276
United States v. Sullivan, 116 F. Supp. 480 109
United States v. Texas & P. Motor Co., 340 U. S. 450 151
United States v. Turley, 352 U. S. 407 27
United States v. United Mine Workers, 330 U. S. 258 74, 75, 79
United States v. Western Pac. R. Co., 352 U. S. 59 257, 539
United States v. White, 228 F. 2d 832 109
United States v. Williams, 28 Fed. Cas. 636 204
Universal Camera Corp. v. Labor Board, 340 U. S. 474 400–402
Urie v. Thompson, 337 U. S. 163 63, 436, 444–452
Uveges v. Pennsylvania, 335 U. S. 437 159
Van Brocklin v. Tennessee, 117 U. S. 151 469, 499
Vance v. Safeway Stores, 239 F. 2d 144 375
Vaux's Case, 4 Co. Rep. 44a 200
Viereck v. United States, 318 U. S. 236 575

Page

Voisine v. Conlin (No. 16638, U. S. D. C., E. D. Mich.) 54
Von Moltke v. Gillies, 332 U. S. 708 161
Wade v. Hunter, 336 U. S. 684 188, 191
Wade v. Mayo, 334 U. S. 672 159
Waldron v. United States, 95 U. S. App. D. C. 66 353
Walker v. Hutchinson, 352 U. S. 112 228
Walker v. Johnston, 312 U. S. 275 392
Wallace Corp. v. Board, 323 U. S. 248 42
Ward v. Love County, 253 U. S. 17 319, 320
Watson v. State, 26 Okla. Cr. 377 217
Watson v. State Comptroller, 254 U. S. 122 503
Wayman v. Southard, 10 Wheat. 1 296
Webb v. Illinois C. R. Co., 352 U. S. 512 18
Weber v. Anheuser-Busch, 348 U. S. 468 39, 138
Weems v. United States, 217 U. S. 349 212
Weiss v. United States, 308 U. S. 321 104, 105
Western Fuel Co. v. Garcia, 257 U. S. 233 429
Weston v. City Council, 2 Pet. 449 497, 503
Wilder Mfg. Co. v. Corn Co., 236 U. S. 165 377
Wilkerson v. McCarthy, 336 U. S. 53 452
Williams v. Boilermakers Union, 27 Cal. 2d 586 598, 599
Williams v. Georgia, 349 U. S. 375 599
Williams v. Huff, 79 U. S. App. D. C. 326 159, 162, 165
Williams v. Kaiser, 323 U. S. 471 159
Williams v. Silliman, 74 Tex. 626 593

	Page
Williams v. United States, 327 U. S. 711	293
Wilson v. Cook, 327 U. S. 474	487
Wilson v. United States, 162 U. S. 613	248
Wisconsin v. Penney Co., 311 U. S. 435	492
Wisconsin Cent. R. Co. v. United States, 164 U. S. 190	263, 264
Wisconsin R. Comm'n v. C., B. & Q. R. Co., 257 U. S. 563	306, 308
Wong Yang Sung v. McGrath, 339 U. S. 33	27
Woods v. Shoreline Apts., 84 F. Supp. 660	296
Wright v. Cannon, 185 Ga. 363	332
Wright Aeronautical Corp. v. Glander Corp., 151 Ohio St. 29	524
Yates v. United States, 354 U. S. 298	67
Yates v. United States, 227 F. 2d 844	69, 72, 77
Yates v. United States, 227 F. 2d 848	69, 79
Young v. People, 54 Colo. 293	216
Youngstown Sheet Co. v. Sawyer, 343 U. S. 579	297
Zacharakis v. Bunker Hill Co., 281 App. Div. 487	223
Ziang Sung Wan v. United States, 266 U. S. 1	248

TABLE OF STATUTES CITED

(A) Statutes of the United States.

	Page
1789, Sept. 24, c. 20, § 25, 1 Stat. 73	66, 313
1790, Apr. 30, c. 9, 1 Stat. 112	286
1825, Mar. 3, c. 65, § 3, 4 Stat. 115	286
1831, Mar. 2, c. 99, 4 Stat. 487	66
1866, Apr. 5, c. 24, 14 Stat. 12	286
1872, June 1, c. 255, § 5, 17 Stat. 196	286
1887, Feb. 4, c. 104, 24 Stat. 379	253, 300
§§ 4, 5	83
§ 22	534
Mar. 3, c. 359, 24 Stat. 505	253
1890, July 2, c. 647, 26 Stat. 209	373
1893, Mar. 3, c. 196, 27 Stat. 531	426
1894, May 5, No. 24, 28 Stat. 582	489
Aug. 27, c. 349, 28 Stat. 509	373
1897, June 7, c. 4, 30 Stat. 96	426
1898, July 7, c. 576, 30 Stat. 717	286
1902, July 1, c. 1369, § 5, 32 Stat. 691	184
1908, Apr. 22, c. 149, 35 Stat. 65	62
§§ 1, 3, 4	426
1909, Mar. 4, c. 321, § 289, 35 Stat. 1088	286
1910, Apr. 14, c. 160, 36 Stat. 298	426
June 18, c. 309, 36 Stat. 539	83
1911, Feb. 16, c. 91, 36 Stat. 913	426
Aug. 22, c. 42, 37 Stat. 32	489
1912, Aug. 23, c. 350, 37 Stat. 360	253
1913, Feb. 12, c. 40, 37 Stat. 667	373
Mar. 1, c. 90, 37 Stat. 699	286
1914, Oct. 15, c. 323, § 1, 38 Stat. 730	373
§ 2	373, 396, 411
§§ 4, 16	373
Dec. 23, c. 2, 38 Stat. 790	313
1916, Sept. 6, c. 448, 39 Stat. 726	426
1917, Feb. 5, c. 29, § 20, 39 Stat. 874	273
Oct. 6, c. 79, § 5, 40 Stat. 345	489
1918, Oct. 16, c. 186, 40 Stat. 1012	273
§§ 1, 4	115
1920, Feb. 28, c. 91, 41 Stat. 456	300
Mar. 30, c. 111, 41 Stat. 537	426
June 4, c. 227, § 1, 41 Stat. 787	579
June 5, c. 250, 41 Stat. 988	426
June 5, c. 251, 41 Stat. 1008	273
1926, May 20, c. 347, § 3, 44 Stat. 577	41
1933, June 15, c. 85, 48 Stat. 152	286
1934, June 19, c. 652, § 201, 48 Stat. 1064	107
§ 605	96
June 21, c. 691, § 3, 48 Stat. 1185	41
1935, Feb. 22, c. 18, 49 Stat. 30	286
June 20, c. 284, 49 Stat. 394	286

Page

1935, Aug. 9, c. 498, § 205, 49 Stat. 543 141
§ 206 et seq 543
§ 207 ..... 83, 141
§ 209 554
§ 210 ..... 83, 141
§ 212 554
§ 213 141
Aug. 29, c. 814, § 5, 49 Stat. 977 24
1936, June 19, c. 592, 49 Stat. 1526 ..... 396, 411
§§ 1–4 373
1938, Mar. 21, c. 49, § 5, 52 Stat. 111 396
June 22, c. 575, 52 Stat. 840 286
June 29, c. 811, 52 Stat. 1236 554
1939, Feb. 10, c. 2, § 145, 53 Stat. 1 233
§ 3672 587
June 29, c. 247, § 401, 53 Stat. 862 587
1940, June 6, c. 241, 54 Stat. 234 286
June 28, c. 439, 54 Stat. 670 273
June 28, c. 440, 54 Stat. 676 489
July 2, c. 508, 54 Stat. 712 489
Aug. 22, c. 686, § 3, 54 Stat. 789 415
Sept. 18, c. 722, 54 Stat. 898 141
§ 1 ..... 83, 175
§ 5 ..... 141, 415
§ 6 83
§ 17 141
§ 322 253
1941, Dec. 18, c. 593, § 201, 55 Stat. 838 489
Dec. 29, c. 641, 55 Stat. 875 253
1942, Oct. 21, c. 619, § 505, 56 Stat. 798 587
1943, July 13, c. 230, 57 Stat. 553 273
1944, June 22, c. 268, § 301, 58 Stat. 284 579
1946, June 11, c. 324, 60 Stat. 237 ..... 554, 579

Page

1946, Aug. 2, c. 753, § 207, 60 Stat. 812 579
1947, June 23, c. 120, 61 Stat. 136 131
§ 302 805
July 30, c. 348, 61 Stat. 517 286
1948, Feb. 19, c. 65, §§ 2, 4, 5, 62 Stat. 21 489
June 24, c. 625, 62 Stat. 604 579
1949, Mar. 30, c. 42, 63 Stat. 18 286
1950, Sept. 1, c. 835, 64 Stat. 574 554
Sept. 23, c. 1024, §§ 1, 4, 64 Stat. 987 273
§ 14 233
§ 22 115
1951, Jan. 2, c. 1194, 64 Stat. 1134 286
Mar. 28, c. 23, § 1, 65 Stat. 28 115
Oct. 25, c. 588, 65 Stat. 655 579
1952, June 27, c. 477, 66 Stat. 163 115
July 16, c. 911, 66 Stat. 736 286
1957, Aug. 30, P. L. 85–238, 71 Stat. 518 286
Constitution. See Index at end of volume.
Criminal Code. See also U. S. Code, Title 18.
§§ 7, 13, 289 286
Internal Revenue Code. See also U. S. Code, Title 26.
§ 145 ..... 233, 339
§§ 3670–3672 587
§ 3793 339
Judicial Code. See U. S. Code, Title 28.
Revised Statutes.
§§ 3620, 3622, 3623, 3633, 3648 253
§§ 4281–4289 426
§ 5391 286
§ 5392 570
U. S. Code.
Title 1, p. LXIII, §§ 202, 204 373

Page

U. S. Code—Continued.
Title 5,
§§ 191a, 1001 et seq. 579
§§ 1001–1011 554
Title 8,
§§ 137, 156..... 273
§ 1251 115
Title 10,
§ 652a 579
§§ 2301–2314, 3012, 6011, 8012..... 534
Title 11, § 24..... 286
Title 15,
§§ 1–12 373
§ 13 ..... 373, 396, 411
§§ 13a–27 373
§ 45 396
§ 80a–1 et seq.... 415
§§ 715, 1172..... 286
Title 16, § 852..... 286
Title 18,
§§ 7, 13, 43, 81, 113, 114 286
§ 371 339
§ 401 66
§§ 661, 662..... 286
§ 875 107
§ 1025 286
§§ 1073, 1111–1113, 1363 286
§ 1621 570
§§ 2031, 2032, 2111. 286
§ 3184 393
§ 3731 ..... 286, 570
Title 26,
§ 145 339
§§ 3670–3672 587
§ 3793 339
§§ 5008, 5642..... 96
Title 27,
§ 122 286
§ 201 24
Title 28,
§§ 294, 295..... 860, 880, 887, 944
§ 601 921
§ 1253 .... 83, 300, 534
§ 1254 489
§ 1257 ..... 225, 313
§ 1336 300
§ 1342 534
§ 1346 ..... 253, 286
§ 1654 570

Page

U. S. Code—Continued.
Title 28—Continued.
§ 1738 220
§ 2071 570
§ 2101 ..... 83, 534
§ 2106 ..... 233, 339
§ 2201 534
§§ 2281, 2284..... 49
Title 29,
§ 151 131
§ 159 453
§ 160 ..... 396, 453
§ 186 805
Title 31, §§ 82, 82b, 82c, 492, 496, 498, 514, 529 253
Title 33, c. 3, §§ 157, 158, 191, 192, 201... 426
Title 38, § 693h..... 579
Title 45,
§§ 1–16, 22–34..... 426
§ 51 ..... 62, 426
§§ 52–60 426
§§ 151 et seq., 153.. 41
Title 46, §§ 181–196, 668, 761–768..... 426
Title 47,
§§ 152, 220, 221.... 96
§ 501 107
§ 605 ..... 96, 107
Title 49,
§ 1 (note preceding) 83, 175
§ 4 83
§ 5 ..... 83, 141, 415
§§ 13, 15a..... 300
§ 17 141
§§ 22, 65..... 534
§ 66 253
§§ 305, 307..... 83, 141
§ 309 554
Title 50,
Appendix,
§§ 454, 463.... 579
§ 1894 286
U. S. Code Annotated.
Title 42, § 416..... 286
Title 47, § 605..... 107
Title 49, § 3..... 253
Administrative Procedure Act 554, 579
Alcohol Administration Act. 24
Armed Services Procurement Act..... 489

	Page
Assimilative Crimes Acts	286
Bankruptcy Act	286
Black Bass Act	286
Boiler Inspection Act	426
Civil Aeronautics Act	253
Clayton Act	373, 389, 396, 411
Communications Act	96, 107
Conformity Act	286
Connally Hot Oil Act	286
Crimes Acts	286
Criminal Appeals Act	570
Death on High Seas Act	426
Employers' Liability Act	426, 897
Federal Alcohol Administration Act	24
Federal Assimilative Crimes Acts	286
Federal Black Bass Act	286
Federal Communications Act	96, 107
Federal Crimes Acts	286
Federal Employers' Liability Act	426, 897
Federal Safety Appliance Acts	426
Federal Tort Claims Act	286
Federal Trade Commission Act	396
First War Powers Act	489
Fugitive from Justice Act	286
Immigration Act	115, 273
Immigration & Nationality Act	115
Internal Security Act	115
Interstate Commerce Act	83, 141, 253, 415, 534
Investment Company Act	415
Johnson Act	286
Jones Act	426
Judiciary Act	66
Legislative Reorganization Act	579
Limited Liability Act	426
Mann-Elkins Act	83
Motor Carrier Act	83, 141, 554
National Labor Relations Act	131, 313, 396, 453
Railway Labor Act	41
Revenue Act, 1939	587
Revenue Act, 1942	587
Revised Criminal Code	286
Robinson-Patman Act	373, 389, 396, 411
Safety Appliance Acts	426
Selective Service Act	579
Servicemen's Readjustment Act	579
Sherman Act	373
Smith Act	66
Social Security Act	286
Subversive Activities Control Act	233, 273
Taft-Hartley Act	805
Taft-Hartley Amendments	453
Tort Claims Act	286
Trade Commission Act	396
Transportation Act	83, 141, 175, 253
Tucker Act	253
Webb-Kenyon Act	286
Wilson Tariff Act	373
Workmen's Compensation Acts	426

(B) STATUTES OF THE STATES AND TERRITORIES.

	Page
Arkansas.	
Stat., 1947, § 41–1412	131
California.	
Constitution, Art. XII, § 22	534
1951 Stat., c. 764, p. 2045	534
1955 Stat., c. 1966	534
Highway Carriers' Act	534
Insurance Code, 1953, §§ 1610–1620	220
Los Angeles Municipal Code, §§ 52.38, 52.39, 52.43	225
California—Continued.	
Public Utilities Code, §§ 486, 493, 494, 530, 2107, 2112, 3515	534
District of Columbia.	
Code, 1951, §§ 22–401, 22 – 2401, 22 – 2403, 22–2404	184
Georgia.	
Constitution, Art. 1, § 1, par. 3	313
Baxley City Criminal Code, § 85	313
Baxley City Ordinance, §§ I–IX	313

Page

Massachusetts.
Colonial Laws, 43, 47.. 184
Michigan.
Constitution,
Art. IX, § 8..... 49
Art. X, § 3..... 489
1893 Acts, No. 206.... 489
1949 Acts, No. 311.... 49
1951 Acts, No. 276.... 49
1953 Acts, No. 189, §§ 1, 2..... 466
1954 Acts, No. 116, c. XV 49
1957 Acts, No. 256.... 155
Comp. Laws, 1948, §§ 168.327, 201.7, 201.10 49
§ 211.40 489
§§ 767.3, 767.4..... 49
Stat. Ann., 1950, Vol. 6, §§ 7.1 to 7.243..... 489
Stat. Ann., 1950, Vol. 6 (1957 Cum. Supp.), § 7.7 466
Stat. Ann., 1954, § 28.548 155
§ 28.550 141

Page

Michigan—Continued.
Stat. Ann., 1954—Con. § 28.1058 155
§ 28.2304 141
Detroit Charter, Tit. VI, c. II, § 1; c. IV, §§ 1, 7, 26, 27..... 489
General Property Tax Act 489
Henderson Stat. Ann., 1938, § 28.548..... 155
New York.
Constitution, Art. I, § 12 96
Code of Criminal Procedure, § 813–a..... 96
Philippines.
Bill of Rights..... 184
1 Public Laws of Philippine Commission, p. LXVI 184
Texas.
Penal Code, 1948, Arts. 1256, 1257a, 1257b, 1257c 28
Vernon Penal Code, 1952, Arts. 535b, 535c 286

(C) Foreign Statutes.

England.
7 Edw. VII, c. 23, s. 4..... 184
Criminal Appeal Act..... 184

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1957.

SCALES *v.* UNITED STATES.

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

No. 3. Argued October 10–11, 1956.—Restored to the docket for reargument June 3, 1957.—Decided October 14, 1957.

Upon consideration of the record and the confession of error by the Solicitor General, the judgment is reversed. *Jencks* v. *United States,* 353 U. S. 657.

227 F. 2d 581, reversed.

Telford Taylor argued the cause and filed a brief for petitioner.

Solicitor General Rankin argued the cause for the United States. With him on the brief were *Assistant Attorney General Tompkins, Harold D. Koffsky, Kevin T. Maroney, William F. O'Donnell* and *Philip T. White.*

Barent Ten Eyck filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

PER CURIAM.

Upon consideration of the entire record and the confession of error by the Solicitor General, the judgment of the United States Court of Appeals for the Fourth Circuit is reversed. *Jencks* v. *United States,* 353 U. S. 657.

LIGHTFOOT *v.* UNITED STATES.

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

No. 4. Argued October 11, 1956.—Restored to the docket for reargument June 3, 1957.—Decided October 14, 1957.

Upon consideration of the record and the confession of error by the Solicitor General, the judgment is reversed. *Jencks* v. *United States,* 353 U. S. 657.

228 F. 2d 861, reversed.

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

Solicitor General Rankin argued the cause for the United States. With him on the brief were *Assistant Attorney General Tompkins, Harold D. Koffsky* and *William F. O'Donnell.*

Barent Ten Eyck filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

PER CURIAM.

Upon consideration of the entire record and the confession of error by the Solicitor General, the judgment of the United States Court of Appeals for the Seventh Circuit is reversed. *Jencks* v. *United States,* 353 U. S. 657.

VIRGINIA *v.* MARYLAND.

ON MOTIONS.

No. 12, Original. Decided October 14, 1957.

Motion of Virginia for temporary restraining order denied.

Motion for leave to withdraw appearance of J. Lindsay Almond, Jr., as counsel for plaintiff granted.

J. Lindsay Almond, Jr., then Attorney General, *Kenneth C. Patty,* then Assistant Attorney General, and *C. F. Hicks,* Assistant Attorney General, filed a motion for a temporary restraining order for the Commonwealth of Virginia. Subsequently, resigning as Attorney General, *Mr. Almond* requested leave to withdraw his appearance and that *Mr. Patty,* who succeeded him as Attorney General, be substituted.

C. Ferdinand Sybert, Attorney General, *Joseph S. Kaufman,* Assistant Attorney General, and *Edward S. Digges,* Special Assistant Attorney General, for the State of Maryland, filed an answer to the motion for a temporary restraining order.

PER CURIAM.

The motion of the Commonwealth of Virginia for a temporary restraining order is denied. The motion for leave to withdraw the appearance of *J. Lindsay Almond, Jr.,* as counsel for the plaintiff, is granted.

ARKANSAS PUBLIC SERVICE COMMISSION *v.* UNITED STATES ET AL.

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

No. 197. Decided October 14, 1957.

147 F. Supp. 454, affirmed.

Harry E. McDermott, Jr. for appellant.

Solicitor General Rankin, Assistant Attorney General Hansen, Robert W. Ginnane and *Samuel R. Howell* for the United States and the Interstate Commerce Commission, appellees.

Toll R. Ware, Clyde W. Fiddes and *Pat Mehaffy* for the Missouri Pacific Railroad Co. et al., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

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

KRASNOV ET AL. *v.* UNITED STATES.

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

No. 238. Decided October 14, 1957.*

143 F. Supp. 184, affirmed.

C. Brewster Rhoads for appellants in No. 238.

Robert L. Wright and *Milton M. Gottesman* for appellants in No. 254.

Joseph F. Padlon for appellant in No. 255.

Solicitor General Rankin, Acting Assistant Attorney General Bicks, Daniel M. Friedman and *Joseph F. Tubridy* for the United States.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER are of the opinion that probable jurisdiction should be noted.

---

*Together with No. 254, *Comfy Manufacturing Co. et al.* v. *United States,* and No. 255, *Oppenheimer* v. *United States,* also on appeals from the same court.

AKRON, CANTON & YOUNGSTOWN RAILROAD CO. ET AL. *v.* FROZEN FOOD EXPRESS ET AL.

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

No. 258. Decided October 14, 1957.*

148 F. Supp. 399, affirmed.

Carl Helmetag, Jr. and *Charles P. Reynolds* for appellants in No. 258.

Rollo E. Kidwell and *Peter T. Beardsley* for appellant in No. 263.

Robert W. Ginnane and *Charlie H. Johns, Jr.* for appellant in No. 270.

Carl L. Phinney for the Frozen Food Express, appellee.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN are of the opinion that probable jurisdiction should be noted.

---

*Together with No. 263, *American Trucking Associations, Inc.*, v. *Frozen Food Express*, and No. 270, *Interstate Commerce Commission* v. *Frozen Food Express et al.*, also on appeals from the same court.

SIMPSON ET AL. *v.* UNITED STATES.

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

No. 131. Decided October 14, 1957.

Certiorari granted.

Upon consideration of the record and the confession of error by the Solicitor General, the judgments are reversed. *Hoffman* v. *United States,* 341 U. S. 479.

241 F. 2d 222; 244 F. 2d 212, 712, reversed.

Reuben G. Lenske for petitioners.

Solicitor General Rankin for the United States.

PER CURIAM.

The petition for writ of certiorari is granted. Upon consideration of the entire record and the confession of error by the Solicitor General, the judgments of the United States Court of Appeals for the Ninth Circuit are reversed. *Hoffman* v. *United States,* 341 U. S. 479.

McCRARY ET AL. *v.* ALADDIN RADIO INDUSTRIES, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE, MIDDLE DIVISION.

No. 116. Decided October 14, 1957.

Certiorari granted; judgment vacated and case remanded for consideration in the light of *Teamsters Union* v. *Kerrigan Iron Works,* 353 U. S. 968.

Reported below: —— Tenn. App. ——, 298 S. W. 2d 770.

Albert Williams, Cecil D. Branstetter and *Jerome A. Cooper* for petitioners.

J. Paschall Davis and *Walton H. Hamilton* for respondents.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the Court of Appeals of Tennessee, Middle Division, is vacated and the case is remanded for consideration in the light of *Teamsters Union* v. *Kerrigan Iron Works,* 353 U. S. 968.

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

FEDERAL TRADE COMMISSION *v.* CRAFTS.

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

No. 229. Decided October 14, 1957.

Certiorari granted and judgment reversed on authority of cases cited. 244 F. 2d 882, reversed.

Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston, Earl W. Kintner and *Robert B. Dawkins* for petitioner.

Christopher M. Jenks for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the United States Court of Appeals for the Ninth Circuit is reversed. *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501; *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186.

NATIONWIDE TRAILER RENTAL SYSTEM, INC., ET AL. *v.* UNITED STATES.

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

No. 114. Decided October 14, 1957.

Judgment affirmed.

Thurman Arnold, Reed Miller and *William T. Stephens* for appellants.

Solicitor General Rankin, Assistant Attorney General Hansen and *Charles H. Weston* for the United States.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

WHITE ET AL., DOING BUSINESS AS KITSAP AUTOMATIC DISPENSER CO., ET AL. *v.* WASHINGTON.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 184. Decided October 14, 1957.

Appeal dismissed for want of a substantial federal question.
Reported below: 49 Wash. 2d 716, 306 P. 2d 230.

S. Harold Shefelman for appellants.

John J. O'Connell, Attorney General of Washington, and *Keith Grim* and *Fred C. Dorsey,* Assistant Attorneys General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MONSON DRAY LINE, INC., *v.* MURPHY MOTOR FREIGHT LINES, INC., ET AL.

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

No. 307. Decided October 14, 1957.

148 F. Supp. 471, affirmed.

D. D. Wozniak for appellant.

Perry R. Moore for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

WILLITS ET AL. *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

No. 134. Decided October 14, 1957.

Appeal dismissed and certiorari denied.

Basil C. Clare for appellants.

Thomas M. Kerrigan for the Pennsylvania Public Utility Commission, and *Eugene J. Bradley, Samuel Graff Miller* and *Vincent P. McDevitt* for the Philadelphia Electric Co., appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

LINCOLN BUILDING ASSOCIATES *v.* BARR ET AL., DOING BUSINESS AS SWIM FOR HEALTH ASSOCIATION.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 128. Decided October 14, 1957.

Appeal dismissed for want of a substantial federal question.
Reported below: 1 N. Y. 2d 413, 135 N. E. 2d 801.

Max Freund for appellant.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

COTTRELL *v.* PAWCATUCK COMPANY (FORMERLY C. B. COTTRELL & SONS CO.) ET AL.

APPEAL FROM THE SUPREME COURT OF DELAWARE.

No. 316. Decided October 14, 1957.

Appeal dismissed and certiorari denied.
Reported below: — Del. —, 128 A. 2d 225.

Edward J. Ennis for appellant.

Henry M. Canby for the Pawcatuck Company et al. and *David F. Anderson* for the Harris-Seybold Company et al., appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

GIBRALTAR FACTORS CORP. *v.* SLAPO ET AL.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 278. Decided October 14, 1957.

Appeal dismissed for want of a substantial federal question.
Reported below: 23 N. J. 459, 129 A. 2d 567.

George H. Rosenstein for appellant.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

INTERSTATE COMMERCE COMMISSION *v.* PREMIER PEAT MOSS CORP. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 148. Decided October 14, 1957.*

147 F. Supp. 169, affirmed.

Robert W. Ginnane and *B. Franklin Taylor, Jr.* for appellant in No. 148.

Carl Helmetag, Jr. for appellants in No. 149.

PER CURIAM.

The judgment is affirmed.

MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN are of the opinion that probable jurisdiction should be noted.

---

*Together with No. 149, *Baltimore & Ohio Railroad Co. et al.* v. *Premier Peat Moss Corp. et al.*, on appeal from the same court.

FOUR MAPLE DRIVE REALTY CORP. *v.* ABRAMS, NEW YORK STATE RENT ADMINISTRATOR, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 181. Decided October 14, 1957.

Appeal dismissed for want of a substantial federal question.
Reported below: 2 N. Y. 2d 837, 140 N. E. 2d 870.

Edward Margolin and *Herbert M. Balin* for appellant.

Nathan Heller for the New York State Rent Administrator, appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

WATSON *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

No. 161. Decided October 14, 1957.

Certiorari granted; judgment vacated and case remanded for consideration in the light of *Service* v. *Dulles*, 354 U. S. 363.
Reported below: 137 Ct. Cl. 557.

Rees B. Gillespie for petitioner.

Solicitor General Rankin for the United States.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the United States Court of Claims is vacated and the case is remanded for consideration in light of *Service* v. *Dulles*, 354 U. S. 363.

ALBANESE *v.* PIERCE ET AL.

APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT.

No. 247. Decided October 14, 1957.

Appeal dismissed for want of a substantial federal question.
Reported below: 144 Conn. 241, 129 A. 2d 606.

Charles A. Horsky and *J. Warren Upson* for appellant.

David Goldstein for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

UNITED STATES *v.* VORREITER.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO.

No. 168. Decided October 14, 1957.

Certiorari granted and judgment reversed. *United States* v. *Security Trust & Savings Bank,* 340 U. S. 47.
134 Colo. 543, 307 P. 2d 475, reversed.

Solicitor General Rankin, Assistant Attorney General Rice and *A. F. Prescott* for the United States.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the Supreme Court of Colorado is reversed. *United States* v. *Security Trust & Savings Bank,* 340 U. S. 47.

UPHAUS *v.* WYMAN, ATTORNEY GENERAL OF NEW HAMPSHIRE.

APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE.

No. 332. Decided October 14, 1957.

Judgment vacated and cause remanded for consideration in the light of *Sweezy* v. *New Hampshire,* 354 U. S. 234.

Reported below: 100 N. H. 436, 130 A. 2d 278.

Royal W. France and *Leonard B. Boudin* for appellant.

PER CURIAM.

The judgment is vacated and the case is remanded to the Supreme Court of New Hampshire for consideration in light of *Sweezy* v. *New Hampshire,* 354 U. S. 234.

LEWIS *v.* FLORIDA.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 80, Misc. Decided October 14, 1957.

Appeal dismissed and certiorari denied.

Reported below: 93 So. 2d 46.

H. M. Rosenhouse for appellant.

Richard W. Ervin, Attorney General of Florida, and *David U. Tumin,* Assistant Attorney General, for appellee.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

McGEE *v.* UNITED STATES.

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

No. 6, Misc. Decided October 14, 1957.

Certiorari granted; judgment vacated; and cause remanded for further hearing on all issues raised by petitioner.

Reported below: 242 F. 2d 520.

Petitioner *pro se.*

Solicitor General Rankin for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted. Upon the representations made in the Solicitor General's brief, and an examination of the record, the petition for certiorari is granted, the judgment of the United States Court of Appeals for the Seventh Circuit is vacated, and the cause is remanded to the District Court for a further hearing upon all issues raised by the petitioner.

GUTIERREZ *v.* ARIZONA.

APPEAL FROM THE SUPREME COURT OF ARIZONA.

No. 25, Misc. Decided October 14, 1957.

Appeal dismissed and certiorari denied.

Reported below: 82 Ariz. 21, 307 P. 2d 914.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

GIBSON *v.* THOMPSON, TRUSTEE.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS.

No. 142. Decided October 21, 1957.

In this case arising under the Federal Employers' Liability Act, *held:* The proofs justified with reason the jury's conclusion that employer negligence played a part in producing petitioner's injury. Therefore, certiorari is granted, the judgment is reversed and the case is remanded.

156 Tex. 593, 298 S. W. 2d 97, reversed and remanded.

Fred Parks for petitioner.

Walter F. Woodul for respondent.

PER CURIAM.

The petition for certiorari is granted, and the judgment of the Supreme Court of Texas is reversed and the case is remanded. 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, Inc.*, 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, C. & S. F. R. Co.*, 353 U. S. 925; *Thomson* v. *Texas & Pacific R. Co.*, 353 U. S. 926; *Arnold* v. *Panhandle & S. F. R. Co.*, 353 U. S. 360; *Ringhiser* v. *Chesapeake & O. R. Co.*, 354 U. S. 901; *McBride* v. *Toledo Terminal R. Co.*, 354 U. S. 517.

For the reasons set forth in his opinion in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 524, MR. JUSTICE FRANKFURTER is of the view that the writ of certiorari is improvidently granted.

Memorandum of MR. JUSTICE HARLAN, with whom MR. JUSTICE BURTON and MR. JUSTICE WHITTAKER join.*

For reasons elaborated by MR. JUSTICE FRANKFURTER at the last Term, 352 U. S. 524, I think that certiorari should have been denied in each of these cases. However, I continue in the view, expressed at the last Term, 352 U. S. 559, that once certiorari has been granted in such cases, we disbelievers, consistent with the Court's certiorari procedure, should consider them on the merits. Further, much as I disagree, 352 U. S. 559, 562–564, with the reasoning and philosophy of the *Rogers* case, which strips the historic role of the judge in a jury trial of all meaningful significance, I feel presently bound to bow to it. Applying *Rogers* to the present cases, I am forced to concur in judgments of reversal in Nos. 142 and 350.

*[This memorandum applies also to No. 350, *Palermo* v. *Luckenbach Steamship Co.*, *post*, p. 20.]

PALERMO *v.* LUCKENBACH STEAMSHIP CO., INC.

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

No. 350. Decided October 21, 1957.

A jury awarded damages to petitioner, a longshoreman, for personal injuries sustained while working on a ship owned and operated by respondent. The Court of Appeals reversed on the ground that the trial court had erred in refusing to charge the jury that petitioner was not entitled to any recovery if he voluntarily chose to use a passageway known by him to be unsafe and if there was any other passageway known by him to be safe. *Held:* Certiorari is granted, the judgment is reversed and the case is remanded.

(a) The trial court did not commit reversible error in refusing to grant such an instruction.

(b) Petitioner's alleged choice of a more dangerous route did not, under the proofs, operate to bar recovery as a matter of law.

(c) The jury was properly instructed that petitioner's negligence, if any, was to be considered in mitigation of damages under the rule applicable in actions for personal injuries arising from maritime torts.

246 F. 2d 557, reversed and remanded.

Philip F. Di Costanzo for petitioner.

Eugene Underwood and *William M. Kimball* for respondent.

PER CURIAM.

The petition for certiorari is granted, and the judgment of the Court of Appeals is reversed and the case is remanded.* We hold that the trial court did not commit reversible error in refusing to charge respondent's request

*[Amended, *post*, p. 910, to provide for remand of the case to the Court of Appeals.]

No. 12. The petitioner's alleged choice of a more dangerous route did not, under the proofs, operate to bar recovery as a matter of law. The jury was properly instructed that the petitioner's negligence, if any, was to be considered in mitigation of damages under the rule applicable in actions for personal injuries arising from maritime torts. *Pope & Talbot, Inc.*, v. *Hawn*, 346 U. S. 406, 408–409; cf. *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424.

For reasons set forth in his opinion in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 524, MR. JUSTICE FRANKFURTER is of the view that the writ of certiorari is improvidently granted.

[For memorandum of MR. JUSTICE HARLAN, joined by MR. JUSTICE BURTON and MR. JUSTICE WHITTAKER, see *ante*, p. 19.]

HOBART *v.* HOBART.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 355. Decided October 21, 1957.

Appeal dismissed and certiorari denied.

Reported below: 166 Ohio St. 112, 141 N. E. 2d 470.

Baird Broomhall, William M. Harrelson and *Richard Wilson* for appellant.

C. V. Diedel and *Frank E. Bazler* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

NEW ORLEANS INSURANCE EXCHANGE *v.* UNITED STATES.

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

No. 399. Decided October 28, 1957.

148 F. Supp. 915, affirmed.

Murray F. Cleveland and *Byron R. Kantrow* for appellant.

Solicitor General Rankin, Assistant Attorney General Hansen and *Charles H. Weston* for the United States.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

HURT *v.* OKLAHOMA.

APPEAL FROM THE CRIMINAL COURT OF APPEALS OF OKLAHOMA.

No. 402. Decided October 28, 1957.

Appeal dismissed and certiorari denied.
Reported below: 312 P. 2d 169.

Herbert K. Hyde and *Sid White* for appellant.

Mac Q. Williamson, Attorney General, and *Sam H. Lattimore,* Assistant Attorney General, for appellee.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

ASSOCIATION OF LITHUANIAN WORKERS ET AL. *v.* BROWNELL, ATTORNEY GENERAL.

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

No. 295. Decided October 28, 1957.

Certiorari granted; judgments vacated; and causes remanded to the District Court with directions to dismiss the proceedings as moot.

Reported below: 101 U. S. App. D. C. 73, 247 F. 2d 64.

Joseph Forer and *David Rein* for petitioners. *Nathan Witt* for Association of Lithuanian Workers, petitioner.

Solicitor General Rankin, Assistant Attorney General Doub, Paul A. Sweeney and *B. Jenkins Middleton* for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgments are vacated and the causes are remanded to the District Court with directions to dismiss the proceedings as moot.

BLACK, ASSISTANT REGIONAL COMMISSIONER, ALCOHOL AND TOBACCO TAX DIVISION, INTERNAL REVENUE SERVICE, *v.* MAGNOLIA LIQUOR CO., INC.

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

No. 14. Argued October 17, 1957.—Decided November 12, 1957.

A wholesale liquor dealer compelled retailers to buy certain brands of alcoholic beverages which they did not desire in order to obtain other brands which they did desire. *Held:* This exacted a "quota" from the retailers and, to that extent, excluded sales by competing wholesalers, in violation of § 5 of the Federal Alcohol Administration Act, and it subjected the offending wholesaler to a suspension of its wholesale liquor permit issued under the Act. Pp. 24–27.

231 F. 2d 941, reversed and remanded.

Daniel M. Friedman argued the cause for petitioner. With him on the brief were *Solicitor General Rankin* and *Assistant Attorney General Hansen.*

Moise S. Steeg, Jr. argued the cause and filed a brief for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner seeks to suspend respondent's wholesale liquor permit issued under the Federal Alcohol Administration Act (49 Stat. 977, 27 U. S. C. § 201) for having made "quota" sales of alcoholic beverages in violation of § 5 (a) and (b) of the Act. The agency ordered suspension of the permit for 15 days for that violation. The Court of Appeals set the order aside, 231 F. 2d 941. The case is here on a petition for a writ of certiorari, which we granted (352 U. S. 877) because of a conflict between the decision below and *Distilled Brands* v. *Dunigan,* 222 F. 2d 867, from the Second Circuit.

Section 5 makes it unlawful for a wholesaler to induce a retailer to purchase distilled spirits "to the exclusion in whole or in part of distilled spirits" offered by other persons "by requiring the retailer to take and dispose of a certain quota of any of such products," where, *inter alia,* the effect is "substantially to restrain or prevent transactions in interstate or foreign commerce in any such products."

The facts are that during the period in question Johnny Walker Scotch and Seagram's V. O. Whiskey were in short supply, while Seagram's Ancient Bottle Gin and Seagram's 7-Crown Whiskey were plentiful, Ancient Bottle being a poor seller. Respondent, in order to increase its sales of Ancient Bottle Gin and 7-Crown Whiskey, compelled retailers to buy them, which they did not desire, in order to obtain the other two whiskeys which they did desire. The agency found that respondent's sales were "quota" sales within the meaning of the Act, that they affected adversely the sales of competing brands, and "excluded, in whole or in part, distilled spirits . . . offered for sale by other persons in interstate commerce"—all to the end of substantially restraining and preventing commerce. The Court of Appeals concluded that the transactions complained of, although tie-in sales, did not violate § 5 of the Act.

Tying agreements by which the sale of one commodity is conditioned on the purchase of another have been repeatedly condemned under the antitrust laws, since they serve no purpose beyond the suppression of competition. *Standard Oil Co.* v. *United States,* 337 U. S. 293, 305–306; *United States* v. *Paramount Pictures,* 334 U. S. 131, 156–159; *International Salt Co.* v. *United States,* 332 U. S. 392; *Mercoid Corp.* v. *Minneapolis-Honeywell Co.,* 320 U. S. 680. One aim of Congress by the present legislation was to prohibit practices that were "analogous to those prohibited by the antitrust laws," (see H. R. Rep.

No. 1542, 74th Cong., 1st Sess., p. 12). The tie-in sales involved here seem to us to run afoul of that policy, since the retailer is coerced into buying distilled spirits he would otherwise not have purchased at that time, and other sellers of the products are to that extent excluded from the market that would exist when the demand arose. A wholesaler who compels a retailer to buy an unwanted inventory as a condition to acquisition of needed articles exacts a "quota" from the retailer and excludes sales by competing wholesalers in the statutory sense.

The court below relied on two countervailing considerations. It noted that § 5 (a) is headed "Exclusive outlet" and § 5 (b) "Tied house." These titles were enough, it thought, to raise doubts concerning the meaning of the statutory clauses, since the retailer in question was not a "tied house" or "exclusive outlet," but only the victim of these particular tied-in sales. The court was constrained to read the Act narrowly, as it conceived it to be penal in nature when it forfeited a permit to do business. But we deal here with remedial legislation whose language should be given hospitable scope. See *Securities and Exchange Commission* v. *Joiner Corp.*, 320 U. S. 344, 353, 355. The will of Congress would be thwarted if we gave the language in question the strictest construction possible. The fair meaning of the Act is our guide; and it seems too clear for extended argument that the tied-in sale, though it falls short of creating an exclusive outlet and a permanently "tied house," violates the Act.

The other consideration relied upon by the Court of Appeals was a letter written by the agency to Congress in 1947 asking for an amendment to § 5 because it had doubt "whether violations of the statute could be established through the 'tie-in' sales." The administrative practice, we are advised, has quite consistently reflected the view that such sales are banned by the Act. See Annual Report, Commissioner of Internal Revenue 1946,

pp. 45–46; *id.*, 1947, p. 49. The fact that the agency sought a clarifying amendment is, therefore, of no significance. See *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 47; *United States* v. *Turley,* 352 U. S. 407, 415, n. 14. The judgment is reversed and the case is remanded to the Court of Appeals for proceedings in conformity with this opinion.

Reversed.

ALCORTA *v.* TEXAS.

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 139. Argued October 23, 1957.—Decided November 12, 1957.

In a Texas state court, petitioner was convicted of murdering his wife and was sentenced to death. At his trial, he admitted the killing but claimed it occurred in a fit of passion when he discovered his wife, whom he had already suspected of marital infidelity, kissing another man late at night in a parked car. Had this claim been accepted by the jury, it could have found him guilty of "murder without malice" which, under a Texas statute, was punishable by a maximum sentence of five years' imprisonment. The other man testified at the trial that his relationship with petitioner's wife was nothing more than a casual friendship and that he had simply driven her home from work a few times. In a subsequent habeas corpus proceeding, the other man confessed to having had sexual intercourse with petitioner's wife on several occasions and testified that he had informed the prosecutor of this before the trial and that the prosecutor had told him he should not volunteer any information about it. The prosecutor admitted that these statements were true. Petitions for writs of habeas corpus were denied both by the trial court and by the Texas Court of Criminal Appeals. *Held:* Petitioner was denied due process of law; the judgment denying a writ of habeas corpus is reversed; and the cause is remanded. Pp. 28–32.

Reversed and remanded.

Fred A. Semaan and *Raul Villarreal* argued the cause, and *Mr. Semaan* filed a brief, for petitioner.

Roy R. Barrera and *Hubert W. Green, Jr.* argued the cause for respondent. With them on the brief was *Will Wilson,* Attorney General of Texas.

PER CURIAM.

Petitioner, Alvaro Alcorta, was indicted for murder in a Texas state court for stabbing his wife to death. Vernon's Tex. Pen. Code, 1948, Art. 1256. He admitted the killing but claimed it occurred in a fit of passion when

he discovered his wife, whom he had already suspected of marital infidelity, kissing one Castilleja late at night in a parked car. Petitioner relied on Texas statutes which treat killing under the influence of a "sudden passion arising from an adequate cause . . . as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection" as murder without malice punishable by a maximum sentence of five years' imprisonment. Vernon's Tex. Pen. Code, 1948, Arts. 1257a, 1257b, 1257c. The jury, however, found him guilty of murder with malice and, acting under broad statutory authority to determine the extent of punishment, sentenced him to death. The judgment and sentence were affirmed by the Texas Court of Criminal Appeals. 165 Tex. Cr. R. ——, 294 S. W. 2d 112.

Castilleja, the only eye witness to the killing, testified for the State at petitioner's trial. In response to inquiries by the prosecutor about his relationship with the petitioner's wife, Castilleja said that he had simply driven her home from work a couple of times, and in substance testified that his relationship with her had been nothing more than a casual friendship. He stated that he had given her a ride on the night she was killed and was parked in front of her home with his car lights out at two o'clock in the morning because of engine trouble. The prosecutor then asked what had transpired between Castilleja and petitioner's wife in the parked car:

> "Q. Did you have a conversation with Herlinda?
>
> "A. Yes; she opened the door. She was going to get .off [*sic*] and, then, she told me to tell my sister to come and pick her up in the morning so she could go to church.
>
> "Q. To tell your sister, Delfina Cabrera, to come pick her up in the morning so she could go to church?
>
> "A. Yes."

At the conclusion of Castilleja's testimony the following colloquy took place between him and the prosecutor:

"Q. Natividad [Castilleja], were you in love with Herlinda?

"A. No.

"Q. Was she in love with you?

"A. No.

"Q. Had you ever talked about love?

"A. No.

"Q. Had you ever had any dates with her other than to take her home?

"A. No. Well, just when I brought her from there.

"Q. Just when you brought her from work?

"A. Yes."

All this testimony was quite plainly inconsistent with petitioner's claim that he had come upon his wife kissing Castilleja in the parked car.

Some time after petitioner's conviction had been affirmed Castilleja issued a sworn statement in which he declared that he had given false testimony at the trial. Relying on this statement petitioner asked the trial court to issue a writ of habeas corpus. He contended that he had been denied a fair trial in violation of State and Federal Constitutions because Castilleja had testified falsely, with the knowledge of the prosecutor, that his relationship with petitioner's wife had been only "that of a friend and neighbor, and that he had had no 'dates,' nor other relations with her, when in truth and in fact the witness had been her lover and paramour, and had had sexual intercourse with her on many occasions . . . ." Petitioner further alleged that he had no knowledge of this illicit intercourse at the time of his trial.

A hearing was held on the petition for habeas corpus. Castilleja was called as a witness. He confessed having sexual intercourse with petitioner's wife on five or six

occasions within a relatively brief period before her death. He testified that he had informed the prosecutor of this before trial and the prosecutor had told him he should not volunteer any information about such intercourse but if specifically asked about it to answer truthfully. The prosecutor took the stand and admitted that these statements were true. He conceded that he had not told petitioner about Castilleja's illicit intercourse with his wife. He also admitted that he had not included this information in a written statement taken from Castilleja prior to the trial but instead had noted it in a separate record. At the conclusion of the hearing the trial judge denied the petition for habeas corpus. Petitioner then applied to the Texas Court of Criminal Appeals for a writ of habeas corpus but that court, acting on the record made at the hearing before the trial court, also refused to issue the writ. We granted certiorari, 353 U. S. 972. Texas concedes that petitioner has exhausted all remedies available to him under state law.

Under the general principles laid down by this Court in *Mooney* v. *Holohan,* 294 U. S. 103, and *Pyle* v. *Kansas,* 317 U. S. 213, petitioner was not accorded due process of law. It cannot seriously be disputed that Castilleja's testimony, taken as a whole, gave the jury the false impression that his relationship with petitioner's wife was nothing more than that of casual friendship. This testimony was elicited by the prosecutor who knew of the illicit intercourse between Castilleja and petitioner's wife. Undoubtedly Castilleja's testimony was seriously prejudicial to petitioner. It tended squarely to refute his claim that he had adequate cause for a surge of "sudden passion" in which he killed his wife. If Castilleja's relationship with petitioner's wife had been truthfully portrayed to the jury, it would have, apart from impeaching his credibility, tended to corroborate petitioner's contention that he had found his wife embrac-

ing Castilleja. If petitioner's defense had been accepted by the jury, as it might well have been if Castilleja had not been allowed to testify falsely, to the knowledge of the prosecutor, his offense would have been reduced to "murder without malice" precluding the death penalty now imposed upon him.

The judgment is reversed and the cause is remanded to the Court of Criminal Appeals of the State of Texas for further proceedings not inconsistent with this opinion.

It is so ordered.

BANTA, TRUSTEE, *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

No. 430. Decided November 12, 1957.

Appeal dismissed.

Reported below: 152 F. Supp. 59.

Richard Swan Buell and *Justin W. Seymour* for appellant.

Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston, W. Louise Florencourt, Robert W. Ginnane and *B. Franklin Taylor, Jr.* for the United States and the Interstate Commerce Commission, appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.

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

BANTA, TRUSTEE, *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

No. 506. Decided November 12, 1957.

152 F. Supp. 59, affirmed.

Richard Swan Buell and *Justin W. Seymour* for appellant.

Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston, W. Louise Florencourt, Robert W. Ginnane and *B. Franklin Taylor, Jr.* for the United States and the Interstate Commerce Commission, appellees.

PER CURIAM.

The motion for leave to use record and jurisdictional statement in case No. 430, October Term 1957, in this case is granted. The motion to affirm is granted and the judgment is affirmed.

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

TIMES FILM CORP. *v.* CITY OF CHICAGO ET AL.

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

No. 372. Decided November 12, 1957.

Certiorari granted and judgment reversed. *Alberts* v. *California,* 354 U. S. 476.

244 F. 2d 432, reversed.

Felix J. Bilgrey for petitioner.

John C. Melaniphy and *Sydney R. Drebin* for respondents.

PER CURIAM.

The petition for writ of certiorari is granted and the judgment of the United States Court of Appeals for the Seventh Circuit is reversed. *Alberts* v. *California,* 354 U. S. 476.

MR. JUSTICE BURTON and MR. JUSTICE CLARK are of the opinion that the petition for certiorari should not have been granted.

EDWARDS *v.* UNITED STATES.

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

No. 108, Misc. Decided November 12, 1957.

Certiorari granted; judgment vacated; and case remanded with instructions to afford petitioner an opportunity to substantiate his allegations.

John T. Miller, Jr. for petitioner.

Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg and *J. F. Bishop* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the United States Court of Appeals for the District of Columbia Circuit is vacated and the case is remanded to that Court with instructions to afford the petitioner an opportunity to substantiate his allegations. *Farley* v. *United States,* 354 U. S. 521; *Johnson* v. *United States,* 352 U. S. 565.

CORSA ET AL. *v.* TAWES ET AL., CONSTITUTING THE COMMISSION OF TIDEWATER FISHERIES OF MARYLAND, ET AL.

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

No. 416. Decided November 12, 1957.

149 F. Supp. 771, affirmed.

Ambler H. Moss and *William H. Price* for appellants.

C. Ferdinand Sybert, Attorney General of Maryland, *Charles B. Reeves, Jr.,* Assistant Attorney General, *Alexander Harvey, II* and *Edward S. Digges,* Special Assistant Attorneys General, for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

FORD *v.* UNITED STATES.

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

No. 82. Decided November 12, 1957.

Upon suggestion of mootness, judgment vacated and case remanded to the District Court with directions to vacate the judgment of conviction and dismiss the indictment.

Reported below: 237 F. 2d 57.

Sydney R. Rubin for petitioner.

Solicitor General Rankin for the United States.

PER CURIAM.

Upon the suggestion of mootness the judgment of the United States Court of Appeals for the Second Circuit is vacated and the case is remanded to the United States District Court with directions to vacate the judgment of conviction and to dismiss the indictment.

DISTRICT LODGE 34, LODGE 804, INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL. *v.* L. P. CAVETT CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 453. Decided November 12, 1957.

Certiorari granted and judgment reversed on authority of cases cited. Reported below: 166 Ohio St. 508, 143 N. E. 2d 840.

J. W. Brown and *Plato E. Papps* for petitioners.

Leonard A. Weakley for respondent.

PER CURIAM.

The petition for writ of certiorari is granted and the judgment of the Supreme Court of Ohio is reversed. *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.*, 353 U. S. 20, 948; *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468; *Garner* v. *Teamsters Union*, 346 U. S. 485.

WOMETCO TELEVISION & THEATRE CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 438. Decided November 12, 1957.

Judgment affirmed.

Monroe E. Stein and *Richard F. Wolfson* for appellant.

Solicitor General Rankin, Assistant Attorney General Hansen and *Charles H. Weston* for the United States, and *Albert R. Connelly* for the Miami Beach Theatre Corporation, appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

SWIFT ET AL., TRUSTEES OF THE CONGREGATION OF JEHOVAH'S WITNESSES, BETHEL UNIT, *v.* BOROUGH OF BETHEL, PENNSYLVANIA, ET AL.

APPEAL FROM THE SUPERIOR COURT OF PENNSYLVANIA.

No. 437. Decided November 12, 1957.

Appeal dismissed for want of a substantial federal question.
Reported below: 183 Pa. Super. 219, 130 A. 2d 240.

Hayden C. Covington for appellants.

Arthur W. Henderson for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

CONLEY ET AL. *v.* GIBSON ET AL.

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

No. 7. Argued October 21, 1957.—Decided November 18, 1957.

Petitioners, who are Negro members of a union designated as their bargaining agent under the Railway Labor Act, brought a class suit against the union, its brotherhood and certain of their officers to compel them to represent petitioners without discrimination in protection of their employment and seniority rights under a contract between the union and the Railroad. They alleged that the Railroad had purported to abolish 45 jobs held by petitioners and other Negroes but had employed whites in the same jobs (except in a few instances in which it had rehired Negroes to fill their old jobs with loss of seniority) and that, despite repeated pleas, the union had done nothing to protect petitioners from such discriminatory discharges. The District Court dismissed the suit on the ground that the National Railroad Adjustment Board had exclusive jurisdiction over the controversy. The Court of Appeals affirmed. *Held:*

1. It was error to dismiss the complaint for want of jurisdiction. Section 3 First (i) of the Railway Labor Act confers upon the Adjustment Board exclusive jurisdiction only over "disputes between an employee or group of employees and a carrier or carriers," whereas this is a suit by employees against their bargaining agent to enforce their statutory right not to be discriminated against by it in bargaining. Pp. 44–45.

2. The Railroad was not an indispensable party to this suit, and failure to join it was not a ground for dismissing the suit. P. 45.

3. The complaint adequately set forth a claim upon which relief could be granted. Pp. 45–48.

(a) The fact that, under the Railway Labor Act, aggrieved employees can file their own grievances with the Adjustment Board or sue the employer for breach of contract is no justification for the union's alleged discrimination in refusing to represent petitioners. P. 47.

(b) Failure of the complaint to set forth specific facts to support its general allegations of discrimination was not a sufficient

ground for dismissal of the suit, since the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. Pp. 47–48.

229 F. 2d 436, reversed.

Joseph C. Waddy argued the cause for petitioners. With him on the brief were *Roberson L. King, Robert L. Carter, William C. Gardner* and *William B. Bryant.*

Edward J. Hickey, Jr. argued the cause for respondents. With him on the brief was *Clarence M. Mulholland.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Once again Negro employees are here under the Railway Labor Act[1] asking that their collective bargaining agent be compelled to represent them fairly. In a series of cases beginning with *Steele* v. *Louisville & Nashville R. Co.,* 323 U. S. 192, this Court has emphatically and repeatedly ruled that an exclusive bargaining agent under the Railway Labor Act is obligated to represent all employees in the bargaining unit fairly and without discrimination because of race and has held that the courts have power to protect employees against such invidious discrimination.[2]

This class suit was brought in a Federal District Court in Texas by certain Negro members of the Brotherhood of Railway and Steamship Clerks, petitioners here, on behalf of themselves and other Negro employees similarly situated against the Brotherhood, its Local Union No. 28 and certain officers of both. In summary, the complaint

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[1] 44 Stat. 577, as amended, 45 U. S. C. § 151 *et seq.*

[2] *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen,* 323 U. S. 210; *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen,* 338 U. S. 232; *Brotherhood of Railroad Trainmen* v. *Howard,* 343 U. S. 768. Cf. *Wallace Corp.* v. *Labor Board,* 323 U. S. 248; *Syres* v. *Oil Workers International Union,* 350 U. S. 892.

made the following allegations relevant to our decision: Petitioners were employees of the Texas and New Orleans Railroad at its Houston Freight House. Local 28 of the Brotherhood was the designated bargaining agent under the Railway Labor Act for the bargaining unit to which petitioners belonged. A contract existed between the Union and the Railroad which gave the employees in the bargaining unit certain protection from discharge and loss of seniority. In May 1954, the Railroad purported to abolish 45 jobs held by petitioners or other Negroes all of whom were either discharged or demoted. In truth the 45 jobs were not abolished at all but instead filled by whites as the Negroes were ousted, except for a few instances where Negroes were rehired to fill their old jobs but with loss of seniority. Despite repeated pleas by petitioners, the Union, acting according to plan, did nothing to protect them against these discriminatory discharges and refused to give them protection comparable to that given white employees. The complaint then went on to allege that the Union had failed in general to represent Negro employees equally and in good faith. It charged that such discrimination constituted a violation of petitioners' right under the Railway Labor Act to fair representation from their bargaining agent. And it concluded by asking for relief in the nature of declaratory judgment, injunction and damages.

The respondents appeared and moved to dismiss the complaint on several grounds: (1) the National Railroad Adjustment Board had exclusive jurisdiction over the controversy; (2) the Texas and New Orleans Railroad, which had not been joined, was an indispensable party defendant; and (3) the complaint failed to state a claim upon which relief could be given. The District Court granted the motion to dismiss holding that Congress had given the Adjustment Board exclusive jurisdiction over

the controversy. The Court of Appeals for the Fifth Circuit, apparently relying on the same ground, affirmed. 229 F. 2d 436. Since the case raised an important question concerning the protection of employee rights under the Railway Labor Act we granted certiorari. 352 U. S. 818.

We hold that it was error for the courts below to dismiss the complaint for lack of jurisdiction. They took the position that § 3 First (i) of the Railway Labor Act conferred exclusive jurisdiction on the Adjustment Board because the case, in their view, involved the interpretation and application of the collective bargaining agreement. But § 3 First (i) by its own terms applies only to "disputes between an employee or group of employees and a carrier or carriers." [3] This case involves no dispute between employee and employer but to the contrary is a suit by employees against the bargaining agent to enforce their statutory right not to be unfairly discriminated against by it in bargaining.[4] The Adjustment Board has no

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[3] In full, § 3 First (i) reads:

"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, including cases pending and unadjusted on the date of approval of this Act [June 21, 1934], shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; 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 Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." 48 Stat. 1191, 45 U. S. C. § 153 First (i).

[4] For this reason the decision in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, is not applicable here. The courts below also relied on *Hayes* v. *Union Pacific R. Co.*, 184 F. 2d 337, cert. denied, 340 U. S. 942, but for the reasons set forth in the text we believe that case was decided incorrectly.

power under § 3 First (i) or any other provision of the Act to protect them from such discrimination. Furthermore, the contract between the Brotherhood and the Railroad will be, at most, only incidentally involved in resolving this controversy between petitioners and their bargaining agent.

Although the District Court did not pass on the other reasons advanced for dismissal of the complaint we think it timely and proper for us to consider them here. They have been briefed and argued by both parties and the respondents urge that the decision below be upheld, if necessary, on these other grounds.

As in the courts below, respondents contend that the Texas and New Orleans Railroad Company is an indispensable party which the petitioners have failed to join as a defendant. On the basis of the allegations made in the complaint and the relief demanded by petitioners we believe that contention is unjustifiable. We cannot see how the Railroad's rights or interests will be affected by this action to enforce the duty of the bargaining representative to represent petitioners fairly. This is not a suit, directly or indirectly, against the Railroad. No relief is asked from it and there is no prospect that any will or can be granted which will bind it. If an issue does develop which necessitates joining the Railroad either it or the respondents will then have an adequate opportunity to request joinder.

Turning to respondents' final ground, we hold that under the general principles laid down in the *Steele, Graham,* and *Howard* cases the complaint adequately set forth a claim upon which relief could be granted. In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts

in support of his claim which would entitle him to relief.[5] Here, the complaint alleged, in part, that petitioners were discharged wrongfully by the Railroad and that the Union, acting according to plan, refused to protect their jobs as it did those of white employees or to help them with their grievances all because they were Negroes. If these allegations are proven there has been a manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit. This Court squarely held in *Steele* and subsequent cases that discrimination in representation because of race is prohibited by the Railway Labor Act. The bargaining representative's duty not to draw "irrelevant and invidious" [6] distinctions among those it represents does not come to an abrupt end, as the respondents seem to contend, with the making of an agreement between union and employer. Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement.[7] A contract may be fair and impartial on its face yet administered in such a way, with the active or tacit consent of the union, as to be flagrantly discriminatory against some members of the bargaining unit.

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[5] See, *e. g., Leimer* v. *State Mutual Life Assur. Co.,* 108 F. 2d 302; *Dioguardi* v. *Durning,* 139 F. 2d 774; *Continental Collieries* v. *Shober,* 130 F. 2d 631.

[6] *Steele* v. *Louisville & Nashville R. Co.,* 323 U. S. 192, 203.

[7] See *Dillard* v. *Chesapeake & Ohio R. Co.,* 199 F. 2d 948; *Hughes Tool Co.* v. *Labor Board,* 147 F. 2d 69, 74.

The respondents point to the fact that under the Railway Labor Act aggrieved employees can file their own grievances with the Adjustment Board or sue the employer for breach of contract. Granting this, it still furnishes no sanction for the Union's alleged discrimination in refusing to represent petitioners. The Railway Labor Act, in an attempt to aid collective action by employees, conferred great power and protection on the bargaining agent chosen by a majority of them. As individuals or small groups the employees cannot begin to possess the bargaining power of their representative in negotiating with the employer or in presenting their grievances to him. Nor may a minority choose another agent to bargain in their behalf. We need not pass on the Union's claim that it was not obliged to handle any grievances at all because we are clear that once it undertook to bargain or present grievances for some of the employees it represented it could not refuse to take similar action in good faith for other employees just because they were Negroes.

The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" [8] that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures

[8] Rule 8 (a) (2).

established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.[9] Following the simple guide of Rule 8 (f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Cf. *Maty* v. *Grasselli Chemical Co.*, 303 U. S. 197.

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

It is so ordered.

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[9] See, *e. g.*, Rule 12 (e) (motion for a more definite statement); Rule 12 (f) (motion to strike portions of the pleading); Rule 12 (c) (motion for judgment on the pleadings); Rule 16 (pre-trial procedure and formulation of issues); Rules 26–37 (depositions and discovery); Rule 56 (motion for summary judgment); Rule 15 (right to amend).

Syllabus.

WILLIAMS, GOVERNOR OF MICHIGAN, ET AL. *v.* SIMONS, CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, ET AL.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS OR IN THE ALTERNATIVE PROHIBITION AND MANDAMUS.

No. 74, Misc. Decided November 18, 1957.

A Federal District Court issued a temporary restraining order restraining the Governor and other officials of Michigan from continuing with proceedings under state law for the removal of certain municipal officers for alleged misfeasance in office. Without passing on the merits of the complaint or a motion to dismiss it, a three-judge District Court, convened to consider the case, continued the temporary restraining order in effect for several months, pending determination of criminal proceedings against the same municipal officers. The Governor and Attorney General filed a motion in this Court for leave to file a petition for writ of mandamus or for writs of prohibition and mandamus directed against the members of the three-judge District Court to compel them to decide the motion for a preliminary injunction and the motion to dismiss, or to refrain from proceeding further in the cause and to vacate the temporary restraining order. This Court issued an order to the members of the District Court to show cause why a writ of mandamus or prohibition should not issue. The District Court, on motion of one of the complainants in the proceeding before it, then vacated its temporary restraining order and dismissed the complaint. *Held:* It appearing that the cause has become moot, the rule to show cause is discharged and the motion is denied.

G. Mennen Williams, Governor of Michigan, *Thomas M. Kavanagh,* Attorney General, *Edmund E. Shepherd,* then Solicitor General, *Samuel J. Torina,* now Solicitor General, and *Joseph A. Sullivan,* Deputy Attorney General, for petitioners.

PER CURIAM.

It appearing that this case has become moot, the rule to show cause is discharged and the motion for leave to file petition for writ of mandamus or in the alternative prohibition and mandamus is denied.

Memorandum by MR. JUSTICE FRANKFURTER, in which MR. JUSTICE BRENNAN joins.

In view of the disposition the Court makes of this unusual litigation, it seems desirable to set forth the facts.

(1) *Inquiry Into Municipal Officers' Wrongdoing.*

Aug. 1956—The Attorney General of Michigan and the Prosecuting Attorney of Wayne County, Michigan, filed with the Circuit Court of the Third Judicial Circuit for Wayne County an application for a judicial investigation of criminal offenses and unlawful practices in the City of Ecorse and other governmental units in Wayne County. *In re Kavanagh*, Misc. No. 83258.

That court entered an order appointing Theodore R. Bohn, Circuit Judge, to conduct an inquiry pursuant to Mich. Comp. Laws, 1948, §§ 767.3 and 767.4, as amended by Mich. Pub. Acts 1949, No. 311, Mich. Pub. Acts 1951, No. 276.[1]

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[1] Section 767.3 authorizes a single judge to conduct an inquiry into alleged illegal practices. Section 767.4 provides that if the judge is satisfied that an offense has been committed and that there is probable cause to believe a person guilty thereof, he may cause his apprehension on proper process. It further provides that if the judge has probable cause to believe that any public officer removable by law has been guilty of misfeasance or malfeasance in office, he shall make findings to this effect and serve them upon the public official having jurisdiction to remove the accused officer.

Sept. 1956—Inquiry conducted by Judge Bohn pursuant to §§ 767.3 and 767.4.

Oct. 17, 1956—Warrant signed by Judge Bohn for the arrest of William Voisine, mayor of the City of Ecorse, and Albert Buday and Francis Labadie, members of the city council of Ecorse. The warrant recites that there is probable cause to believe that Voisine, Buday, Labadie, and others have conspired to obstruct justice by knowingly permitting illegal gambling to flourish in return for bribes and gratuities. A separate warrant issued, evidently on October 22d, charging Elmer Korn, also a member of the city council, with accepting bribes.

Oct. 23, 1956—Judge Bohn signed and transmitted to G. Mennen Williams, Governor of Michigan, findings of probable cause to believe Voisine, Labadie, and Buday guilty of misfeasance in office, and of other offenses constituting grounds for removal, and recommended that the Governor, the official empowered to do so, take steps to remove them from office. Similar findings were transmitted to the Governor concerning Elmer Korn.

(2) *Criminal Proceedings.*

Nov. 1956—Preliminary examination held by Justice of the Peace, and accused officers bound over for trial in the Circuit Court on criminal charges.

Dec. 21, 1956—Information filed in the Circuit Court for Wayne County against Voisine, Buday, Labadie, and others, by the Attorney General, charging a conspiracy to obstruct justice by knowingly permitting illegal gambling in return for bribes and gratuities. Arraignment set for January 15, 1957. *People* v. *Voisine,* No. 34092.

Jan. 11, 1957—Information filed against Korn.

——Motions to quash filed by Voisine and Labadie.

(3) *Removal Proceedings.*

Governor initiated removal proceedings against accused officers, pursuant to constitutional and statutory authorization. Mich. Const., Art. IX, § 8; Mich. Comp. Laws, 1948, § 767.4, as amended by Mich. Pub. Acts 1949, No. 311, Mich. Pub. Acts 1951, No. 276; Mich. Comp. Laws, 1948, § 168.327, as added by Mich. Pub. Acts 1954, No. 116, c. XV; Mich. Comp. Laws, 1948, §§ 201.7, 201.10.[2]

Oct. 25, 1956—Executive order issued by Governor Williams, on the basis of the findings of Judge Bohn, directing the Attorney General to inquire into the charges made against Korn, and appointing John W. Conlin, Probate Judge, to conduct hearings and take testimony produced before him.

——Executive order issued by Governor directing the Attorney General and Judge Conlin to conduct similar proceedings against Voisine, Labadie, and Buday.

Nov. 1 or 2, 1956—Notice of removal proceedings was served on Voisine, Labadie, and Buday, and hearing set for November 13th.

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[2] Section 767.4 provides that findings of probable cause transmitted to the Governor by a judge who has conducted an investigation under § 767.3 shall be a sufficient complaint as a basis for initiation of removal proceedings. Section 168.327 authorizes the Governor to remove an elected municipal officer when satisfied by sufficient evidence submitted to him in the manner prescribed by law that the officer is guilty of misconduct. Sections 201.7 and 201.10 authorize the Governor to direct the Attorney General to inquire into the charges and to present testimony and examine witnesses before a probate judge appointed by the Governor for such purpose. The probate judge is to certify a transcript of the testimony produced before him by the Attorney General and the accused officer, and deliver it to the Attorney General for transmittal to the Governor.

——Korn also served with notice of the removal proceedings.

Nov. 13, 1956—Removal proceedings continued to November 21st.

Nov. 21, 1956—Accused officers filed motions to dismiss the proceedings, and objected to hearing on removal charges before trial in the criminal proceedings.

Removal proceedings continued to January 7th, 1957, and then to January 9th.

Jan. 9, 1957—Order issued by Judge Conlin the effect of which, according to accused officers, was to deny their various motions.

(4) *Intervention by United States District Court.*

Jan. 14, 1957—Complaint filed by Voisine, Labadie, Buday, and Korn in the United States District Court for the Eastern District of Michigan, naming as defendants Judge Conlin, Governor Williams, Judge Bohn, and Attorney General Kavanagh, and alleging that the statute conferring removal power on the Governor, and the statutes under which Judge Bohn acted, violate the complainants' rights under the Federal Constitution. The complaint prays: that a temporary restraining order issue to prevent defendants from continuing with the removal proceedings until other matters of relief prayed for can be determined; that a three-judge District Court be organized under 28 U. S. C. § 2284, as required by 28 U. S. C. § 2281, to issue a preliminary injunction; that on final hearing the removal proceedings be declared unconstitutional and void, and that a permanent injunction issue against defendants' continuing the proceedings; that the warrant and information underlying the criminal action be determined

to have arisen out of unconstitutional proceedings. *Voisine* v. *Conlin*, Civ. No. 16638.

Complainants also filed a notice of motion for a preliminary injunction and for the formation of a three-judge District Court, and prayed for a temporary restraining order to issue without notice.

Temporary restraining order issued without notice by District Judge Levin, restraining defendants from continuing with removal proceedings. See 28 U. S. C. § 2284 (3) and Fed. Rules Civ. Proc., 65.

Jan. 15, 1957—Announcement of organization of three-judge District Court, and hearing set for January 29th. Defendants agreed that temporary restraining order should remain in effect until matter disposed of by three-judge court.

Jan. 21, 1957—Defendants filed answer to complaint, denying jurisdiction of the court on the grounds, among others, that complainants had failed to exhaust their state remedies, and that the suit was in substance one to enjoin the State of Michigan from exercising its sovereign powers.

Defendants filed motion to dismiss on similar grounds.

Jan. 29, 1957—Hearing held before three-judge District Court on motions of complainants and defendants.

Feb. 1, 1957—District Court entered amended order holding in abeyance determination of the questions submitted until the termination of complainants' criminal trials or until further order of court, and continuing in force the temporary restraining order. The court recited as grounds for its action that complainants may forthwith be tried in the criminal proceedings and the constitutional questions presented may thereby become moot, and that complainants may be prejudiced in the criminal proceed-

ings by the investigation in the removal proceedings. Chief Judge Lederle, District Judge, dissented on the ground that the case was ripe for decision.

Feb. 28, 1957—The Governor and Attorney General filed a motion to dissolve the temporary restraining order or to pass on defendants' motion to dismiss, on the ground that the court had no authority to refuse to decide the motion and to continue the temporary restraining order.

Mar. 8, 1957—Proceedings on the motion to dissolve.

Mar. 11, 1957—Voisine filed an answer to the motion to dissolve.

Apr. 9, 1957—The court entered an order denying the motion to dissolve on the ground that, deeming it a motion for a rehearing, it presented no considerations that were not before the court when it entered its amended order of February 1st. Chief Judge Lederle dissented.

(5) *Proceedings in This Court for Review of District Court's Action.*

July 3, 1957—The Governor and Attorney General filed in this Court a motion for leave to file a petition for writ of mandamus or for writs of prohibition and mandamus directed against the members of the three-judge District Court to compel them to decide the motion for a preliminary injunction and the motion to dismiss, or to refrain from proceeding further in the cause and to vacate the temporary restraining order.

Petitioners asserted, among other grounds for the issuance of the writs, that in a case of great public importance the District Court had, for an unreasonable time, failed to perform its judicial function by granting or denying the motions before it, while continuing in effect the temporary restraining order.

Oct. 24 or 25, 1957—Counsel for Voisine filed in the District Court a motion to dismiss the complaint, noticed for hearing on November 4th. The Attorney General received a copy of this motion and on October 29th a copy of a similar motion by Labadie, also noticed for hearing on November 4th.

Oct. 28, 1957—This Court issued an order to the members of the District Court to show cause on or before November 12th why a writ of mandamus or prohibition should not issue. This order was sent to the respondents the same day, Monday, October 28th.

Oct. 29, 1957—The next day, the District Court entered an order, on the motion of Voisine and with the concurrence of the other complainants, vacating the temporary restraining order and dismissing the complaint. The Attorney General, we are advised, was not given notice that the District Court would act on the motion to dismiss, or given an opportunity to present objections.

Oct. 31, 1957—Defendants filed with the District Court an answer to the motion to dismiss, asserting that the court should refrain from acting on the motion until it had filed a return to this Court's order of October 28th to show cause.

Nov. 4, 1957—The District Court advised this Court of the order of dismissal of October 29th, and expressed its view that, since the issues presented by the case are moot, this Court should vacate its order to show cause.

Nov. 8, 1957—The Attorney General of Michigan, protesting against the District Court's action, requested a determination of the issues presented in spite of the District Court's order dismissing the complaint.

From the foregoing it appears that as a result of the District Court's refusal to pass on the questions pre-

sented by the complainants' motion for a preliminary injunction and the defendants' motion to dismiss, together with the court's continuance of the temporary restraining order, the Governor of Michigan and subordinate state officials designated by him were prevented for almost nine months from exercising powers claimed to be conferred upon them by Michigan law to remove municipal officers guilty of misconduct. The motion for leave to file a petition for mandamus or prohibition was filed in this Court at the end of the 1956 Term and could not be considered until the commencement of the new Term. Immediately after the Court considered the motion and issued its order to show cause on the basis of a claim that challenged the validity of the actions taken by the District Court, that court dismissed the complaint and thereby derailed, as in effect it has asserted, consideration on the merits of the issues presented by the order to show cause. Putting to one side the validity or propriety of the District Court's action in relation to the order of October 28th, and accepting the dismissal as accomplished, we must deny the petition for mandamus or prohibition. By vacating the temporary restraining order and dismissing the complaint, the District Court has brought to pass one alternative of the order petitioners would have this Court issue, thus rendering the petition for all practical purposes moot. But, although the past cannot be recalled and the physical entries in the records expunged, the legal significance and implications of this case are to be deemed expunged as though the restraints imposed by the District Court had never been ordered.

Memorandum by MR. JUSTICE DOUGLAS.

This Court is empowered by the Constitution to decide cases and controversies. U. S. Const., Art. III, § 2. A cause that has become moot is not a case or controversy

in the constitutional sense. *Amalgamated Assn. of Street, Electric Ry. & Motor Coach Employees* v. *Wisconsin Board,* 340 U. S. 416, 418. We cannot underscore this principle too heavily. We have no business in giving any expression of views on the merits, even in squinting one way or another. That is why the Court properly restricts its action to the order entered this day.

IN RE LAMKIN.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 275, Misc. Decided November 18, 1957.

Certiorari denied.

The judgment below rests on an adequate state ground since petitioner, in filing his application for habeas corpus in the state court, failed to comply with applicable state procedures.

The stay is continued to December 18, 1957, to afford petitioner an opportunity to file application for relief in the appropriate state court, and in event of denial of same in the highest court of the State, to renew in this Court an application for writ of certiorari.

Reported below: 164 Tex. Cr. R. —, 301 S. W. 2d 922.

Petitioner *pro se*.

Will Wilson, Attorney General, and *E. M. DeGeurin* and *George P. Blackburn*, Assistant Attorneys General, filed a brief for the State of Texas in opposition to the petition for writ of certiorari.

PER CURIAM.

The petition for writ of certiorari is denied. The judgment below rests on an adequate state ground since petitioner, in filing his application for habeas corpus in the state court, failed to comply with applicable state procedures. See *Fox Film Corp.* v. *Muller*, 296 U. S. 207 (1935). The stay heretofore entered is continued through December 18, 1957, to afford petitioner an opportunity to file with due diligence a proper application for relief in the appropriate state court, and in the event of a final denial of same in the highest court of the state, to renew in this Court an application for writ of certiorari. See *Tenner* v. *Dullea*, 314 U. S. 692 (1941).

PORET ET AL. *v.* SIGLER, WARDEN.

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

No. 268, Misc. Decided November 18, 1957.

Certiorari granted.

In view of recent action of the Supreme Court of Louisiana in certain related cases, the judgments heretofore entered are vacated and the cause is remanded to the District Court for consideration of the application for habeas corpus.

Stay continued in effect until final disposition of the case in District Court.

G. W. Gill and *Gerard H. Schreiber* for petitioners.

PER CURIAM.

The petition for writ of certiorari is granted and in view of the action of the Supreme Court of Louisiana on September 25, 1957, in *Poret* v. *Sigler* and *Poret* v. *Louisiana,* Nos. 269 and 270, Misc., O. T. 1957, certiorari denied this day [*post,* p. 879], the judgments heretofore entered are vacated, and the cause is remanded to the District Court for consideration of the application for habeas corpus. The stay heretofore entered is continued in effect until final disposition of the case in the District Court.

LEE YOU FEE *v.* DULLES, SECRETARY OF STATE.

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

No. 58. Decided November 18, 1957.

Upon consideration of the record and the confession of error by the Solicitor General, the judgment is reversed and the case is remanded to the District Court with directions to vacate its order dismissing the complaint.

236 F. 2d 885, reversed and remanded.

Jack Wasserman for petitioner.

Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg and *Robert G. Maysack* for respondent.

PER CURIAM.

Upon consideration of the confession of error by the Solicitor General and of the entire record, the judgment of the United States Court of Appeals for the Seventh Circuit is reversed and the case is remanded to the District Court with directions to vacate its order dismissing the complaint.

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STINSON, ADMINISTRATRIX, *v.* ATLANTIC COAST LINE RAILROAD CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 442. Decided November 18, 1957.

In this case arising under the Federal Employers' Liability Act, certiorari granted; judgment reversed and cause remanded for consideration of any grounds not disposed of on the first appeal and, if none has merit, with instructions to reinstate the judgment awarding damages to petitioner.

(a) This Court agrees with the finding of the Supreme Court of Alabama that there was sufficient evidence for the jury to find that there was negligence on the part of respondent railroad.

(b) The evidence also presented a jury question whether the employee's death resulted in whole or in part from such negligence.

Reported below: 266 Ala. 244, 96 So. 2d 305.

Joseph S. Lord, III for petitioner.

Peyton D. Bibb and *Norman C. Shepard* for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The Supreme Court of Alabama held that "there was sufficient evidence for the jury to find that there was negligence on the part of the Atlantic Coast Line Railroad Company." 264 Ala. 522, 527, 88 So. 2d 189, 193. We agree. We now hold that the evidence also presented a jury question whether the employee's death resulted in whole or in part from such negligence. 35 Stat. 65, 45 U. S. C. § 51; *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500; *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523. The judgment of the Supreme Court of Alabama is therefore reversed and the cause is remanded for consideration of any grounds not disposed of on the first appeal; and, if none has merit, with instructions to reinstate the judgment entered on the jury verdict of June 12, 1953,

awarding the petitioner damages of $46,600. *Urie* v. *Thompson,* 337 U. S. 163.

For the reasons set forth in his opinion in *Rogers* v. *Missouri Pacific R. Co.,* 352 U. S. 500, 524, MR. JUSTICE FRANKFURTER is of the view that the writ of certiorari is improvidently granted.

MR. JUSTICE BURTON dissents.

MR. JUSTICE HARLAN, while believing that certiorari should be denied, considers that *Rogers* v. *Missouri Pacific R. Co., supra,* requires him to concur in the result.

CITY OF NASHVILLE ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE.

No. 365. Decided November 18, 1957.*

Judgment affirmed.

Reported below: No. 365, 155 F. Supp. 98.

Allison B. Humphreys, Harold Seligman and *William Waller* for appellants in No. 365.

Judson Harwood for appellants in No. 519.

Solicitor General Rankin and *Robert W. Ginnane* for the United States and the Interstate Commerce Commission, appellees.

W. L. Grubbs, John J. Hooker and *William H. Swiggart* for the Louisville & Nashville Railroad Co., appellee.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

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*Together with No. 519, *Lambert et al.* v. *United States et al.,* also on appeal from the same court.

AMERICAN PUBLIC POWER ASSOCIATION ET AL. *v.* POWER AUTHORITY OF NEW YORK ET AL.

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

No. 477. Decided November 18, 1957.

Certiorari granted, judgment vacated and case remanded with directions to dismiss the petition on the ground that the cause is moot.

Reported below: 101 U. S. App. D. C. 132, 247 F. 2d 538.

Northcutt Ely and *Robert L. McCarthy* for petitioners.

Louis J. Lefkowitz, Attorney General, and *John R. Davison,* Solicitor General, for the State of New York, and *Thomas F. Moore, Jr., Frederick P. Lee* and *Ralph A. Gilchrist* for the Power Authority of New York, respondents.

A brief as *amici curiae* was filed by *Edmund G. Brown,* Attorney General, and *Charles E. Corker,* Deputy Attorney General, for the State of California; *Duke W. Dunbar,* Attorney General, *Frank E. Hickey,* Deputy Attorney General, and *John B. Barnard, Jr.,* Assistant Attorney General, for the State of Colorado; *Harvey Dickerson,* Attorney General, for the State of Nevada; *Fred M. Standley,* Attorney General, and *Paul L. Billhymer,* Assistant Attorney General, for the State of New Mexico; *Will Wilson,* Attorney General, *James N. Ludlum,* First Assistant Attorney General, and *James W. Wilson,* Assistant Attorney General, for the State of Texas; *E. R. Callister,* Attorney General, for the State of Utah; and *Thomas O. Miller,* Attorney General, for the State of Wyoming.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the United States Court of Appeals for the District of Columbia Circuit is vacated and the case is remanded to that court with directions to dismiss the petition upon the ground that the cause is moot.

TURNER *v.* WRIGHT, TREASURER OF ILLINOIS, ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 405. Decided November 18, 1957.*

Appeals dismissed for want of a substantial federal question.

Reported below: No. 405, 11 Ill. 2d 161, 142 N. E. 2d 84; No. 470, 11 Ill. 2d 337, 142 N. E. 2d 691; No. 482, 11 Ill. 2d 294, 142 N. E. 2d 46.

Amos M. Matthews for appellant in No. 405.

Melvin B. Lewis for appellants in No. 470.

E. H. McDermott and *Richard S. Oldberg* for appellant in No. 482.

Latham Castle, Attorney General of Illinois, and *Mark O. Roberts, Lee D. Martin* and *Willard Ice,* Special Assistant Attorneys General, for appellees in Nos. 405 and 482.

John C. Melaniphy and *Sydney R. Drebin* for appellee in No. 470.

PER CURIAM.

The motions to dismiss are granted and the appeals are dismissed for want of a substantial federal question.

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*Together with No. 470, *Abbate Brothers, Inc., et al.* v. *City of Chicago,* and No. 482, *Burgess-Norton Manufacturing Co.* v. *Lyons et al.,* also on appeals from the same court.

YATES *v.* UNITED STATES.

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

No. 2. Argued October 9–10, 1956.—Restored to the calendar for reargument June 10, 1957.—Reargued October 22, 1957.—Decided November 25, 1957.

In the trial of petitioner and 13 codefendants for conspiracy to violate the Smith Act, petitioner testified in her own defense after the Government and all but four defendants had rested their cases. On the first day of her cross-examination, she refused to answer four questions about the Communist membership of a nondefendant and a codefendant who had rested his case, indicating that she would refuse to identify other persons as members of the Communist Party. For this she was imprisoned for civil contempt. On the third day of her cross-examination, she refused to answer 11 similar questions, stating that she would not identify others as Communists if to do so would hurt them or their families. The judge notified her at the time that he would treat these 11 refusals to answer as criminal contempts; and, after the close of the conspiracy trial, he found her guilty of 11 separate criminal contempts and sentenced her to imprisonment for one year on each, the sentences to run concurrently. In doing so he stated that, if she would answer the questions within 60 days, he would be inclined to accept her submission to the court's authority; but petitioner persisted in her refusal. *Held:*

1. The latter sentences were not for civil contempt, for the purpose of coercing answers to questions; they were for criminal contempt, to vindicate the authority of the court. P. 72.

2. Petitioner was guilty of only one criminal contempt by her refusals to answer on the third day of her cross-examination; and punishment for that was not barred by the fact that she had been imprisoned for civil contempt for her refusals to answer on the first day of her cross-examination. Pp. 72–75.

(a) The prosecution cannot multiply contempts by repeated questioning on the same subject of inquiry within which a recalcitrant witness already had refused answers. P. 73.

(b) Even assuming that the unanswered questions encompassed several subjects of inquiry, each of the questions fell within the

area of refusal established by petitioner on the first day of her cross-examination, and only one contempt is shown on the facts of this case. Pp. 73–74.

(c) However, her refusal to answer on the third day of her cross-examination was a continuance of her defiance of the court's authority, and it subjected her to a conviction for criminal contempt. P. 74.

(d) Imposition of the civil sentence for her refusals to answer on the first day of her cross-examination is no barrier to criminal punishment for her refusals to answer on the third day of her cross-examination, since the civil and criminal sentences served distinct purposes, the one coercive, the other punitive and deterrent. Pp. 74–75.

3. Petitioner's contempt convictions on all but the first specification are reversed; that on the first specification is affirmed; but the sentence on that conviction is vacated and the case is remanded to the District Court for resentencing in the light of this opinion. Pp. 75–76.

227 F. 2d 851, affirmed in part and reversed in part, judgment vacated and case remanded.

Leo Branton, Jr. argued the cause for petitioner. With him on the briefs were *Ben Margolis*. *A. L. Wirin* entered an appearance for petitioner.

Kevin T. Maroney argued the cause for the United States on the original argument, and *Philip R. Monahan* on the reargument. With them on the brief were *Solicitor General Rankin* and *Assistant Attorney General Tompkins*.

MR. JUSTICE CLARK delivered the opinion of the Court.

This case is one of criminal contempt for refusal to answer questions at trial. Petitioner, admittedly a high executive officer of the Communist Party of California, and 13 codefendants were indicted and convicted of conspiracy to violate the Smith Act.[1] During the trial, peti-

[1] This Court reversed the convictions in the principal case. *Yates v. United States*, 354 U. S. 298 (1957).

tioner refused on June 30, 1952, to answer 11 questions relating to whether persons other than herself were members of the Communist Party. The District Court held petitioner in contempt of court for each refusal to answer, and imposed 11 concurrent sentences of one year each, which were to commence upon petitioner's release from custody following execution of the five-year sentence imposed in the conspiracy case. This judgment was affirmed by the Court of Appeals. 227 F. 2d 851. We granted certiorari. 350 U. S. 947. The principal question presented is whether the finding of a separate contempt for each refusal constitutes an improper multiplication of contempts. We hold that it does, and find that only one contempt has been committed.

The circumstances of petitioner's conviction are these. After the Government had rested its case in the Smith Act trial, all but four of the defendants—petitioner and three others—rested their cases. Petitioner took the stand and testified in her own defense. During the afternoon of the first day of her cross-examination, June 26, 1952, she refused to answer four questions about the Communist membership of a nondefendant and of a codefendant who had rested his case.[2] In refusing to answer, she stated, ". . . [T]hat is a question which, if I were to answer, could only lead to a situation in which a person could be caused to suffer the loss of his job . . . and perhaps be subjected to further harassment, and . . . I cannot bring myself to contribute to that." She added, "However many times I am asked and in however many forms, to identify a person as a communist, I can't bring myself to do it . . . ." The District Court adjudged her guilty of civil contempt for refusing to answer these ques-

[2] At the morning session petitioner indicated that she would answer questions as to the Party membership of codefendants who had not rested their cases, and in fact she did so.

tions, and committed her to jail until she should purge herself by answering the questions or until further order of the court. She was confined for the remainder of the trial.[3]

On the third day of petitioner's cross-examination, June 30, 1952, despite instructions from the court to answer, petitioner refused to answer 11 questions which in one way or another called for her to identify nine other persons as Communists. The stated ground for refusal in these instances was petitioner's belief that either the person named or his family could "be hurt by" such testimony. She expressed a willingness to identify others as Communists—and in one instance did so—if such identification would not hurt them. The judge stated that he expected to treat these 11 refusals as criminal contempt under Rule 42 (a) of the Federal Rules of Criminal Procedure.[4] Adjudication of the contempt was deferred until completion of the principal case.

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[3] The trial ended on Aug. 5, 1952. Petitioner was confined under the judgment of conviction in the principal case until Aug. 30, 1952, when she was released on bail pending appeal in that case. She was reconfined on Sept. 4, 1952, this time under the civil contempt order of June 26. She was released on bail on Sept. 6, 1952, pending appeal from the order directing her reconfinement. That order was reversed on appeal on the ground that petitioner could not purge herself of the civil contempt since the trial had ended. *Yates* v. *United States*, 227 F. 2d 844. Petitioner was again confined on Sept. 8, 1952, after the District Court, on that same day, adjudged her in criminal contempt of court for her June 26 refusals to answer. She was released on bail on Sept. 11, 1952, pending appeal from that judgment, which was later reversed on appeal because the district judge had given her no notice at the time of the trial that he expected to hold her in criminal contempt for the June 26 refusals. *Yates* v. *United States*, 227 F. 2d 848. Neither the civil nor the criminal contempt sentences for the June 26 refusals, nor their reversals, are under review in the present case.

[4] "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt

After conviction and imposition of sentences in the conspiracy case, the court, acting under 18 U. S. C. § 401,[5] found petitioner guilty of "eleven separate criminal contempts" for her 11 refusals to answer questions on June 30. No question is raised as to the form or content of the specifications.

The court sentenced petitioner to imprisonment for one year on each of the 11 separate specifications of criminal contempt. The sentences were to run concurrently and were to commence upon her release from custody following execution of the five-year sentence imposed on the conspiracy charge. Upon imposing sentence, the court stated that if petitioner answered the 11 questions then or within 60 days, while he had authority to modify the sentence under Rule 35 of the Federal Rules of Criminal Procedure, he would be inclined to accept her submission to the authority of the court. However, petitioner persisted in her refusal.

The summary contempt power in the federal courts, ". . . although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions. Without it, judicial tribunals would be at the mercy of the disorderly and violent, who respect neither the laws enacted for the vindication of public and private rights, nor the officers

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and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

[5] "§ 401. Power of court.

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

"(2) Misbehavior of any of its officers in their official transactions;

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

charged with the duty of administering them." *Ex parte Terry,* 128 U. S. 289, 313 (1888). The Judiciary Act of 1789 contained a section making it explicit that federal courts could "punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same . . . ." 1 Stat. 73, 83. After United States District Judge Peck's acquittal in 1831 [6] on charges of high misdemeanors for summarily punishing a member of the bar for contempt in publishing a critical comment on one of his judgments, Congress modified the statute. In the Act of 1831, the contempt power was limited to specific situations such as disobedience to lawful orders. 4 Stat. 487. See Frankfurter and Landis, Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts, 37 Harv. L. Rev. 1010, 1023–1038. The present code provision is substantially similar.[7] We have no doubt that the refusals in question constituted contempt within the meaning of 18 U. S. C. § 401 (3).

This case presents three issues. Petitioner claims that the sentences were imposed to coerce her into answering the questions instead of to punish her, making the contempts civil rather than criminal and the sentences to a prison term after the close of the trial a violation of Fifth Amendment due process. Second, petitioner argues that her several refusals to answer on both June 26 and June 30 constituted but a single contempt which was total and complete on June 26, so that imposition of contempt sentences for the June 30 refusals was in violation of due process. Finally, petitioner contends that her one-year sentences were so severe as to violate due process and constitute cruel and unusual punishment under the Eighth Amendment.

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[6] Stansbury, Report of the Trial of James H. Peck (1833).

[7] See note 5, *supra.*

I.

While imprisonment cannot be used to coerce evidence after a trial has terminated, *Yates* v. *United States,* 227 F. 2d 844; cf. *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 443, 449 (1911), it is unquestioned that imprisonment for a definite term may be imposed to punish the contemnor in vindication of the authority of the court. We do not believe that the sentences under review in this case were imposed for the purpose of coercing answers to the 11 questions. Rather, the record clearly shows that the order was made to "vindicate the authority of the court" by punishing petitioner's "defiance" thereof. The sentencing judge did express the hope that petitioner would still "purge herself to the extent that she bows to the authority of the court" by answering the questions either at the time of the sentencing or within 60 days thereafter. In doing so, however, he acted pursuant to the power of the court under Rule 35 of the Federal Rules of Criminal Procedure [8] rather than under any theory of civil contempt. Indeed, in express negation of the latter idea, he stated that should she answer the questions, "[i]t could have no effect upon this proceeding and need not be accepted as a purge, because of the fact that the time has passed . . . for the administration of justice in this case to be affected by it."

II.

Petitioner contends that the refusals of June 26 and June 30 constituted no more than a single contempt because the questions asked all related to identification of others as Communists, after she made it clear on June 26 that she would not be an informer. She urges

[8] "Correction or Reduction of Sentence.

". . . The court may reduce a sentence within 60 days after the sentence is imposed . . . ."

that the single contempt was completed on June 26 since the area of refusal was "carved out" on that day. From this, petitioner concludes that no contempt was committed on June 30 and that imposition of criminal contempt sentences for refusals of that day to answer violates due process guaranties.

A witness, of course, cannot "pick and choose" the questions to which an answer will be given. The management of the trial rests with the judge and no party can be permitted to usurp that function. See *United States* v. *Gates,* 176 F. 2d 78, 80. However, it is equally clear that the prosecution cannot multiply contempts by repeated questioning on the same subject of inquiry within which a recalcitrant witness already has refused answers. See *United States* v. *Orman,* 207 F. 2d 148.

Even though we assume the Government correct in its contention that the 11 questions in this case covered more than a single subject of inquiry, it appears that every question fell within the area of refusal established by petitioner on the first day of her cross-examination. The Government admits, pursuant to the holding of *United States* v. *Costello,* 198 F. 2d 200, that only one contempt would result if Mrs. Yates had flatly refused on June 26 to answer *any* questions and had maintained such a position. We deem it *a fortiori* true that where a witness draws the lines of refusal in less sweeping fashion by declining to answer questions within a generally defined area of interrogation, the prosecutor cannot multiply contempts by further questions within that area. The policy of the law must be to encourage testimony; a witness willing to testify freely as to all areas of investigation but one, should not be subject to more numerous charges of contempt than a witness unwilling to give any testimony at all.

Having once carved out an area of refusal, petitioner remained within its boundaries in all her subsequent

refusals. The slight modification on June 30 of the area of refusal did not carry beyond the boundaries already established. Whereas on June 26 the witness refused to identify other persons as Communists, on June 30 she refused to do so only if those persons would be hurt by her identification. Although the latter basis is not identical to the former, the area of refusal set out by it necessarily fell within the limits drawn on June 26. We agree with petitioner that only one contempt is shown on the facts of this case.

That conclusion, however, does not establish petitioner's contention that no contempt whatsoever was committed by her refusal to answer the 11 questions of June 30. The contempt of this case, although single, was of a continuing nature: each refusal on June 30 continued the witness' defiance of proper authority. Certainly a party who persisted in refusing to perform specific acts required by a mandatory injunction would be in continuing contempt of court. We see no meaningful distinction between that situation and petitioner's persistent refusal to answer questions within a defined area.

Though there was but one contempt, imposition of the civil sentence for the refusals of June 26 is no barrier to criminal punishment for the refusals of June 30. The civil and criminal sentences served distinct purposes, the one coercive, the other punitive and deterrent; that the same act may give rise to these distinct sanctions presents no double jeopardy problem. *Rex Trailer Co.* v. *United States,* 350 U. S. 148, 150 (1956); *United States* v. *United Mine Workers,* 330 U. S. 258, 299 (1947).[9] Clearly, if

[9] Nor does the finding of a single contempt mean that the criminal contempt sentence under review in this case constitutes double jeopardy because the court also imposed a criminal contempt sentence for the June 26 refusals. The latter was reversed on appeal, note 3, *supra,* and in any event was imposed after the criminal contempt sentence for the June 30 refusals.

the civil and criminal sentences could have been imposed simultaneously by the court on June 26, as the *United Mine Workers* case holds, it scarcely can be argued that the court's failure to invoke the criminal sanction until June 30 was fatal to its criminal contempt powers. Indeed, the more salutary procedure would appear to be that a court should first apply coercive remedies in an effort to persuade a party to obey its orders, and only make use of the more drastic criminal sanctions when the disobedience continues. Had the court imposed a civil sentence and found petitioner guilty of criminal contempt on June 26, it could have postponed imposition of a criminal sentence until termination of the principal case. The distinction between that procedure and the one followed here is entirely formal.

III.

While the sentences imposed were concurrent, it may be that the court's judgment as to the proper penalty was affected by the view that petitioner had committed 11 separate contempts. In addition, petitioner has now served a total of over 70 days in jail awaiting final disposition of the several proceedings against her. The conspiracy conviction and another criminal contempt conviction have been reversed, and the sentences imposed here have been termed "severe" by the Court of Appeals. 227 F. 2d 851, 855. Moreover, the court should consider ". . . the extent of the willful and deliberate defiance of the court's order [and] the seriousness of the consequences of the contumacious behaviour . . ." *United States* v. *United Mine Workers, supra,* at 303. In this regard, petitioner's understandable reluctance to be an informer, although legally insufficient to explain her refusals to answer, is a factor, as is her apparently courteous demeanor and the fact that her refusals seem to have had no perceptible effect on the outcome of the

trial. All of this points up the necessity, we think, of having the trial judge reconsider the sentence in the cool reflection of subsequent events.[10]

The contempt convictions on specifications II–XI, inclusive, are reversed. The contempt conviction on specification I is affirmed, but the sentence on that conviction is vacated, and the case is remanded to the District Court for resentencing in the light of this opinion.[11]

It is so ordered.

MR. JUSTICE BURTON agrees with the Court of Appeals and the trial court that petitioner's refusals to answer when ordered to do so by the trial court on June 30 constituted at least nine contempts of court. However, in view of all the circumstances, he now joins in the judgment of this Court remanding the case for resentencing.

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

This case to me is a shocking instance of the abuse of judicial authority. It is without precedent in the books.

Mrs. Yates, not wanting to be an informer, refused on cross-examination to answer four questions concerning the Communist Party affiliations of any codefendant who had rested his case or any other person who might be subject to persecution by such a disclosure.

For this, her *first* refusal, she was given her *first* sentence and confined in jail for 70 days.[1] On the third

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[10] In addition, the sentences imposed were ordered to commence upon completion of the five-year sentence in the conspiracy case. Reversal of the conspiracy conviction has rendered uncertain the date at which the sentences here imposed would begin.

[11] Cf. *Nilva* v. *United States*, 352 U. S. 385, 396 (1957).

[1] The trial judge was not through with Mrs. Yates. In his view, the *first* or "coercive" civil contempt order remained in effect so long as the judgment of conviction in the main case was pending on

day of her cross-examination she was asked 11 more questions along the same line and, adhering to her original position, remained adamant in her refusal to answer. The district judge told Mrs. Yates that he intended to treat her refusals to answer as 11 separate criminal contempts, but indicated that he would defer action on the criminal contempt for the *second* refusal for the duration of the trial. The conviction for criminal contempt because of her *second* refusal to testify was affirmed by the Court of Appeals (227 F. 2d 851) and is now affirmed by this Court.[2]

First. One reason I would reverse is that this is a transparent attempt to multiply offenses. The one offense which Mrs. Yates committed was her *first* refusal to answer. Her *second* refusal was merely the maintenance of the same position she took at the start of her cross-examination. I do not think a prosecutor should be allowed to multiply the contempts by repeating the questions. The correct rule, I believe, is stated in *United States* v. *Costello,* 198 F. 2d 200, 204.

> "Certainly the refusal to testify was an act in contempt of the Committee for which the defendant was subject to the punishment prescribed by the statute. But when the defendant made his position clear, the Committee could not multiply the contempt, and the punishment, by continuing to ask him questions each time eliciting the same answer: his refusal to

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appeal. The Court of Appeals ordered her released (*Yates* v. *United States,* 227 F. 2d 844) on the ground that confinement for civil contempt is not permissible after the termination of the trial.

[2] Petitioner has not urged that this charge of criminal contempt should have been tried before some other judge. Cf. *Offutt* v. *United States,* 348 U. S. 11. Nor has petitioner contended that she could be held only on indictment by a grand jury, or tried only by a jury, or prosecuted without the other procedural safeguards of the Fifth and Sixth Amendments.

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> give *any* testimony. In other words, the contempt was total when he stated that he would not testify, and the refusals thereafter to answer specific questions can not be considered as anything more than expressions of his intention to adhere to his earlier statement and as such were not separately punishable."

Or, as stated in *United States* v. *Orman*, 207 F. 2d 148, 160.

> ". . . where the separate questions seek to establish but a single fact, or relate to but a single subject of inquiry, only one penalty for contempt may be imposed."

Any other rule gives the prosecutor and the judge the awful power to create crimes as they choose. Because of the prosecutor's efforts to multiply the offense by continuing the line of questions, Mrs. Yates' *second* refusal to answer, following consistently the position she had made clear to the court upon the first day of her cross-examination, was not a contempt. Her *second* refusal to answer was merely a failure to purge [3] herself of the first contempt, not a new one.

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[3] This is apparent from what transpired when Mrs. Yates appeared before the trial judge in this case:

"I had hoped by this time that Mrs. Yates might be willing to purge herself; that she might be prompted to do so."

". . . as I view it, the court, in its discretion, might treat answers now to the questions as a vindication of judicial authority and treat it as purged."

"I take it from the defendant's statement that she is as adamant now as she was the day the questions were put."

"I hope Mrs. Yates will yet purge herself. I think, in offering to accept her answers now as a purge is a humane, merciful thing to do under the circumstances.

"I am not interested in imprisoning Mrs. Yates. I am interested in vindicating the authority of this court, which I feel must be

Second. Mrs. Yates might have been subjected to criminal penalties as well as civil coercion for the contempt she committed upon her *first* refusal to testify. See *Penfield Co.* v. *S. E. C.*, 330 U. S. 585; *United States* v. *United Mine Workers*, 330 U. S. 258. The district judge in fact attempted to impose a three-year criminal sentence for her *first* refusal to answer; but he was reversed by the Court of Appeals for his failure to give her the necessary notice during the pendency of the trial. *Yates* v. *United States*, 227 F. 2d 848.

What the Court now does is to make the present conviction do service for the invalid conviction for her *first* refusal to testify. This cannot be done unless we are to make a rule to fit this case only.

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vindicated when anyone wilfully refuses to obey a lawful order of the court.

"If she at any time within 60 days, while I have the authority to modify this sentence under the Rules, wishes to purge herself, I will be inclined even at that late date to accept her submission to the authority of the court."

ROSENBLOOM *v.* UNITED STATES.

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

No. 451. Decided November 25, 1957.

Certiorari granted.

In the circumstances of this case, the Court of Appeals erred in holding that petitioner's notice of appeal from his conviction of a crime was untimely. Therefore, its judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

246 F. 2d 608, reversed and remanded.

Petitioner *pro se.*

Solicitor General Rankin, Assistant Attorney General Rice and *Joseph F. Goetten* for the United States.

PER CURIAM.

The petition for a writ of certiorari is granted. The Court of Appeals has held, without opinion, that petitioner's notice of appeal from the District Court, filed on July 8, 1957, was untimely. The Government has conceded that the Clerk of the District Court did not mail to petitioner or his attorney a notice of the entry of the order of June 14 denying petitioner's motion for a new trial and judgment of acquittal, as required by Rule 49 (c), Federal Rules of Criminal Procedure. In our opinion the record in this case fails to show with sufficient certainty that petitioner or his attorney had actual notice of the entry of that order by reason of the proceedings which took place in the District Court on June 14.* Cf.

*The record shows the following:

"The COURT: . . .

. . . . . .

"Do you want some time for your client before he turns in?

"Mr. SHAW: Your Honor, I was going to ask for some time in

Huff v. *United States,* 192 F. 2d 911; *Gonzalez* v. *United States,* 233 F. 2d 825, 827, reversed on other grounds, 352 U. S. 978. What transpired at those proceedings is too ambiguous to permit the conclusion that petitioner and his attorney were not justified in believing that petitioner's time to appeal would begin to run on July 8. In these circumstances we think that the Court of Appeals erred in holding that petitioner's notice of appeal was untimely. Rule 37 (a)(2), Fed. Rules Crim. Proc.; see *Carter* v. *United States,* 168 F. 2d 310. The judgment of the Court of Appeals is reversed and the case is remanded to that court for further proceedings consistent with this opinion.

MR. JUSTICE BURTON, with whom MR. JUSTICE CLARK concurs, dissenting.

Petitioner was present in open court with his attorney at the time the court overruled his motion for a new trial. He thus had actual notice of the denial of his motion and was not entitled to rely upon an additional notice in writing from the clerk to the same effect. The colloquy quoted by the court took place later, "after calling other motions in other cases." At that time this case "was again called by the Judge and the proceedings as indicated in the transcript of the official Court reporter took place." Especially in the light of the time interval

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which to get his affairs straightened out, and within which to file an appeal, should we so desire to do.

"The COURT: Very well. If you file an appeal, of course, if you apply for bond, I will tell you now that I will grant you bond. Be permitted to go under the bond you are under now. How much time do you want?

"Mr. SHAW: About two weeks, your Honor.

"The COURT: How about Monday, July 1st, or do you want it the 8th, the following Monday?

"Mr. SHAW: That will be all right.

"The COURT: Be given until July 8th.

"Mr. SHAW: Thank you."

between the denial of the motion and the colloquy quoted in the opinion, I believe the Court of Appeals was justified in concluding that petitioner's counsel should have understood that his motion had been denied on June 14.

IN RE LATIMER.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 147, Misc. Decided November 25, 1957.

Appeal dismissed and certiorari denied.
Reported below: 11 Ill. 2d 327, 143 N. E. 2d 20.

John L. Kilcullen for petitioner.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

Syllabus.

SCHAFFER TRANSPORTATION CO. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA.

No. 20. Argued November 13, 1957.—Decided December 9, 1957.

The Interstate Commerce Commission denied an application by appellant, a common carrier by motor truck, for authority under § 207 (a) of the Motor Carrier Act of 1935, as amended by the Transportation Act of 1940, to transport granite between various points now served exclusively by rail. Certain shippers, receivers, and an association of manufacturers of finished granite products had testified that the existing rail service was satisfactory for the transportation of carload shipments but entirely inadequate for less-than-carload shipments, not only from the standpoint of cost but also and primarily from a service standpoint. The Commission based its denial of the application on the grounds that the rail service was "reasonably adequate," that the main purpose of these witnesses in supporting the application was to obtain lower rates rather than improved service and that this was not a proper basis for a grant of authority. It failed to evaluate the "inherent advantages" of the proposed motor service, including whatever benefit might be determined to exist from the standpoint of rates, and its findings as to the adequacy of the rail service were not sufficient to provide a basis for determining whether its decision comported with the National Transportation Policy. *Held:* The Commission's order must be set aside and the case remanded to it for further proceedings in conformity with this opinion. Pp. 84–93.

(a) Under the National Transportation Policy, when a motor carrier seeks to offer service where only rail transportation is presently authorized, the "inherent advantages" of the proposed service are a critical factor which the Commission must assess. Pp. 88–90.

(b) The record does not disclose the factors which the Commission compared in concluding that existing rail service is "reasonably adequate," and it does not provide this Court with a basis for determining whether the Commission's decision comports with the National Transportation Policy. Pp. 90, 92.

(c) To reject a motor carrier's application on the bare conclusion that existing rail service can move the available traffic, without regard to the inherent advantages of the proposed service, would give one mode of transportation unwarranted protection from competition from others. Pp. 90–91.

(d) No carrier is entitled to protection from competition in the continuance of a service that fails to meet a public need, nor should the public be deprived of a new and improved service because it may divert some traffic from other carriers. P. 91.

(e) The ability of one mode of transportation to operate with a rate lower than competing types of transportation is precisely the sort of "inherent advantage" that the National Transportation Policy requires the Commission to recognize. Pp. 91–92.

139 F. Supp. 444, reversed and remanded.

Peter T. Beardsley argued the cause and filed a brief for appellants.

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.*

H. Neil Garson argued the cause for the Interstate Commerce Commission, appellee. With him on the brief was *Robert W. Ginnane.*

Amos Mathews argued the cause for the Akron, Canton & Youngstown Railroad Co. et al., appellees. With him on the brief were *J. D. Feeney, Jr., Joseph H. Hays, H. F. Chapman, Carl Helmetag, Jr., James G. Lane* and *Ed White.*

John S. Burchmore and *Robert N. Burchmore* filed a brief for the National Industrial Traffic League, as *amicus curiae.*

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

The issue in this case is whether the Interstate Commerce Commission adequately and correctly applied the

standards of the National Transportation Policy in denying a motor carrier's application to provide service between points now served exclusively by rail. The applicant, A. W. Schaffer, a common carrier by motor doing business as Schaffer Transportation Co., holds a certificate of public convenience and necessity authorizing him to transport granite from Grant County, South Dakota, to points in 15 States. In the present application he sought additional authority under § 207 (a) of the Motor Carrier Act of 1935, as amended by the Transportation Act of 1940,[1] to transport granite from Grant County to various new points as well as authority to transport from points in Vermont to several States in the Midwest and South.[2] From all that appears in the Commission's report, rail service is currently the only mode of transportation available to shippers of granite between the points sought to be served by Schaffer.

The evidence adduced to demonstrate the need for Schaffer's service came from three shippers, six receivers

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[1] 49 Stat. 551, as amended, 54 Stat. 923, 49 U. S. C. § 307 (a). Section 207 (a) of the Act provides:

"(a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied . . . ."

[2] A portion of the requested East-bound authority was opposed by a motor carrier already certificated to serve points in five of the Eastern States. This portion of the requested authority was denied by Division 5 of the Commission and is no longer in issue as Schaffer did not seek reconsideration. With this exception, the requested authority was opposed solely by railroads which presently serve the points involved.

and an association composed primarily of Vermont manufacturers of finished granite products. Their evidence, as summarized in the report of Division 5 of the Commission, disclosed the following advantages to be gained from motor carrier service: [3]

> "They all agree that [existing rail] service, in the main, is satisfactory for the transportation of carload shipments but entirely inadequate for the transportation of less-than-carload shipments, not only from the standpoint of cost, but also and primarily from a service standpoint. In this respect, the record shows that on movements of small shipments the supporting witnesses have experienced delays, damage to their merchandise, and have been hampered to some degree by the lack or insufficiency of rail sidings. In many instances, they have been asked by customers to furnish delivery by motor carrier but because of the lack of such service they have been unable to comply with these requests. Moreover, and no less important from a business point of view, the shippers are faced with the competitive disadvantage of having to compete with producers of granite at other locations which have truck delivery available. Then, too, the lack of truck service has impeded shippers' ability to increase their sales and expand their markets in this area. By use of the proposed service, certain other benefits also would accrue to the shippers or dealers. For example, the latter would be able to maintain lower inventories, receive their freight faster and more frequently, and thus, be able better to meet erection deadlines,

[3] Whether these advantages demonstrate that the public convenience and necessity required Schaffer's proposed service is not for us to say. We take note of them only to indicate that *some* showing of need was established.

> especially during the peak seasons. Furthermore, the amount of crating now necessary would be reduced with resultant savings in time and money."

Relying on these factors, Division 5 approved the application, but the full Commission reconsidered the application on the same record, and, with four Commissioners dissenting, ordered it denied. *A. W. Schaffer Extension—Granite,* 63 M. C. C. 247. Schaffer brought an action before a statutory three-judge court under 49 U. S. C. § 305 (g) to set the order aside. The District Court denied relief and ordered the complaint dismissed. 139 F. Supp. 444. The case is here on direct appeal.[4] 28 U. S. C. §§ 1253, 2101 (b). We noted probable jurisdiction. 352 U. S. 923.

The National Transportation Policy,[5] formulated by Congress, specifies in its terms that it is to govern the

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[4] The American Trucking Associations, Inc., was a plaintiff below and is an appellant here. The United States supported the ICC's order in the District Court but has since concluded "on further analysis" that the order is erroneous; the United States therefore opposed in this Court the Commission's motion to affirm and both filed a brief and presented oral argument in support of appellants. Fifty-four railroads, presently serving the areas for which Schaffer seeks operating authority, appear as appellees along with the Commission.

[5] "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs

Commission in the administration and enforcement of all provisions of the Act, and this Court has made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured. *Dixie Carriers, Inc.* v. *United States,* 351 U. S. 56; *Eastern-Central Motor Carriers Assn.* v. *United States,* 321 U. S. 194; *McLean Trucking Co.* v. *United States,* 321 U. S. 67. Of course, the Commission possesses a "wide range of discretionary authority" in determining whether the public interest warrants certification of any particular proposed service. *United States* v. *Detroit & Cleveland Navigation Co.,* 326 U. S. 236, 241; *Interstate Commerce Commission* v. *Parker,* 326 U. S. 60. But that discretion must be exercised in conformity with the declared policies of the Congress. To see whether those policies have been implemented we look to the Commission's own summary of the evidence, and particularly to the findings, formal or otherwise, which the Commission has made. Just as we would overstep our duty by undertaking to evaluate the evidence according to our own notions of the public interest, we would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress.

The Commission denied Schaffer's application on the following basis:

> "On the foregoing facts, we are unable to conclude that the public convenience and necessity require the proposed operation. It is seen that for one reason or another the supporting witnesses find fault with the presently utilized rail service. Actually, however,

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of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." 54 Stat. 899, 49 U. S. C. preceding § 1.

the evidence warrants the conclusion that the witnesses are reasonably satisfied with rail service except for the one complaint that all share, namely, that rail service is too slow. Nevertheless, it is the practice for the Vermont shippers to hold finished granite until they can accumulate a pool-car load in order that the shipments may move at the lower pool-car rate. This practice is followed with the knowledge and consent of the consignees, and the sole purpose therein is to take advantage of the lower rail rate. Less-than-carload rail service, while not as expeditious as the proposed service, is fairly good, but because of the higher rate involved this service is seldom used by the supporting witnesses. The testimony of the South Dakota shipper also indicates that its support of the application is largely motivated by anticipated cheaper transportation.

"We have carefully considered applicant's arguments to the contrary, but are forced to conclude that the service presently available is reasonably adequate. The evidence indicates that the witnesses' main purpose in supporting the application is to obtain lower rates rather than improved service. It is well established that this is not a proper basis for a grant of authority, and the application, therefore, must be denied."

Viewing these conclusions in light of the National Transportation Policy we find at the outset that there has been no evaluation made of the "inherent advantages" of the motor service proposed by the applicant. That policy requires the Commission to administer the Act so as to "recognize and preserve the inherent advantages" of each mode of transportation. *Dixie Carriers, Inc.* v. *United States, supra; Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567. When a motor carrier seeks to offer service where only rail transportation is presently

authorized, the inherent advantages of the proposed service are a critical factor which the Commission must assess. How significant these advantages are in a given factual context and what need exists for a service that can supply these advantages are considerations for the Commission.

Rather than evaluate the benefit that Schaffer's proposed motor service might bring to the public, the Commission cast its first principal conclusion in terms of the adequacy of existing rail service, finding that service to be "reasonably adequate." Yet the Commission itself has previously stated: "That a particular point has adequate rail service is not a sufficient reason for denial of a certificate [to a motor carrier]." *Bowles Common Carrier Application,* 1 M. C. C. 589, 591. Of course, adequacy of rail service is a relevant consideration, but as the Commission recognized in *Metler Extension—Crude Sulphur,* 62 M. C. C. 143, 148, "relative or comparative adequacy" of the existing service is the significant consideration when the interests of competition are being reconciled with the policy of maintaining a sound transportation system. The record here does not disclose the factors the Commission compared in concluding that existing rail service is "reasonably adequate." For example, the Commission has not determined whether there are benefits that motor service would provide which are not now being provided by the rail carriers, whether certification of a motor carrier would be "unduly prejudicial" [6] to the existing carriers, and whether on balance the public interest would be better served by additional competitive service. To reject a motor carrier's application on the bare conclusion that existing rail service can move the

[6] *Interstate Commerce Commission* v. *Parker,* 326 U. S. 60, 70.

The Commission did not purport to rely on any evidence indicating what revenue the railroads might lose by certification of the applicant.

available traffic, without regard to the inherent advantages of the proposed service, would give one mode of transportation unwarranted protection from competition from others. As the report of Division 5 emphasizes, "[N]o carrier is entitled to protection from competition in the continuance of a service that fails to meet a public need, nor, by the same token, should the public be deprived of a new and improved service because it may divert some traffic from other carriers."

The Commission's second basic conclusion from the record was that the main purpose of the witnesses in supporting the application was the prospect of obtaining lower rates. For this reason the Commission discounted the testimony of these witnesses, apparently without even evaluating the claimed advantages of the proposed service other than reduced rates. We think this approach runs counter to the National Transportation Policy. The ability of one mode of transportation to operate with a rate lower than competing types of transportation is precisely the sort of "inherent advantage" that the congressional policy requires the Commission to recognize. *Dixie Carriers, Inc.* v. *United States, supra.* The Commission asserts that it has always considered rates irrelevant in certification proceedings under § 207 (a), yet, with but one exception, it relies on administrative decisions involving applications by a carrier to provide service to an area already served by the same mode of transportation.[7]

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[7] *Omaha & C. B. Ry. & Bridge Co. Common Carrier Application,* 52 M. C. C. 207, 234–235; *Pomprowitz Extension—Packing House Products,* 51 M. C. C. 343, 347–348; *Black Extension of Operations—Prefabricated Houses,* 48 M. C. C. 695, 708–709; *Johnson Common Carrier Application,* 18 M. C. C. 194, 195–196; *Wellspeak Common Carrier Application,* 1 M. C. C. 712, 714.

In the one exception, *Youngblood Extension of Operations—Canton, N. C.,* 8 M. C. C. 193, the motor carrier's application was opposed by other motor carriers.

Those decisions are entirely different from the situation presented here, where a motor carrier seeks to compete for traffic now handled exclusively by rail service. In these circumstances a rate benefit attributable to differences between the two modes of transportation is an "inherent advantage" of the competing type of carrier and cannot be ignored by the Commission.

Since the Commission has failed to evaluate the benefits that Schaffer's proposed service would provide the public, including whatever benefit may be determined to exist from the standpoint of rates, and since the findings as to the adequacy of rail service do not provide this Court with a basis for determining whether the Commission's decision comports with the National Transportation Policy, that decision must be set aside, and the Commission must proceed further in light of what we have said.

We do not minimize the complexity of the task the Commission faces in evaluating and balancing the numerous considerations that collectively determine where the public interest lies in a particular situation. And we do not suggest that the National Transportation Policy is a set of self-executing principles that inevitably point the way to a clear result in each case. On the contrary, those principles overlap and may conflict, and, where this occurs, resolution is the task of the agency that is expert in the field. But there is here no indication in the Commission's findings of a conflict of policies. Shippers and receivers now served exclusively by rail have testified to the advantages they would gain from a proposed motor carrier service. There is no finding that the authorization of the proposed service would impair the sound operation of the carriers already certificated. Nor has the Commission properly evaluated the advantages urged by the supporting witnesses to determine whether the standard of public convenience and necessity has been met.

For the foregoing reasons, the judgment is reversed and the cause is remanded to the District Court with directions to set aside the Commission's order and remand the cause to the Commission for further proceedings in conformity with this opinion.

It is so ordered.

MR. JUSTICE FRANKFURTER.

The Transportation Act of 1940 (amending the Interstate Commerce Act) grants to the Interstate Commerce Commission powers and imposes limitations upon their exercise in terms of greatly varying degrees of definiteness. As a consequence, the range of discretion left to the Commission and, correspondingly, the scope of judicial review of Commission orders greatly vary. Thus, our decision this day in Nos. 6 and 8, *American Trucking Associations* v. *United States, post,* p. 141, is a striking illustration of the difference between the limitation to which the Commission is subjected in a proceeding under § 5 (2)(b) of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. § 5 (2)(b), and the requirements of § 207 of that Act, as amended by 49 Stat. 551, 49 U. S. C. § 307, although both relate to motor carrier service by railroads. The Commission's power to grant relief under the undefined terms of the long-and-short-haul clause of § 4 of that Act, as amended by the Mann-Elkins Act of June 18, 1910, 36 Stat. 539, 547, see *Intermountain Rate Cases,* 234 U. S. 476, was modified by the specific requirements which Congress wrote into the long-and-short-haul clause in § 6 of the Transportation Act of 1940, 54 Stat. 904, 49 U. S. C. § 4 (1). In short, some rules dealing with the regulation of surface transportation are narrowly specific, leaving practically no scope for discretion in their application by the Interstate Commerce Commission. Other provisions are expressed

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in terms which necessarily leave considerable scope in the evaluation of their implied ingredients, while still others are of such breadth as to leave even wider opportunity for an exercise of judgment by the Commission not to be displaced by a court's independent judgment under the guise of judicial review.

In the case before us, the Interstate Commerce Commission denied an application for a certificate of public convenience and necessity under § 207 (a) of the Interstate Commerce Act, as amended. On review of this denial, the three-judge District Court sustained the Commission. This Court reverses the District Court on the ground that the Commission has failed to enforce the National Transportation Policy in § 1 of the Transportation Act of 1940, 54 Stat. 899, 49 U. S. C., at p. 7107. The very name of these introductory recitals to the Transportation Act illumines their legal significance: "All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." Congress thus conveyed to the Commission a most generalized point of view for carrying out its manifold, complicated and frequently elusive duties. In the very nature of things this Policy is unlike a more or less specific rule affording more or less defined criteria for application in a particular case. Still less does it afford concrete, definable criteria for judicial overturning of the Commission's conscientious attempt to translate such Policy into concreteness in a particular case.

No doubt the Commission is under obligation to heed what was declared to be "the national transportation policy of the Congress," namely, "to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each." Surely these are not mechanical or self-defining standards. They inevitably imply the widest areas for judg-

ment to be exercised, as the Commission has sought to exercise it, with the massive experience which must be attributed to it in this particular case. It is because I find myself regretfully in disagreement with my brethren regarding the nature and scope of the problem of judicial review in a case like this that I would affirm the judgment of the District Court.

It is, however, pertinent to add that the Court's decision may serve a useful purpose if it will lead the Interstate Commerce Commission, despite its enormous volume of business, to a more detailed and illuminating formulation of the reasons for the judgment that it reaches even in that class of cases where Congress has relied on the Commission's discretion in enforcing the most broadly expressed congressional policy. Since the orders in such cases also fall under judicial scrutiny, it is desirable to insist upon precision in the findings and the reasons for the Commission's action.

BENANTI *v.* UNITED STATES.

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

No. 231. Argued October 29, 1957.—Decided December 9, 1957.

Evidence obtained as a result of wiretapping a telephone by state law-enforcement officers pursuant to a state-court warrant authorized by state law, and without participation by federal authorities, is not admissible in a criminal trial in a federal court, where the existence of the intercepted communication is disclosed to the jury in violation of § 605 of the Federal Communications Act. Pp. 97–106.

1. Evidence obtained by means forbidden by § 605, whether by state or federal agents, is inadmissible in a federal court. Pp. 99–103.

(a) *Nardone* v. *United States,* 302 U. S. 379, and 308 U. S. 338, followed; *Schwartz* v. *Texas,* 344 U. S. 199, distinguished. Pp. 99–103.

(b) In this case, § 605 was violated, if not earlier, at least upon disclosure to the jury of the *existence* of the intercepted communication. Pp. 100–101.

2. A different result is not required by the fact that, in this case, the wiretap was placed by state agents acting in accordance with state law. Pp. 103–106.

(a) In setting out the prohibition of § 605 in plain terms, Congress did not intend to allow state legislation which would contradict that section and the public policy underlying it. Pp. 104–106.

244 F. 2d 389, reversed.

George J. Todaro argued the cause for petitioner. With him on the brief was *Jacob Kossman.*

John F. Davis argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg.*

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

The question presented by petitioner is whether evidence obtained as the result of wiretapping by state law-enforcement officers, without participation by federal authorities, is admissible in a federal court. Petitioner was convicted of the illegal possession and transportation of distilled spirits without tax stamps affixed thereto in violation of 26 U. S. C. §§ 5008 (b)(1), 5642. The New York police, suspecting that petitioner and others were dealing in narcotics in violation of state law, obtained a warrant in accordance with state law [1] authorizing them to tap the wires of a bar which petitioner was known to frequent. On May 10, 1956, the police overheard a conversation between petitioner and another in which it was said that "eleven pieces" were to be transported that night at a certain time and to a certain place in New York City. Acting according to this information, the police followed and stopped a car driven by petitioner's brother. No narcotics were found, but hidden in the car were eleven five-gallon cans of alcohol without the tax stamps required by federal law. The brother and the alcohol were turned over to federal authorities and this prosecution followed.

At the trial the first government witness, a state police officer, testified to the events leading up to the discovery of the cans of alcohol in an automobile which had been driven by the petitioner and then taken by his brother to the appointed spot. No mention was made of the wiretap on direct examination. However, on cross-examination this witness admitted that the information causing the police to follow the car and intercept it came

[1] N. Y. Const., Art. I, § 12; N. Y. Code of Criminal Procedure, § 813–a (1942).

from a wiretap.[2] On redirect examination the prosecutor sought to prove that the wiretap had been authorized by state law. The Government introduced a second police official, who testified substantially as the first, admitting on direct examination that a wiretap had existed and on cross-examination that the discovery of the alcohol was occasioned by knowledge of the contents of the wiretapped conversation. The words of that conversation were not disclosed to the jury although they were disclosed to the trial judge and the defense counsel.[3] The

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[2] R. 7: "Cross examination by Mr. Todaro [defense counsel]:

"Q. Officer, you were in the vicinity of this Reno Bar quite frequently?

"A. Yes, sir.

"Q. Did the Police Department have a tap on the Reno Bar, if you know?

"A. Yes, they have several taps on the Reno Bar.

"Q. Did you obtain any information as part of this investigation from the wiretap conversation?

"A. Did I obtain any information in regard—

"Q. Yes, in reference to the Benantis.

"A. Benanti?

"Q. Yes.

"A. Yes.

. . . . .

"Q. You also obtained information as a result of this wiretap that this car was going to be driven to a certain location?

"A. Yes.

. . . . .

"Q. But you had obtained some information through the wiretap which gave you a lead to this trap?

"A. Part of the information."

[3] R. 52: "(The following took place in the absence of the jury:)

"THE COURT: Mr. Todaro, the assistant district attorney is here with the order of the [state] court [authorizing the wiretap]. I just tell you, Mr. Todaro, I have looked at it and it does provide for the tap of these premises, so that your concession [that the tap

record is silent as to whether the prosecutor was told the words of the conversation. However, in our view it is unimportant whether he had this information or not.

Petitioner's motion to suppress the evidence was denied and he was convicted. The Court of Appeals for the Second Circuit affirmed, 244 F. 2d 389, holding that while the action of the state officials violated Section 605 of the Federal Communications Act, the evidence obtained from the violation was still admissible. We granted certiorari. 355 U. S. 801. Petitioner, relying on this Court's supervisory powers over the federal court system, claims that the admission of the evidence was barred by the Federal Constitution and Section 605. We do not reach the constitutional questions as this case can be determined under the statute.

Section 605 states in pertinent part: [4]

> ". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . ."

I.

In *Nardone* v. *United States,* 302 U. S. 379, and 308 U. S. 338, this Court held that evidence obtained from wiretapping by federal agents was inadmissible in federal court. In *Schwartz* v. *Texas,* 344 U. S. 199, the same type

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was authorized under state law], generally made, was actually well based.

"Also, for whatever factual interest it may have on this motion, Mr. Murphy overheard the conversation that night, if you want to get the full facts on that.

"The reference on the wire was to 'eleven pieces' which they thought meant narcotics, and that was why they intercepted the car."

[4] 48 Stat. 1103, 47 U. S. C. § 605.

of evidence was held admissible in a state court where it had been obtained by state agents. The case before us, containing elements from these three cases, forces a choice between the different results reached.

The *Nardone* decisions laid down the underlying premises upon which is based all subsequent consideration of Section 605. The crux of those decisions is that the plain words of the statute created a prohibition against any persons violating the integrity of a system of telephonic communication and that evidence obtained in violation of this prohibition may not be used to secure a federal conviction. *Nardone* v. *United States,* 302 U. S. 379, 382. Moreover, as the second *Nardone* decision asserts, distinctions designed to defeat the plain meaning of the statute will not be countenanced. 308 U. S. 338, 340. We hold that the correct application of the above principle dictates that evidence obtained by means forbidden by Section 605, whether by state or federal agents, is inadmissible in federal court.

In this case the statute was violated if not earlier at least upon the disclosure to the jury of the *existence* of the intercepted communication,[5] for Section 605 forbids the divulgence of "the *existence,* contents, substance, purport, effect, or meaning" of the intercepted message. The effect of that violation in contributing to the conviction here is manifest. The jury were free to speculate that the existence of the communication, the source of the Government's evidence, was further proof of petitioner's

[5] Because both an interception *and* a divulgence are present in this case we need not decide whether both elements are necessary for a violation of § 605. Also because here the disclosure was of the existence of the communication, it is not necessary for us to reach the issue whether § 605 is violated by an interception of the communication and a divulgence of its fruits without divulging the existence, contents, etc., of the communication.

criminal activities.[6] The prosecutor continued to use evidence now linked to a disclosed wiretap although he had been made aware of its existence and of its obvious significance to his case.[7]

Respondents argue that the evidence obtained from the disclosed wiretap should have been admissible by referring to *Schwartz* v. *Texas, supra,* and by drawing a parallel to the Fourth Amendment. It is urged that as long as the wiretapping occurred without the participation or even knowledge of federal law-enforcement officers, the evidence should be admitted in federal court; the Federal Government, being without fault, should not be handicapped. However, *Schwartz* v. *Texas* does not indicate approval of such a proposition. Both a state court and state law-enforcement officers were there involved. The rationale of that case is that despite the plain prohibition of Section 605, due regard to federal-state relations precluded the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect. In the instant

[6] The obvious prejudice to the petitioner from the disclosure of the wiretap is shown by efforts of the prosecution to mitigate it by showing that the wiretap had not been instigated on account of the charge for which petitioner was being tried. However, disclosure of the *existence* of the communication was the prejudicial error that was not overcome.

[7] The heart of the Government's case was (1) the testimony of the two policemen, who were present at the scene of the wiretap and at least one of whom arrested petitioner's brother and discovered the alcohol, and (2) the evidence of a government chemist as to his analysis of the seized alcohol. As the Court of Appeals below said: "But it is equally clear that but for the wiretap there would have been no basis for any prosecution whatever, as the apprehension of Angelo [petitioner's brother] and seizure of the 'eleven pieces' led to the discovery of appellant's participation in the violations of federal law for which he has been convicted; and the sequence of cause and effect is clear." 244 F. 2d, at 390.

case we are not dealing with a state rule of evidence. Although state agents committed the wiretap, we are presented with a federal conviction brought about in part by a violation of federal law,[8] in this case in a federal court.[9]

Furthermore, confronted as we are by this clear statute, and resting our decision on its provisions, it is neither necessary nor appropriate to discuss by analogy distinctions suggested to be applicable to the Fourth Amendment.[10] Section 605 contains an express, absolute prohibition against the divulgence of intercepted communications. *Nardone* v. *United States,* 302 U. S. 379, 382. This case is but another example of the use of wiretapping that was so clearly condemned under other circumstances in the second *Nardone* decision: [11]

> "To forbid the direct use of [these] methods . . . but to put no curb on their full indirect use would

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[8] A complementary distinction was made in *Rea* v. *United States,* 350 U. S. 214. There this Court reversed the denial of an injunction against a federal agent who had seized evidence in violation of the Federal Rules of Criminal Procedure and, being unable to introduce the evidence in federal court, was about to do so in a state prosecution. In answer to the argument that such an injunction would interfere with state judicial procedure, the decision states: "The command of the federal Rules is in no way affected by anything that happens in a state court. They are designed as standards for federal agents. The fact that their violation may be condoned by state practice has no relevancy to our problem." *Id.,* at 217.

[9] The first divulgence appearing on the record occurred in court, but we do not mean to imply that an out-of-court violation of the statute would not also lead to the invalidation of a subsequent conviction.

[10] It has remained an open question in this Court whether evidence obtained solely by state agents in an illegal search may be admissible in federal court despite the Fourth Amendment. See *Lustig* v. *United States,* 338 U. S. 74, 78–79. The instant decision is not concerned with the scope of the Fourth Amendment.

[11] 308 U. S., at 340.

> only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.' What was said in a different context in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392, is pertinent here: 'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.' "

The above principle has for its purpose enhancement of the proper administration of criminal justice. To impute to the statute anything less would give it "a self-defeating, if not disingenuous purpose." [12] *Nardone* v. *United States,* 308 U. S. 338, 340–341.

II.

As an alternative argument to support the judgment below, respondent urges that the interception and divulgence in this case were no violation of Section 605 because the wiretap was placed by state agents acting in accordance with the law of New York. The Constitution and statutes of the State of New York [13] provide that an *ex parte* order authorizing a wiretap may be issued by

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[12] *Goldstein* v. *United States,* 316 U. S. 114, is not to the contrary. The holding of that decision is that one not a party to an intercepted conversation may not bar the testimony of one who has been induced to testify by exposure of the fact that his own conversations have been wiretapped. *Id.,* at 122. The broad language in the decision that the policy of the Fourth Amendment applies to § 605 is placed in the context of a discussion of the right of one not a party to the conversation to complain. *Id.,* at 120, 121. This right was rejected on the ground that since the statute allows the "sender" of a message to consent to its divulgence, it meant to protect only him.

[13] N. Y. Const., Art. I, § 12; N. Y. Code of Criminal Procedure, § 813–a (1942).

judges of a certain rank upon the oath or affirmation of certain officials that there is reasonable ground to believe evidence of a crime may be obtained and which identifies the telephone line and the persons who are to be affected thereby. It is undisputed that an order pursuant to that law was issued in this case and that it was executed according to state law.

Respondent does not urge that, constitutionally speaking, Congress is without power to forbid such wiretapping even in the face of a conflicting state law. Cf. *Weiss* v. *United States,* 308 U. S. 321, 327. Rather the argument is that Congress has not exercised this power and that Section 605, being general in its terms, should not be deemed to operate to prevent a State from authorizing wiretapping in the exercise of its legitimate police functions. However, we read the Federal Communications Act, and Section 605 in particular, to the contrary.

The Federal Communications Act is a comprehensive scheme for the regulation of interstate communication.[14] In order to safeguard those interests protected under Section 605, that portion of the statute pertinent to this case applies both to intrastate and to interstate communications. *Weiss* v. *United States, supra.* The natural result of respondent's argument is that both interstate and intrastate communication would be removed from the

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[14] The Federal Communications Act was the response to a Presidential message calling to the attention of Congress the disjointed exercise of federal authority over the forms of communication. The primary purpose of the Act was to create a commission "to regulate all forms of communication and to consider needed additional legislation." H. R. Rep. No. 1850, 73d Cong., 2d Sess. 3. Note also the remarks of Senator Dill, Chairman of the Committee on Interstate Commerce, who introduced the bill in the Senate, that the Act would correct the theretofore cursory federal regulation of telephone and telegraph companies. 78 Cong. Rec. 8822.

statute's protection because, as this Court noted in *Weiss*,[15] the intercepter cannot discern between the two and will listen to both. Congress did not intend to place the protections so plainly guaranteed in Section 605 in such a vulnerable position. Respondent points to portions of the Act which place some limited authority in the States over the field of interstate communication. The character of these matters, dealing with aspects of the regulation of utility service to the public, is technical in nature [16] in contrast to the broader policy considerations motivating Section 605.[17] Moreover, the very existence of these grants of authority to the States underscores the conclusion that had Congress intended to allow the States to make exceptions to Section 605, it would have said so. In light of the above considerations, and keeping in mind this comprehensive scheme of interstate regulation and the public policy underlying Section 605 as part of that scheme, we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that

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[15] 308 U. S., at 328.

[16] 47 U. S. C. § 220 (h) allows the Federal Communications Commission to place carriers under state authority in regard to accounting systems and methods of depreciation accounting. See H. R. Rep. No. 1850, 73d Cong., 2d Sess. 7. 47 U. S. C. § 221 (b), as originally enacted, enabled state commissions "to regulate exchange services in metropolitan areas overlapping State lines." S. Rep. No. 781, 73d Cong., 2d Sess. 5; H. R. Rep. No. 1850, 73d Cong., 2d Sess. 7. State authority over intrastate communication is reserved by 47 U. S. C. (Supp. II) § 152 (b), which removes the jurisdiction of the Federal Communications Commission from "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." See S. Rep. No. 781, 73d Cong., 2d Sess. 3.

[17] Cf. *Nardone* v. *United States*, 302 U. S. 379; *Nardone* v. *United States*, 308 U. S. 338; *Weiss* v. *United States*, 308 U. S. 321.

policy.[18] Cf. *Pennsylvania* v. *Nelson,* 350 U. S. 497; *Hill* v. *Florida,* 325 U. S. 538; *Hines* v. *Davidowitz,* 312 U. S. 52.[19]

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

Reversed.

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[18] In passing, it should be pointed out that several Attorneys General of the United States have urged Congress to grant exceptions to § 605 to federal agents under limited circumstances. See, *e. g.,* Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H. R. 762, 867, 4513, 4728, 5096, 84th Cong., 1st Sess. 28; Rogers, The Case for Wire Tapping, 63 Yale L. J. 792 (1954). But Congress has declined to do so. In view of this, it would seem unreasonable to believe that Congress is willing to allow this same sort of exception to state agents with no further legislation on its part.

[19] *Schwartz* v. *Texas, supra,* is not to the contrary. While it refused to overturn a state rule of evidence, the Court was satisfied that the action of the state officials nonetheless violated § 605. 344 U. S., at 202.

RATHBUN *v.* UNITED STATES.

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

No. 30. Argued October 29, 1957.—Decided December 9, 1957.

Contents of a communication overheard by police officers on a regularly used telephone extension, with the consent of the person who is both the subscriber to the extension and a party to the conversation, are admissible in a criminal trial in a federal court; because such use of a regularly used telephone extension does not involve any "interception" of a telephone message, as Congress intended that word to be used in § 605 of the Federal Communications Act. Pp. 107–111.

236 F. 2d 514, affirmed.

Thomas K. Hudson argued the cause and filed a brief for petitioner.

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. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case concerns the issue of whether the contents of a communication overheard on a regularly used telephone extension with the consent of one party to the conversation are admissible in federal court.[1] Petitioner was convicted of violations of 18 U. S. C. § 875 (b) and (c)

[1] The grant of certiorari was limited to the following question, as phrased by petitioner: "Is the listening in of third parties on an extension telephone in an adjoining room, without consent of the sender, an interception of a telephone message, and the divulgence of the contents of such conversation prohibited by statute, to wit Sec. 605, Title 47, U. S. C. A." Implicit in this phrasing of the question is the fact that one party to the conversation did consent.

for transmitting an interstate communication which threatened the life of one Sparks in order to obtain from him a stock certificate which Sparks held as collateral for a loan. On March 16, 1955, petitioner, who was in New York, spoke by telephone with Sparks, who was in Pueblo, Colorado. Anticipating another call from petitioner, Sparks requested that members of the Pueblo police force overhear the conversation. When petitioner phoned Sparks in the early morning of March 17, two police officers at Sparks' direction listened to the conversation on a telephone extension in another room of the Sparks home. This extension had not been installed there just for this purpose but was a regular connection, previously placed and normally used. At the trial the police officers testified over timely objection that during this conversation petitioner had threatened Sparks' life because he would not surrender the certificate. Petitioner was convicted and the Court of Appeals affirmed. 236 F. 2d 514. We granted certiorari. 352 U. S. 965.

Benanti v. *United States, ante,* p. 96, determined that information obtained and divulged by state agents in violation of Section 605 of the Federal Communications Act [2] is inadmissible in federal court. The pertinent portion of Section 605 states:

> ". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . ."

Since there was a divulgence of the contents of a communication, the only issue on the facts before us is whether there has been an unauthorized interception within the meaning of Section 605.[3] The federal courts have split in

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[2] 48 Stat. 1103, 47 U. S. C. § 605.

[3] We do not decide the question of whether § 605 is violated where a message is intercepted but not divulged since the police officers did

their determination of this question. Some courts have held that the statute proscribes the use of an extension telephone to allow someone to overhear a conversation without the consent of both parties.[4] Others have concluded that the statute is inapplicable where one party has consented.[5] We hold that Section 605 was not violated in the case before us because there has been no "interception" as Congress intended that the word be used. Every statute must be interpreted in the light of reason and common understanding to reach the results intended by the legislature. Cf. *Holy Trinity Church* v. *United States,* 143 U. S. 457; *American Security & Trust Co.* v. *Commissioners,* 224 U. S. 491. That principle would be violated if we attributed to Congress acceptance of the results that would occur here from the position argued by petitioner.

The telephone extension is a widely used instrument of home and office,[6] yet with nothing to evidence congressional intent, petitioner argues that Congress meant to

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divulge the contents of the overheard conversation when they testified in court. Cf. *Benanti* v. *United States, ante,* p. 96.

[4] *United States* v. *Polakoff,* 112 F. 2d 888; *James* v. *United States,* 89 U. S. App. D. C. 201, 191 F. 2d 472; *United States* v. *Hill,* 149 F. Supp. 83; see *Reitmeister* v. *Reitmeister,* 162 F. 2d 691.

[5] *United States* v. *White,* 228 F. 2d 832; *Flanders* v. *United States,* 222 F. 2d 163; *United States* v. *Sullivan,* 116 F. Supp. 480, affirmed, 95 U. S. App. D. C. 78, 219 F. 2d 760; *United States* v. *Lewis,* 87 F. Supp. 970, reversed on other grounds, *Billeci* v. *United States,* 87 U. S. App. D. C. 274, 184 F. 2d 394; cf. *Rayson* v. *United States,* 238 F. 2d 160; *United States* v. *Bookie,* 229 F. 2d 130; *United States* v. *Pierce,* 124 F. Supp. 264, affirmed, 224 F. 2d 281.

[6] For example, in 1934 the Bell Telephone System, including affiliates, had 1,315,000 extension telephones out of a total of 13,378,000. In 1956 the System had 8,465,000 extension telephones out of a total of 50,990,000. Exhibit 1364 of the Federal Communications Commission Special Telephone Investigation; Federal Communications Commission, "Statistics of the Communications Industry in the United States for the year ended December 31, 1956."

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place a severe restriction on its ordinary use by subscribers, denying them the right to allow a family member, an employee, a trusted friend, or even the police to listen to a conversation to which a subscriber is a party. Section 605 points to the opposite conclusion. Immediately following the portion quoted above, the statute continues:

> ". . . no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto . . . ."

The clear inference is that one entitled to receive the communication may use it for his own benefit or have another use it for him. The communication itself is not privileged, and one party may not force the other to secrecy merely by using a telephone. It has been conceded by those who believe the conduct here violates Section 605 that either party may record the conversation and publish it.[7] The conduct of the party would differ in no way if instead of repeating the message he held out

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[7] See *United States* v. *Polakoff*, 112 F. 2d 888, 889:
"We need not say that a man may never make a record of what he hears on the telephone by having someone else listen at an extension, or, as in the case at bar, even by allowing him to interpose a recording machine. *The receiver may certainly himself broadcast the message as he pleases,* and the sender will often give consent, express or implied, to the interposition of a listener." (Emphasis added.)

Note also that the regulations of the Federal Communications Commission which control the recording of telephone conversations presuppose that either party may record a conversation and declare that tariff regulations of telephone companies which bar the use of recording devices are unjust and unreasonable and so in violation of § 201 of the Federal Communications Act. *In the Matter of Use of Recording Devices in Connection with Telephone Service,* 11 F. C. C. 1033, 1053.

his handset so that another could hear out of it. We see no distinction between that sort of action and permitting an outsider to use an extension telephone for the same purpose.

The error in accepting petitioner's argument is brought into sharper focus by the fact that Section 605 is penal in nature, the first violation being punishable by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both.[8] For example, it follows from petitioner's argument that every secretary who listens to a business conversation at her employer's direction in order to record it would be marked as a potential federal criminal. It is unreasonable to believe that Congress meant to extend criminal liability to conduct which is wholly innocent and ordinary.

Common experience tells us that a call to a particular telephone number may cause the bell to ring in more than one ordinarily used instrument. Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain. Consequently, one element of Section 605, *interception,* has not occurred.

Affirmed.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE DOUGLAS joins, dissenting.

Although this Court had, in *Olmstead* v. *United States,* 277 U. S. 438, decided that neither the Fourth Amendment nor the general judicial principles governing criminal trials in United States courts barred evidence

[8] 48 Stat. 1100, 47 U. S. C. § 501. Additional violations are punishable by the same fine and not more than two years' imprisonment, or both.

obtained through interception of telephone communications by law-enforcing officers without the consent of the sender, the Congress a few years later provided that

> "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . ." § 605, Federal Communications Act of June 19, 1934, 48 Stat. 1064, 1104, 47 U. S. C. § 605.

If the judicial attitude that lies behind the phrase "strict construction of a statute," *i. e.*, in favor of an accused, can have an emphatic illustration, it is found in the two *Nardone* cases, in which the quoted provision of § 605 was first given effect by this Court. We there held that the implications of that section bar even the most relevant and persuasive evidence obtained, without a sender's authorization, through interception by law officers, and likewise bar independently secured evidence obtained as a result of leads afforded by such interception. *Nardone* v. *United States,* 302 U. S. 379; 308 U. S. 338. The whole point of the vigorous dissent in the first *Nardone* case was directed against literal application of the phrase "no person" thereby "enabling the most depraved criminals to further their criminal plans over the telephone, in the secure knowledge that even if these plans involve kidnapping and murder, their telephone conversations can never be intercepted by officers of the law and revealed in court." Mr. Justice Sutherland, dissenting in *Nardone* v. *United States,* 302 U. S., at 385. The Court's opinion gave a short and decisive answer: "We nevertheless face the fact that the plain words of § 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that *'no person'* shall divulge or publish the message or its substance to 'any person.' " 302 U. S., at 382.

In this case, petitioner's conviction was based on the testimony of a police officer who listened in on a telephone communication made by petitioner, and such listening-in was not "authorized by the sender," to wit, the petitioner. It is suggested that the interception, for such it was, in the clear meaning of the term for carrying out its function—an intrusion by way of listening to the legally insulated transmission of thought between a speaker and a hearer—does not fall within the prohibition of § 605, because it was carried out by means of "a regularly used telephone extension with the consent of one party." But, surely, the availability of a "regularly used telephone extension" does not make § 605 inoperative. The fact that the Court relies on "the consent of one party" evidently implies that it would not be without the purview of § 605 for a police officer to conceal himself in a room of a house or a suite of offices having several "regularly used telephone extensions" and surreptitiously to utilize such an extension to overhear telephone conversations.

It is said that the overhearing in this case was "with the consent of one party." But the statute is not satisfied with "the consent of one party." The statute says "no person not being authorized by the sender." Since this Court, in *Nardone,* read "no person" to mean no person, it is even more incumbent to construe "sender" to mean sender, as was the petitioner here, and not to read "sender" to mean one of the parties to the communication, whether sender or receiver. It is further suggested that Congress must have been aware of the wide use of telephone extensions and the practice of listening-in on extensions. In the first *Nardone* case this Court rejected the argument that Congress had knowledge of the employment of federal agents "to tap wires in aid of detection and conviction of criminals." 302 U. S., at 381. But the Court refused to qualify the rigorous policy of Congress as expressed by its enactment. And today, in *Benanti* v.

United States, the Court rejects, and if I may say so rightly, the plausible contention that the well-known legislative authorization of wire-tapping by some of the States ought to be deemed to have qualified the strict purpose of Congress.

It is suggested, however, that it is one of the accepted modes of carrying on business in our time to have secretaries listen in on conversations by their principals. A secretary may fairly be called the employer's *alter ego.* And so, a secretary is fairly to be deemed as much of an automatic instrument in the context of our problem as a tape recorder. Surely a police officer called in to facilitate the detection of crime is not such an *alter ego.* His participation in telephone communications when not authorized by the sender occupies precisely the same position that it occupied in the *Olmstead* case when this Court sanctioned the practice, and in the *Nardone* cases where this Court rigorously enforced the prohibition by Congress of what theretofore was a lawful practice.

Sharing the views expressed by Judge Learned Hand in *United States* v. *Polakoff,* 112 F. 2d 888, and *Reitmeister* v. *Reitmeister,* 162 F. 2d 691, I would reverse the judgment.

ROWOLDT *v.* PERFETTO, ACTING OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE.

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

No. 5. Argued November 13–14, 1956.—Restored to the calendar for reargument June 24, 1957.—Reargued October 14, 1957.—Decided December 9, 1957.

In this case, the only evidentiary support for the order for petitioner's deportation under § 22 of the Internal Security Act of 1950, as amended, was his own testimony before an immigration inspector in 1947, that he joined the Communist Party in 1935, paid dues, attended meetings, worked in a Communist bookstore and terminated his membership after a year. *Held:*

1. From his testimony, the dominating impulse of petitioner's "affiliation" with the Party may well have been wholly devoid of any "political" implications. Pp. 116–121.

2. The record is too insubstantial to establish that petitioner's membership was the kind of meaningful association required by § 22, as amended by the Act of March 28, 1951, to support an order of deportation. Pp. 116–121.

228 F. 2d 109, reversed.

David Rein argued the cause on the original argument, and with *Joseph Forer* on the reargument, for petitioner. With them on the brief on the original argument was *Ann Fagan Ginger.*

Carl H. Imlay argued the cause on the original argument, and *Oscar H. Davis* on the reargument, for respondent. With *Mr. Imlay* on the briefs were *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg. Mr. Davis* was also on the brief on the reargument.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Petitioner is an alien who has been ordered deported by virtue of § 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006,[1] for past membership in the Communist Party. He attacks the judgment below on the ground—the only claim we need to consider—that he was not a "member" of the Communist Party within the scope of that section.

Petitioner is an alien who entered the United States in 1914 and, except for a short interval in Canada, has resided here continuously. The finding of "membership" by the hearing officer rested on petitioner's own testimony. He stated that he joined the Communist Party in "the spring or summer of 1935," paid dues,

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[1] That section amended the Act of October 16, 1918, 40 Stat. 1012, as amended, to provide:

"[Sec. 1] That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

. . . . . .

"(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

. . . . . .

"(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States . . . .

. . . . . .

"SEC. 4. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, . . . a member of any one of the classes of aliens enumerated in section 1 (2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States."

The substance of the relevant portion of this provision was incorporated in the Immigration and Nationality Act of 1952, 66 Stat. 163, 205, 8 U. S. C. § 1251 (a)(6)(C).

attended meetings, and remained a member "until I got arrested [in deportation proceedings] and that was at the end of 1935. When I was arrested, I finished the Communist Party membership . . . ." At a later point in his testimony, petitioner stated that he was probably a member for approximately one year.

He then explained his reasons for joining the Communist Party:

> "The purpose was probably this—it seemed to me that it came hand in hand—the Communist Party and the fight for bread. It seemed to me like this—let's put it this way—that the Communist Party and the Workers' Alliance had one aim—to get something to eat for the people. I didn't know it was against the law for aliens to join the Communist Party and the Workers' Alliance. . . ."

In response to a question whether his joining the Communist Party was "motivated by dissatisfaction in living under a democracy," the following colloquy took place:

> "A. No, not by that. Just a matter of having no jobs at that time. Everybody around me had the idea that we had to fight for something to eat and clothes and shelter. We were not thinking then—anyways the fellows around me, of overthrowing anything. We wanted something to eat and something to crawl into.
>
> "Q. You say 'fight for something to eat and crawl into.' What do you mean by that term?
>
> "A. We had to go and ask those who had it—that was the courthouse at that time. We petitioned city, state and national government. We did and we succeeded. We finally got unemployment laws and a certain budget. Even at the few communist meetings I attended, nothing was ever said about over-

throwing anything. All they talked about was fighting for the daily needs. That is why we never thought much of joining those parties in those days."

The other activity bearing on petitioner's membership in the Communist Party was discussed in the following colloquy:

"Q. Were you an active worker in the Communist Party?

"A. The only active work I did was running the bookstore for a while.

. . . . . .

"Q. What sort of bookstore was it?

"A. Oh, all kinds of literature—all kinds of writers in the whole world—Strachey, Marx, Lenin's writing and others. Socialism and all that stuff.

"Q. Did you own the bookstore?

"A. No. I didn't get a penny there.

"Q. What was the arrangement there?

"A. I was kind of a salesman in there, but the Communist Party ran it.

"Q. You secured this employment through your membership in the Communist Party?

"A. Yes.

"Q. Was this store an official outlet for communist literature?

"A. Yes."

Petitioner testified that he never advocated change of government by force or violence and he also gave his unilluminating understanding of, and beliefs about, the principles of communism. His account of the circumstances and motives that led him to join the Communist Party stood unchallenged and was evidently accepted at face value.

This testimony was all given during an examination of petitioner by the Immigration and Naturalization Service

in 1947. At the hearing below, in 1951, petitioner refused to answer whether he had ever been a member of the Communist Party on the ground that the answers might incriminate him. The hearing officer found, from the evidence in the record, that petitioner "was a member of the Communist Party of the United States in 1935." On appeal, to both the Assistant Commissioner, Adjudications Division of the Immigration and Naturalization Service, and subsequently the Board of Immigration Appeals, this finding was held supported by the record. Petitioner then sought a writ of habeas corpus from the District Court for the District of Minnesota. Both the District Court and, on appeal, the Court of Appeals for the Eighth Circuit held that the evidence produced at the hearing was sufficient to sustain the finding that petitioner was a "member" of the Communist Party. 228 F. 2d 109. As the case involves an application of *Galvan* v. *Press,* 347 U S. 522, we granted certiorari. 350 U. S. 993.

The authority for the order deporting petitioner derives from the Internal Security Act of 1950, as amended by the Act of March 28, 1951, 65 Stat. 28. As indicated, its evidentiary support rests entirely on petitioner's testimony before an immigration inspector in 1947. The transcript of that hearing was the foundation of the administrative proceedings that resulted in the order now under review. The adequacy of that testimony to sustain the order must be judged by the Internal Security Act of 1950, which was amended by § 1 of the Act of March 28, 1951, 65 Stat. 28, set forth in the margin.[2]

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[2] "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Attorney General is hereby authorized and directed to provide by regulations that the terms 'members of' and 'affiliated with' where used in the Act of October 16, 1918, as amended, shall include only membership or affiliation which is or was voluntary, and shall not include membership or affiliation which is or was solely (a) when under

As pointed out in *Galvan* v. *Press, supra,* at 527, the legislative history of this amendatory statute shows that the three specified qualifications are not to be applied as narrow exceptions but are to be considered as illustrative of the spirit in which the rigorous provisions regarding deportability of § 22 (2) are to be construed. There must be a substantial basis for finding that an alien committed himself to the Communist Party in consciousness that he was "joining an organization known as the Communist Party which operates as a distinct and active political organization . . . ." 347 U. S., at 528.

Bearing in mind the solidity of proof that is required for a judgment entailing the consequences of deportation, particularly in the case of an old man who has lived in this country for forty years, cf. *Ng Fung Ho* v. *White,* 259 U. S. 276, 284, we cannot say that the unchallenged account given by petitioner of his relations to the Communist Party establishes the kind of meaningful association required by the alleviating Amendment of 1951 as expounded by its sponsor, Senator McCarran, and his legislative collaborator, Senator Ferguson. (See 97 Cong. Rec. 2368 and 2387.) All that the Immigration authorities went on is what the petitioner himself said, for his truthfulness was not called into question. From his own testimony in 1947, which is all there is, the dominating impulse to his "affiliation" with the Communist Party may well have been wholly devoid of any "political" implications. To be sure, he was a "salesman" in a Communist book store, but he "didn't get a penny there."

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sixteen years of age, (b) by operation of law, or (c) for purposes of obtaining employment, food rations, or other essentials of living, and where necessary for such purposes." See 16 Fed. Reg. 2907. These three exclusions from the substantive provision were, so far as deportations are concerned, repealed by the Immigration and Nationality Act of 1952, 66 Stat. 163, 280; however, as the text of this opinion makes clear, we are not deciding this case on the basis of (c), *supra.*

Presumably he had to live on something and further inquiry might have elicited that he was getting the necessities of life for his work in the book store. Nor is there a hint in the record that this was not a bona fide book shop.

Accordingly, we are of the opinion that the record before us is all too insubstantial to support the order of deportation. The differences on the facts between *Galvan* v. *Press, supra,* and this case are too obvious to be detailed.

Judgment reversed.

MR. JUSTICE HARLAN, whom MR. JUSTICE BURTON, MR. JUSTICE CLARK and MR. JUSTICE WHITTAKER join, dissenting.

I regret my inability to join the Court's opinion, for its effort to find a way out from the rigors of a severe statute has alluring appeal. The difficulty is that in order to reach its result the Court has had to take impermissible liberties with the statute and the record upon which this case is based.

Section 22 of the Internal Security Act of 1950, under which these proceedings were brought, provides for the deportation of aliens who at the time of entry into the United States, or thereafter, were "members of or affiliated with . . . the Communist Party of the United States . . . ." [1] In this case there is no dispute that the petitioner was a dues-paying member of the Communist Party for about a year after he entered the United States. The Court, however, finds the record insufficient to establish that petitioner's membership was "the kind of meaningful association required by the alleviating Amendment of 1951," and suggests that "the dominating impulse to his 'affiliation' with the Communist Party may well have been wholly devoid of any 'political' implications."

[1] 64 Stat. 987, 1006, 1008.

This holding is derived from the Act of March 28, 1951, which amended the Internal Security Act by exempting from the broad sweep of the membership provision those persons who joined the Party "(a) when under sixteen years of age, (b) by operation of law, or (c) for purposes of obtaining employment, food rations, or other essentials of living, and where necessary for such purposes." [2] The Court does not rely here upon any of these exemptions as such, but rests its decision on its finding in *Galvan* v. *Press,* 347 U. S. 522, 527, that the legislative discussion of these exemptions indicates that the membership provision of the 1950 Act should be read benignly.

The Court's holding as to the insufficiency of this record may be interpreted in one of two ways, either (a) that petitioner was not shown to have joined the Communist Party conscious of its character as a political organization, or (b) that if he did so join, his membership was nonetheless excusable under the 1950 Act because it was predominantly motivated by economic necessity.

Under either view of the Court's opinion I think that the setting aside of this deportation order cannot be reconciled with the holding in *Galvan* v. *Press, supra.* There the Court, in rejecting the contention that the statute should be interpreted as not reaching persons who joined or remained members of the Communist Party without knowledge of its tenets of force and violence,[3] said, p. 528: "It is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will." I need not retrace the reasoning which

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[2] 65 Stat. 28.

[3] "It must be concluded, therefore, that support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation." 347 U. S., at 528.

inescapably led the Court to that decision,[4] save to note one point not alluded to in the *Galvan* opinion, namely, that the ameliorating amendment of the 1951 Act, on whose "spirit" the Court here relies, was motivated solely by the problems of aliens who were being *excluded* from entry into the United States because they had joined totalitarian organizations in *foreign countries*.[5]

[4] The result reached in *Galvan* was thoroughly consistent both with the judicial and administrative decisions interpreting the predecessors of the 1950 Act, and with the purpose of that Act to "strengthen" the provisions of the law relating "to the exclusion and deportation . . . of subversive aliens." See H. R. Rep. No. 3112, 81st Cong., 2d Sess., p. 54. Compare the exhaustive treatment in *Latva* v. *Nicolls,* 106 F. Supp. 658, where Judge Wyzanski reached the same conclusion as to the meaning of the 1950 Act.

[5] This conclusion is compelled by the legislative history. The House of Representatives Report on the bill embodying the amendment stated:

"The attention of the Committees on the Judiciary of both Houses has been directed to the increasing number of cases in which nonimmigrant and immigrant *visas* have been withheld or *admission* into this country denied to aliens on the basis of regulations issued pursuant to the act of October 16, 1918, as amended. The majority of the cases brought to the attention of the committees involve spouses of servicemen, close relatives of American citizens, permanent residents previously admitted into the United States and returning from abroad to their unrelinquished domiciles with appropriate documentation, such as reentry permits, etc.

"The reason most frequently given for the denial of *visas* or the denial of *admission* appears to be the applicant's past membership of [*sic*], or affiliation with, certain totalitarian youth, national labor, or professional student, or similar organizations, or the alien's service in the German or Italian Armies, or his involuntary membership in totalitarian parties or their affiliates and auxiliaries, including those cases where it was shown that such membership or affiliation occurred by operation of law or edict, or for purposes of obtaining or preserving employment, food rations, or other essentials of living.

. . . . . .

"The bill makes clear the intent of Congress that aliens who are, or were, voluntary members of . . . totalitarian parties or organizations are to be *excluded*, but aliens who were involuntary mem-

Under the first possible view of the Court's opinion it is plain that the petitioner is deportable, for in my judgment the record leaves no room for the conclusion that he was

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bers . . . are not to be considered ipso facto as members of, or affiliated with, the . . . organizations within the meaning of the act of October 16, 1918, as amended." H. R. Rep. No. 118, 82d Cong., 1st Sess., pp. 1–2. (Italics added.)

The debates on the floor of both Houses of Congress provide additional evidence on this score. In the Senate, where the major discussion took place, every specific reference to the scope of the proposed amendment discloses that its purpose was to assist individuals who were being denied *admission* into the United States because of their prior membership in totalitarian organizations in their homeland. For example, Senator Smith inquired at one point: "Would the pending bill exclude, for instance, a Ukrainian who lived in the Soviet Union and who was forced to belong to a Kulak farm cooperative in order to obtain work? Would such a man be excluded?" 97 Cong. Rec. 2369. And Senator McCarran, the chief author of the amendment, described its three subsections in revealing detail. With respect to each he emphasized that many "spouses of members of the United States Armed Forces" were included. The first class, he said, consisted of persons "who during infancy where [*sic*] members of the Hitler Youth, Fascist Youth, and similar organizations where the child's education and welfare were made dependent upon membership . . . ." The second class embraced "aliens who unwittingly, and without their knowledge or consent, were impressed into the various labor fronts and professional unions and organizations; aliens who served in the German and Italian Armies; and aliens who . . . by law or decree became members of or affiliated with subsidiary totalitarian organizations." And the third class, as described by Senator McCarran, consisted of "aliens who were forced to become members of totalitarian organizations in order to obtain food ration cards, housing, employment, and other essentials of living." 97 Cong. Rec. 2370–2371.

The inference that Congress intended to aid only persons being denied admission to the United States rather than persons subject to deportation for membership which took place in this country is substantially reinforced by the fact that when the Immigration and Nationality Act of 1952 repealed the ameliorating amendment, 66 Stat. 163, 280, its substance was re-enacted as far as exclusions were concerned, 66 Stat. 186, but *not* with respect to deportation.

unaware that the Communist Party was "a distinct and active political organization." The petitioner has freely admitted that he was a member of the Party for about a year; that he paid Party dues; that he attended Party meetings; and that he worked, without pay, in the Party bookstore, which he recognized as "an official outlet for communist literature." Beyond this, petitioner's testimony betrayed considerable, albeit rudimentary, knowledge of Communist history and philosophy. To be sure, he disclaimed belief in the forcible overthrow of government, but that, as *Galvan* holds, is immaterial under this statute.

Perhaps it should be added that I do not understand the Court to suggest that, although petitioner joined the Communist Party aware that it was a political organization, his activities in the Party were too slight to constitute him a "member" within the meaning of the 1950 Act. The Court's reaffirmation of the *Galvan* definition of membership would seem to preclude such an interpretation of the opinion. Moreover, that interpretation would do violence to the sweeping and unequivocal language of the Act itself.

The Court says that the "differences on the facts between *Galvan* v. *Press* . . . and this case are too obvious to be detailed." But, in respect to the crucial question whether conscious membership in the Communist Party as a political organization was sufficiently shown, I submit that this record is at least as strong as that in *Galvan*. A "detailing" of the record before us will demonstrate this, and I have therefore liberally quoted from it in the Appendix to this opinion, *post*, p. 127.

The second possible ground of the Court's decision is equally foreclosed by *Galvan*. For if the record shows, as I believe it plainly does, that the petitioner joined the Communist Party of the United States of his own free will, and knowing it to be "a distinct and active political

organization," the 1950 Act makes his economic motives for joining just as irrelevant as the absence of proof that he did not believe in the violent overthrow of government.

The Court's action in this case calls to mind what Mr. Justice Cardozo said in *Anderson* v. *Wilson,* 289 U. S. 20, 27: "We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take the statute as we find it." Again, with specific reference to the statute here involved, this Court said in *Galvan,* p. 528: "A fair reading of the legislation requires that this scope [see *ante,* p. 122] be given to what Congress enacted in 1950, however severe the consequences and whatever view one may have of the wisdom of the means which Congress employed to meet its desired end." I fear that the Court has departed from those wise precepts in this instance.

My view of this case would require us to deal with petitioner's contention that the statute, as applied to him, is unconstitutional. Since the Court does not reach that question, no extended discussion of it seems appropriate in a dissenting opinion. It is enough to say that I regard petitioner's constitutional argument foreclosed by *Galvan* v. *Press, supra, Harisiades* v. *Shaughnessy,* 342 U. S. 580, and by the considerations and long line of authorities to which those cases refer. Whatever may be the scope of the limitations of the Fifth Amendment upon the deportation power (see *Galvan,* at pp. 530–531)—a question as to which I reserve the right to speak when occasion arises—I think that there is no constitutional bar to the statute as applied in this case.

For the foregoing reasons I would affirm the judgment below.

115 Appendix to Opinion of HARLAN, J., dissenting.

APPENDIX TO OPINION OF MR. JUSTICE HARLAN, DISSENTING.

EXCERPTS FROM THE RECORD.

After being warned of his rights, petitioner went on to say:

> "I told you just now. I don't want to give testimony whatsoever on that Communist stuff again. That is finished for me as far as I am concerned. I am telling you that I have been working here 32 years—since 1914, and you can ask me what kind of work you are doing, how much wages you are getting, does your boss like you, but I don't want to be asked anything else about politics because I am not interested. I am too old to be interested. I am not interested whether the Republicans get in office, or the Democrats, or the Communists, or the Socialists. I do not want anything else to be asked because I don't want to be in this country. I am just in this country for the people's benefit. I am working and paying taxes all the time for them. Why should I go through this and get trapped through your questioning? I do not want to be asked anything about politics. It is 10 years ago now. I don't care what they have in their minds. I don't want to answer any trapping questions. If they don't want me in this country, they can take me and ship me any time."

Thereafter the following occurred, omitting certain portions of the record of no significance here and the testimony already quoted by the Court that related to petitioner's disclaimer of belief in the forcible overthrow of government:

> "Q. Are you a member of any organizations or societies of any kind at the present time?

"A. Yes, I belong to the A. F. L. Local No. 665, Miscellaneous Hotel & Restaurant Workers.

"Q. To what organizations have you belonged in the past?

"A. In the past, the Workers' Alliance, the Communist Party.

"Q. When did you join the Workers' Alliance?

"A. In the spring or summer of 1935, I joined both the Workers' Alliance and the Communist Party.

"Q. Where did you join these organizations?

"A. In Minneapolis.

"Q. Did you hold any office in either of these organizations?

"A. Not in the Communist Party but in the Workers' Alliance, I was on the Executive Board, and once in a while I was secretary for some local.

"Q. What—the purpose of your joining the Communist Party at that time?

"A. We had no books then, just paid dues, and somebody collected.

"Q. Did you carry a party dues book at that time?

"A. No, but in the Workers' Alliance we had dues books.

"Q. Did you carry a Communist Party card at that time?

"A. I don't think we had cards at all.

"Q. For how long were you a member of the Communist Party?

"A. From then on until I got arrested and that was at the end of 1935. When I was arrested, I finished the Communist Party membership, but I stayed in the Workers' Alliance.

. . . . .

"Q. What were your political beliefs at the time you joined the Communist Party?

115 Appendix to Opinion of HARLAN, J., dissenting.

"A. My political beliefs were always somewhat for the benefit of most of the people—always for the benefit to help most of the people.

"Q. Apparently you were a member of the Communist Party for approximately one year. Is that correct?

"A. Yes, probably something like that.

. . . . . .

"Q. What is your opinion of a revolution, such as occurred in Russia when the Communists obtained power?

"A. What is my opinion of the Russian revolution—that is about it. As much as I know about it, the Russian revolution, in my opinion, is this. It seemed that at the end of the war of 1914, the Russian middle-class especially and the Russian soldiers were sick and tired of being double-crossed and betrayed by their generals and what not (they went in with the Germans). Russian soldiers spilled their blood running against the Germans without ammunition, and there was chaos in the country. I said middle-class—that they organized and succeeded in overthrowing that particular leadership which was headed by the Czar. But this is my opinion. This was under the leadership of Kerensky. Seemingly, Lenin and his followers which represented more the lower peasant and factory workers, were not satisfied with this set-up, and kept on working for another revolution which finally overthrew the whole upper class in the fall of 1918, and so divorced themselves for the first time in world's history, economically and politically, from the rest of the world. That is the way I see it. That is my opinion on that.

. . . . . .

"Q. Do you feel that your beliefs in government have changed during the past ten years, that is, since

you terminated membership in the Communist Party?

"A. Yes, it has changed to that extent—that I began thinking for myself instead of following somebody else telling me things. I found that nothing can be broken over a knee, and that any government that exists today has a right to exist as it is—by the power of the majority of a nation's people. Nobody in the world can say there are no changes. We must always consider changes. They can be made when the people see that it is the right time for it, and at that time they will have their representatives which will take care of it. I am absolutely against sudden dictatorship and overthrow of government.

. . . . . .

"Q. What is your opinion as to whether communism was the cause or outgrowth of the Russian revolution?

"A. Communism did not start the revolution. The middle-class started the revolution. Lenin got hold of it. Communism was the result of the revolution.

"Q. Were you an organizer for the Communist Party?

"A. No.

"Q. What is your personal belief as to the principles of communism?

"A. What is communism? That is a good question. My belief is a different thing than communism is. According to Marx and Lenin and as I have seen the Communists working, since I knew of them, they are aiming, more or less, with forever methods to set up an economic system to get the people out of a monopoly control on to their own economic feet. That is the way I see them working now."

YOUNGDAHL ET AL. *v.* RAINFAIR, INC.

CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

No. 11. Argued October 15, 1957.—Decided December 9, 1957.

Respondent, a manufacturer engaged in interstate commerce and whose employees were entitled to the protection of the National Labor Relations Act, operated a branch plant in an essentially rural community of about 4,000 inhabitants. The plant had about 100 employees, none of whom were members of a labor union but many of whom had signed applications to join a union. Apparently in an effort to compel respondent to recognize the union as the bargaining agent of the employees, some of the employees struck and picketed the plant. The picketing was accompanied by massed name-calling, threats, and other conduct calculated to intimidate the officers, agents and nonstriking employees of the plant. A state court enjoined not only the threatening, intimidating or coercing of employees of the plant but also all "picketing or patrolling" of the plant premises. *Held:*

1. The evidence supports the conclusion of the trial court, affirmed by the State Supreme Court, that the conduct and massed name-calling by petitioners were calculated to provoke violence and were likely to do so unless promptly restrained; and such conduct and abusive language in such circumstances can be enjoined. Pp. 138–139.

2. However, the trial court unlawfully entered the pre-empted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing. P. 139.

3. Insofar as the injunction prohibits petitioners and others cooperating with them from threatening violence, or provoking violence on the part of any of the officers, agents or employees of respondent, and prohibits them from obstructing or attempting to obstruct the free use of the streets adjacent to respondent's place of business, and the free ingress and egress to and from the property, it is affirmed. P. 139.

4. To the extent that the injunction prohibits all other picketing and patrolling of respondent's premises and in particular prohibits peaceful picketing, it is set aside. Pp. 139–140.

226 Ark. 80, 288 S. W. 2d 589, affirmed in part, reversed in part; judgment vacated and cause remanded.

William J. Isaacson argued the cause for petitioners. With him on the brief were *Sidney S. McMath, Leland F. Leatherman* and *Henry Woods.*

J. L. Shaver, Sr. argued the cause and filed a brief for respondent.

MR. JUSTICE BURTON delivered the opinion of the Court.

The issues here are whether, under the circumstances of this case, a state court may enjoin strikers and union representatives from (1) "threatening, intimidating or coercing any of the officers, agents or employees of [the employer] at any place," and also "from obstructing, or attempting to obstruct the free use of the streets adjacent to [the employer's] place of business, and the free ingress and egress to and from [the employer's] property," and (2) all "picketing or patrolling" of the employer's premises. For reasons hereafter stated, we conclude that the state court may lawfully enjoin conduct of substantially the first category but not of the second.

Most of the material facts are uncontroverted. In 1955, respondent, Rainfair, Inc., was a Wisconsin corporation with headquarters in Racine, Wisconsin. It owned and operated a plant in Wynne, Arkansas, an essentially rural community of about 4,000 inhabitants. About 100 women and seven men were there employed in the manufacture of men's slacks which were shipped in interstate commerce. None of the employees were members of a labor union but many had signed applications to join the Amalgamated Clothing Workers of America, CIO, which is one of the petitioners.

Apparently in an effort to compel the employer to recognize the union as the bargaining agent of the employees, 29 of the employees did not report for work on May 2, 1955. A picket line was established on the street in front of the plant. Strike headquarters were

maintained across the street from the plant entrance. Nearly all of the strikers were women. Their number varied from eight to 37. All was not quiet, however. On one occasion nails were strewn over the company's parking lot and, about a week later, the whole lot was "seeded" with roofing tacks. Tacks were also scattered in the driveway of the plant manager's home and on the driveways of 12 of the nonstriking women employees. One of the pickets told the plant manager that she would "wipe the sidewalk" with him and send him back to Wisconsin because he "was nothing but trash." The plant manager was followed by the strikers each time he left the plant; he also was harassed at night by occasional shouting at his home and by numerous anonymous telephone calls.

Immediately after the strike was called, respondent, by registered mail, informed each of the strikers that, if they did not return to work within a few days, the company would assume that those not returning had quit their jobs. Only three returned. Thirteen new employees were hired. The strike ended on May 19, the pickets were withdrawn and the strikers applied for reinstatement. Respondent, however, declined to arrange for immediate reinstatement. On June 17, the strikers voted to re-establish the picket line on Monday, June 20.[1] The purpose was to protest against respondent's failure to recognize the union and its refusal to reinstate the employees who had applied for reinstatement in May.

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[1] In the meantime the union had filed unfair labor practice charges against respondent before the National Labor Relations Board. These were still pending at the time of the hearing of the instant case. The union also requested the Board to conduct a representation election, but this request was withdrawn before the hearing on the injunction. At an election held on October 19, a majority of the employees of respondent voted not to be represented by the union.

Shortly after midnight, on the morning of June 20, two women strikers deliberately drove a sharp instrument into two tires of a car owned by the daughter of one of the nonstriking women employees.[2] At about 5:15 a. m. the police were summoned to the plant where they found a five-foot black snake inside the plant beneath a broken window. At about 6 a. m. picketing was resumed.[3] Although the union posted notices warning the strikers against committing acts of violence, a union representative later was sufficiently concerned to ask the police to have someone regularly on duty at the entrance to the plant. The evidence shows that the tension was in large part caused by the enormous amount of abusive language hurled by the strikers at the company employees. The Supreme Court of Arkansas later summarized this as follows:

> "As the employees would go to and from work at the plant, or go to lunch, or take a recess, the strikers would congregate along the west edge of their lot and sometimes in Rowena Street and engage in loud and offensive name calling, singing or shouting directed at the workers. They would call the workers 'scabs,' 'dirty scabs,' 'fat scabs,' 'yellow scabs,' 'crazy scabs,' 'cotton patch scabs,' 'pony tailed scabs,' 'fuzzy headed scabs,' 'fools,' 'cotton picking fools,' and other similar names. This took place every time an employee left or entered the plant. It was done by the strikers individually, in couples or by the entire group and in a loud and boisterous manner. One witness described it as 'just bedlam' when more than a dozen joined in the shouting. Particular

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[2] They later were convicted of this misdemeanor.

[3] The placards were inscribed, "Rainfair Workers on Strike, Rainfair is unfair to its employees, Amalgamated Clothing Workers of America, CIO."

names or remarks were reserved for individual workers. One pregnant worker was greeted with, 'Get the hot water ready,' or, 'I am coming to make another payment on the baby, call Dr. Beaton,' or, 'Why, you can work another hour until you go to the delivery room.' This worker and another drove to a filling station for gasoline when two of the strikers drove up and told the attendant not to wait on 'these scabs' before he waited on the strikers.

"One worker said the strikers always called her 'fat scab,' and that individual pickets and strikers made fun of her clothing and asked her if 'Pete,' the plant manager, still liked her 'low-cut dresses and earrings.' This made the employee so angry she invited the picket to come over and 'make it some of her business.' . . .

"The strikers sang songs with improvised lyrics to the tune of certain popular ballads and religious and Union songs. 'When The Saints Go Marching In' became 'When The Scabs Go Marching In' and the ballad, 'Davy Crockett,' began, 'Born in a cotton patch in Arkansas, the greenest gals we ever saw . . . .'

"The women pickets would stand in the street or sit near the plant and shout ugly names, stick out their tongues, hold their noses and make a variety of indecent gestures while pointing at the workers in the plant. Several workers testified the continuous name calling and boisterous conduct of the strikers made them afraid, angry, ill or nervous and had an adverse effect on their ability to properly do their work. Some of the workers would talk back to the strikers while others remained silent. The Chief of Police of Wynne testified there was more tension during the second picketing than the first and that he was fearful there was going to be trouble

> during the second picketing and so informed Union staff members. One staff member called him once when trouble seemed imminent and wanted to 'go on record' as having requested the presence of the officer." 226 Ark. 80, 83–84, 288 S. W. 2d 589, 591.

On June 24, respondent filed a complaint in the local Chancery Court. It described the conduct of the strikers and alleged that such conduct amounted to "unlawful acts . . . for the unlawful purpose of intimidating and coercing" respondent's employees into joining the union, that respondent had no adequate remedy at law and that it was suffering irreparable damage from such conduct. The court acted upon the complaint and the testimony of the plant manager and issued a temporary injunction. After full hearing, it made the injunction permanent on September 15. The trial court's findings included the following statement:

> "That the defendants, in picketing the plaintiff's plant, have resorted to violence, coercion and intimidation, and such other unlawful conduct as was calculated to cause a breach of the peace, and that the defendants have unlawfully abused the right to peaceably picket, as granted to them by the laws of this state and the Federal Constitution, and that said defendants should be permanently enjoined from picketing the plaintiff's plant."

The permanent decree enjoined not only the threatening and intimidation of the employees of respondent at any place, but also all picketing or patrolling of respondent's premises by the named defendants and all other persons in sympathy or acting in concert with them.[4] The

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[4] "It is, therefore, considered and decreed by this court that the defendants James E. Youngdahl . . . and each of them, and their agents and employees, and each and every one of the officers and

Supreme Court of Arkansas affirmed the decree. 226 Ark. 80, 288 S. W. 2d 589. We granted certiorari largely because of the sweeping language of the decree. 352 U. S. 822.

The applicable principles of law are substantially agreed upon. Respondent concedes that it is engaged in interstate commerce and that its employees are entitled to the protection of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. § 151. Respondent does not contend that the state court had power to enjoin peaceful organized activity, recognizing that generally the

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members of Amalgamated Clothing Workers of America, CIO, and all other persons in sympathy, or acting in concert with them, be, and they are hereby permanently enjoined while on, adjacent to, or near plaintiff's premises located on Martin Drive and Rowena Street, in Wynne, Arkansas, from interfering with plaintiff's business, its customers and employees, and from picketing or patrolling, or causing to be picketed or patrolled the plaintiff's premises, and the sidewalks, streets, or other property adjacent to plaintiff's premises, with placards or banners designating said place of business as unfair to organized labor, or with placards otherwise so worded as to give said place of business such designation; that the defendants, and each of them, their agents and employees, and the officers and members of the above-mentioned union, and all sympathizers, and all other persons acting in concert with them, be, and they are hereby restrained and enjoined from accosting and detaining, or causing to be accosted or to be detained on the sidewalks or streets adjacent to or on plaintiff's premises, any person or persons seeking to enter or depart from said place of business for the purpose of dissuading them from patronizing, or working for plaintiff, or from calling attention to any alleged unfairness of plaintiff, or its place of business, to organized labor; from threatening, intimidating or coercing any of the officers, agents or employees of plaintiff at any place; from loitering and congregating around and under the tent and upon the property that is used as the union's headquarters, located directly across Rowena Street in front of plaintiff's premises; and from obstructing, or attempting to obstruct the free use of the streets adjacent to plaintiff's place of business, and the free ingress and egress to and from plaintiff's property."

National Labor Relations Board has exclusive jurisdiction of such matters. *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468. Petitioners concede that the state court had the power to enjoin violence. *Auto Workers* v. *Wisconsin Board*, 351 U. S. 266; *Allen-Bradley Local* v. *Wisconsin Board*, 315 U. S. 740. Respondent contends that the record here shows a pattern of violence so enmeshed in the picketing that, to restore order, it was necessary to enjoin all organized conduct. Petitioners, on the other hand, urge that there was no violence here and no threat of it and, accordingly, that there was no factual warrant for the injunction which issued.

The issue here is whether or not the conduct and language of the strikers were likely to cause physical violence. Petitioners urge that all of this abusive language was protected and that they could not, therefore, be enjoined from using it. We cannot agree. Words can readily be so coupled with conduct as to provoke violence. See *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572. Petitioners contend that the words used, principally "scab" and variations thereon, are within a protected terminology. But if a sufficient number yell any word sufficiently loudly showing an intent to ridicule, insult or annoy, no matter how innocuous the dictionary definition of that word, the effect may cease to be persuasion and become intimidation and incitement to violence.[5] Wynne is not an industrial metropolis. When, in a small community, more than 30 people get together and act as they did here, and heap abuse on their neighbors and

[5] In Arkansas there was then in effect a statute of long standing which expressly made it a crime for any person to "make use of any profane, violent, vulgar, abusive or insulting language toward or about any other person in his presence or hearing, which language in its common acceptation is calculated to arouse to anger the person about or to whom it is spoken or addressed, or to cause a breach of the peace or an assault . . . ." Ark. Stat., 1947, 41–1412.

former friends, a court is justified in finding that violence is imminent. Recognizing that the trial court was in a better position than we can be to assess the local situation, we think the evidence supports its conclusion, affirmed by the State Supreme Court, that the conduct and massed name-calling by petitioners were calculated to provoke violence and were likely to do so unless promptly restrained.

Though the state court was within its discretionary power in enjoining future acts of violence, intimidation and threats of violence by the strikers and the union, yet it is equally clear that such court entered the pre-empted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing by petitioners. The picketing proper, as contrasted with the activities around the headquarters, was peaceful. There was little, if any, conduct designed to exclude those who desired to return to work. Nor can we say that a pattern of violence was established which would inevitably reappear in the event picketing were later resumed. Cf. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287. What violence there was was scattered in time and much of it was unconnected with the picketing. There is nothing in the record to indicate that an injunction against such conduct would be ineffective if picketing were resumed.

Accordingly, insofar as the injunction before us prohibits petitioners and others cooperating with them from threatening violence against, or provoking violence on the part of, any of the officers, agents or employees of respondent and prohibits them from obstructing or attempting to obstruct the free use of the streets adjacent to respondent's place of business, and the free ingress and egress to and from that property, it is affirmed. On the other hand, to the extent the injunction prohibits all other picketing and patrolling of respondent's premises and in

particular prohibits peaceful picketing, it is set aside. The judgment of the Supreme Court of Arkansas is vacated and the case is remanded to it for further proceedings not inconsistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE DOUGLAS, being of opinion that Congress has given the National Labor Relations Board exclusive jurisdiction of this controversy, would reverse the judgment in its entirety and remand the cause to the state court for dismissal of the injunction.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL. *v.* UNITED STATES ET AL.

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

No. 6. Argued October 23, 1957.—Decided December 9, 1957.*

1. In this proceeding under § 207 (a) of the Interstate Commerce Act, wherein a motor carrier subsidiary of a railroad sought a certificate permitting it to provide ordinary motor carrier service at or near the parent railroad's line, the Interstate Commerce Commission was not required by § 5 (2) (b) and the National Transportation Policy to restrict such motor carrier service to that which is auxiliary to, or supplemental of, the parent railroad's services. Pp. 143–144, 147–152.

(a) Section 207 makes no reference to the phrase "service . . . in its operations" used in § 5 (2) (b), nor is there any language even suggesting a mandatory limitation to service which is auxiliary or supplementary. P. 149.

(b) The legislative history of the Motor Carrier Act of 1935 gives no indication that § 213 (a) (1), the predecessor of § 5 (2) (b) of the present Act, was to be considered as a limitation on applications under § 207. P. 149.

(c) In interpreting § 207, the Commission has accepted the policy of § 5 (2) (b) as a guiding light, not as a rigid limitation. Pp. 149–150.

(d) Congress did not intend the rigid requirement of § 5 (2) (b) to be considered as a limitation on certificates issued under § 207. P. 150.

(e) This holding is not contrary to *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419, or *United States* v. *Texas & Pacific Motor Transport Co.*, 340 U. S. 450. P. 151.

(f) The underlying policy of § 5 (2) (b) must not be divorced from proceedings for new certificates under § 207, and the Commission must take "cognizance" of the National Transportation Policy and apply the Act "as a whole"; but the Commission does

*Together with No. 8, *Railway Labor Executives' Association et al.* v. *United States et al.*, also on appeal from the same court.

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not act beyond its statutory authority when in the public interest it occasionally departs from the auxiliary and supplementary limitations in a § 207 proceeding. Pp. 151–152.

2. In this case, the Commission has not permitted the § 207 proceedings to be used as a device to evade the restrictions previously imposed in the acquisition proceedings under § 5 (2) (b). P. 152.

3. In this case, the evidence was sufficient to support the Commission's finding of public convenience and necessity and its issuance of the certificate. Pp. 152–154.

(a) Public need for the motor carrier's operation in truckload traffic in this case can be grounded to some extent on the need for its operation in "peddle traffic," since economic justification for carrying on a costly peddle operation depends on combining it with a more lucrative truckload operation. Pp. 153–154.

(b) While railroads are not allowed to enter the motor trucking industry primarily to build an independently profitable trucking operation, there is no foundation in the Act for so construing § 207 as to require that any railroad operation in the motor trucking field be unprofitable. P. 154.

(c) If the unrestricted operations permitted in this case are destructive of competition or otherwise detrimental to the public service, the situation would not be without remedy, since the Commission has reserved continuing jurisdiction which will enable it to make certain that the unlimited certificate issued here does not operate to defeat the National Transportation Policy. P. 154.

4. In this case, railway labor organizations representing employees of the parent railroad had standing under §§ 17 (11) and 205 (h) of the Act to sue to set aside the Commission's order. P. 144.

144 F. Supp. 365, affirmed.

Peter T. Beardsley argued the cause for appellants in No. 6. On the brief were *Mr. Beardsley* for the American Trucking Associations, Inc., *Roland Rice* and *Albert B. Rosenbaum* for the Regular Common Carrier Conference of A. T. A., and *Stephen Robinson* and *Rex H. Fowler* for certain Motor Carriers.

Edward J. Hickey, Jr. argued the cause for appellants in No. 8. With him on the brief were *Clarence M. Mulholland* and *James L. Highsaw, Jr.*

Robert W. Ginnane argued the cause and filed a brief for the Interstate Commerce Commission, appellee in Nos. 6 and 8.

Alden B. Howland argued the cause for the Rock Island Motor Transit Co., appellee. With him on the brief were *Arthur L. Winn, Jr.* and *John H. Martin.*

Paul Ahlers filed a brief for the Iowa State Commerce Commission, appellee in Nos. 6 and 8.

D. C. Nolan filed a brief for Traffic Bureaus et al., appellees.

John S. Burchmore and *Robert N. Burchmore* filed a brief for the National Industrial Traffic League, as *amicus curiae,* in No. 6.

MR. JUSTICE CLARK delivered the opinion of the Court.

These appeals involve, among subsidiary issues, the basic question of whether the Interstate Commerce Commission in a proceeding under § 207 (a)[1] of the Interstate Commerce Act, wherein a railroad subsidiary seeks a certificate permitting it to provide ordinary motor carrier service at or near the parent railroad's line, is required by § 5 (2)(b)[2] of the Act and the National Transportation

[1] "SEC. 207. (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied . . . ." 49 Stat. 551, 49 U. S. C. § 307 (a).

[2] SEC. 5 (2)(b) ". . . If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it

Policy to restrict such motor carrier service to that which is auxiliary to, or supplemental of, the parent railroad's services. A three-judge District Court sitting in the District of Columbia upheld the action of the Commission in issuing a certificate without such restrictions. 144 F. Supp. 365. We agree with the conclusion of the District Court that under the circumstances of this case the action of the Commission was well founded.

At the time we noted probable jurisdiction of the appeals, 352 U. S. 816 (1956), counsel in No. 8 were invited to discuss the issue of appellants' standing to sue. None of the parties now question that standing, and our examination of § 17 (11)[3] and § 205 (h)[4] of the Act leads us to conclude that appellants may properly bring this action. See *Brotherhood of Railroad Trainmen* v. *Baltimore & O. R. Co.*, 331 U. S. 519 (1947).

In 1938 the Commission authorized Rock Island Motor Transit, a wholly owned subsidiary of the Chicago, Rock Island and Pacific Railroad, to purchase the property and operating rights of the White Line Motor Freight Company, between Silvis, Illinois, and Omaha, Nebraska. 5 M. C. C. 451. The operating certificate, issued in 1941, restricted Motor Transit to service to or from points on

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shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." 54 Stat. 906, 49 U. S. C. § 5 (2) (b).

[3] 54 Stat. 916, 49 U. S. C. § 17 (11).

[4] 49 Stat. 550, as amended, 54 Stat. 922, 49 U. S. C. § 305 (h).

the Rock Island Railroad, subject to any further restrictions the Commission might impose "to insure that the service shall be auxiliary or supplementary to the train service. . . ." No. MC–29130. Three years later the Commission allowed Motor Transit to purchase property and operating rights of the Frederickson Lines, covering routes between Atlantic, Iowa, and Omaha. 39 M. C. C. 824. Prior to issuing an operating certificate for the Frederickson routes, however, the Commission reopened both proceedings and imposed five conditions on Motor Transit's operation over the combined routes.[5]

Although Motor Transit succeeded in its efforts to have this order set aside by a three-judge District Court, 90 F. Supp. 516, we upheld on appeal the power of the Commission to impose the conditions, and reversed the order of the District Court. *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419 (1951). Pursuant to

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[5] "1. The service to be performed by The Rock Island Transit Company shall be limited to service which is auxiliary to, or supplemental of, train service of The Chicago, Rock Island and Pacific Railway Company, hereinafter called the Railway.

"2. The Rock Island Motor Transit Company shall not render any service to, or from or interchange traffic at any point not a station on a rail line of the Railway.

"3. No shipments shall be transported by The Rock Island Motor Transit Company between any of the following points, or through, or to, or from, more than one of said points: Omaha, Nebr., Des Moines, Iowa, and collectively Davenport and Bettendorf and Rock Island, Moline, and East Moline, Ill.

"4. All contractual arrangements between the Rock Island Motor Transit Company and the Railway shall be reported to use [*sic*] and shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties.

"5. Such further specific conditions as we, in the future, may find it necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, train service." 40 M. C. C. 457, 477.

our holding, a certificate was issued in September 1951, containing the restrictions as originally ordered.[6]

Soon thereafter Motor Transit filed with the Commission the present application for a certification of unrestricted operations. Authority was requested to serve the points along the White Line and Frederickson routes as well as certain off-line points, all of which parallel generally the lines of the parent railroad between Chicago and Omaha. The application was substantially granted in November 1954.[7] 63 M. C. C. 91. Operations were authorized, free of the prior conditions, between Silvis, Illinois, and Omaha. The application was denied insofar as it sought authority between Silvis and Chicago; the Commission pointed out that Motor Transit already possessed such authority.

The order was attacked in the District Court by American Trucking Associations, Inc., its Regular Common Carrier Conference, and nine motor carriers—all appellants in No. 6. The Railway Labor Executives' Asso-

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[6] Prior to this date, temporary operating authority was granted Motor Transit over the White Line and Frederickson routes with three restrictions:

1. No service to be performed for shipments originating at Chicago, Ill., or Omaha, Nebr., and destined to either of said points.

2. No shipment to be transported between any of the following points or through, or to, or from more than one of said points: Omaha, and collectively Davenport and Bettendorf, Iowa, Rock Island, Moline and East Moline, Ill.

3. No single shipment to be handled on motor carrier billing weighing more than 2,000 pounds.

[7] Two conditions were imposed: "(1) that there may be attached from time to time to the privileges granted herein such reasonable terms, conditions, and limitations as the public convenience and necessity may require, and (2) that all contractual arrangements between [Motor Transit] and [Rock Island] shall be reported to us and shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties . . . ." 63 M. C. C., at 109.

ciation and two organizations which since have become members thereof—all of whom are appellants in No. 8—intervened in opposition to the order. Answers were filed by the United States and the Commission. Intervenors in support of the order included Motor Transit, a committee of its employees, the Iowa State Commerce Commission, and numerous Chambers of Commerce and shipper organizations. These appeals were taken from the order of the District Court upholding the certificate as granted.

Appellants advance three reasons why the order should be stricken. They say, in general, that the Commission is required not only in acquisition proceedings under § 5 (2)(b) but also in certification proceedings under § 207 to limit service by a rail-owned motor carrier to that which is auxiliary to or supplemental of the rail service of its parent; that the Commission is without power to void restrictions previously imposed in acquisition proceedings on the subterfuge of a subsequent § 207 application; and, even if such contentions have no validity, that the evidence was insufficient and the findings inadequate to support the certification order of the Commission.

I.

By § 5 (2)(b), which was formerly § 213 (a)(1) of the Motor Carrier Act of 1935, 49 Stat. 555, the Congress authorized consolidation, merger, acquisition, or lease of carriers if found by the Commission to be "consistent with the public interest." However, in transactions involving a motor carrier where a railroad or its affiliate is an applicant, the Congress directed the Commission "not [to] enter such an order unless it finds that the transaction proposed" not only is in the public interest but "will enable such [railroad] carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." The Commission has

interpreted this mandate of the Congress to confine acquisition of a motor carrier by a railroad or its affiliate to "operations . . . which are auxiliary or supplementary to train service." [8] We specifically approved this long administrative practice in *United States* v. *Rock Island Motor Transit Co., supra.* It will be remembered that the acquisitions of the White Line and Frederickson routes by Motor Transit, wherein "auxiliary or supplemental" restrictions were imposed, were pursuant to this section of the Act.

The present proceedings, however, were instituted under § 206 *et seq.* of the Act, which involve applications for certificates of public convenience and necessity. Motor Transit had been carrying on scheduled peddle operations over the entire White Line and Frederickson routes regardless of the volume of traffic available. By this application it sought to secure a certificate covering the same general routes without the restrictions imposed in the § 5 (2)(b) proceedings. Such a certificate would enable it to haul, *inter alia,* the more profitable truckload traffic, thus supplementing the expensive peddle service.[9]

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[8] *Pa. Truck Lines—Control—Barker,* 1 M. C. C. 101, supplemented, 5 M. C. C. 9, 11; see, *e. g., Gulf Transport Co.—Purchase—Crane,* 35 M. C. C. 699; *Pacific Motor Trucking Co.—Purchase—Keithly,* 15 M. C. C. 427; *Texas & P. Motor Transport Co.—Purchase—Southern Transp. Co.,* 5 M. C. C. 653.

[9] In contrast to "truckload traffic," which refers to starting with a full load and delivering at one destination, the term "peddle traffic" refers to starting with a full load and delivering at various destination points, or the converse, picking up parts of a load at various points and delivering at a single destination. Because Motor Transit is exclusively licensed over the routes in question by the Iowa State Commerce Commission, all intrastate traffic will go to Motor Transit regardless of the outcome of the present proceeding. In addition, all rail-billed traffic will go to Motor Transit as a matter of course. Therefore, only two kinds of traffic are actually involved in this case, interstate truckload and interstate peddle traffic proceeding on a motor bill of lading.

Section 207, which defines the showing on which issuance of a certificate of public convenience and necessity is predicated, makes no reference to the phrase "service . . . in its operations" used in § 5 (2)(b), nor is there any language even suggesting a mandatory limitation to service which is auxiliary or supplementary.

The legislative history of the Motor Carrier Act of 1935 gives no indication that § 213 (a)(1), the predecessor of § 5 (2)(b), was to be considered a limitation on applications under § 207. Congressional debate was largely confined to the subject of acquisitions, and no reference to railroad operation of motor carriers appears in either of the Committee Reports. S. Rep. No. 482, H. R. Rep. No. 1645, 74th Cong., 1st Sess. Certain amendments were proposed in 1938, including one by Senator Shipstead which would have added to § 207 the same language which in § 213 (a) of the Motor Carrier Act and § 5 (2)(b) of the Interstate Commerce Act had been construed as a limitation to auxiliary or supplementary service. The Senator withdrew his amendment after Commissioner Eastman of the Interstate Commerce Commission expressed the view that "in interpreting and applying the provisions of section 207 (a) . . . the Commission should read the act as a whole and take cognizance of this policy" of restricting certificates to auxiliary or supplementary service. See Hearings before Senate Committee on Interstate Commerce on S. 3606, 75th Cong., 3d Sess., pp. 26–30, 141–142.

In interpreting § 207, the Commission has accepted the policy of § 5 (2)(b) as a guiding light, not as a rigid limitation. While it has applied auxiliary and supplementary restrictions in many § 207 proceedings, the Commission has occasionally issued certificates to railroad subsidiaries without the restrictions where "special circumstances" prevail, namely, where unrestricted operations by the rail-owned carrier are found on specific facts

and circumstances to be in the public interest.[10] At least three of these cases had been decided when the Congress extensively revised the Interstate Commerce Act by enactment of the Transportation Act of 1940, 54 Stat. 898, in which § 213 of the Motor Carrier Act was substantially re-enacted into § 5 (2)(b) of the Interstate Commerce Act, while § 207 (a) was left unchanged.

We conclude, therefore, that the Congress did not intend the rigid requirement of § 5 (2)(b) to be considered as a limitation on certificates issued under § 207.

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[10] For cases where restrictions have been applied in § 207 cases, see, *e. g., Kansas City S. Transport Co., Com. Car. Application,* 10 M. C. C. 221, 28 M. C. C. 5; *Chicago, M., St. P. & P. R. Co. Extension—Milwaukee Division,* 53 M. C. C. 341; *Frisco Transportation Co. Extension—Springfield Airport,* 47 M. C. C. 63; *Great Northern R. Co. Extension—Hobson—Lewistown,* 19 M. C. C. 745; *Texas & P. Motor Transport Co. Extension—Big Spring—Pecos, Tex.,* 14 M. C. C. 649.

For cases where certificates were issued under § 207 without restrictions, see, *e. g., Burlington Truck Lines Extension—Iowa,* 48 M. C. C. 516; *Rock Island Motor Transit Extension—Wellman, Iowa,* 31 M. C. C. 643; *Burlington Transportation Co. Extension—Council Bluffs—Weldon—Kansas City,* 28 M. C. C. 783; *Santa Fe Trail Stages, Inc., Com. Car. Application,* 21 M. C. C. 725; *Interstate Transit Lines Extension—Verdon, Neb.,* 10 M. C. C. 665; *St. Andrews Bay Transportation Co. Extension,* 3 M. C. C. 711.

In the instant case the Commission summarized its practice: "This policy [of imposing auxiliary and supplementary restrictions] was and is sound and should be relaxed only where the circumstances clearly establish (1) that the grant of authority has not resulted and probably will not result in the undue restraint of competition, and (2) that the public interest requires the proposed operation, which the authorized independent motor carriers have not furnished, except where it suited their convenience.

. . . . . .

"The findings hereinafter made . . . do not establish a precedent. Each case of this character must be determined upon the facts and circumstances disclosed by the evidence." 63 M. C. C. 91, 102, 108.

Nor is this contrary to our holding in *United States* v. *Rock Island Motor Transit Co., supra,* an acquisition case in which the Court also discussed Commission policy under § 207. We pointed out that "[r]ail affiliates have been permitted to leave the line of the railroad to serve communities without other transportation service. Those divergences, however, are an exercise of the discretionary and supervisory power with which Congress has endowed the Commission." 340 U. S., at 442. We found that the Commission's purpose was to apply the National Transportation Policy so as "to preserve the inherent advantages of motor-carrier service." In discussing this practice we quoted at page 428 from the opinion of the Commission in that case, which stated the test in this language:

> "In other words, a railroad applicant for authority to operate as a common carrier by motor vehicle, though required to do no more than prove, as any other applicant, that its service is required by public convenience and necessity, has a special burden . . . by reason of the very circumstance that it is a railroad. Where it fails to show special circumstances negativing any disadvantage to the public from this fact, a grant of authority to supply motor service other than service auxiliary to and supplemental of train service is not justified." 40 M. C. C. 457, 474.

In *United States* v. *Texas & Pacific Motor Transport Co.,* 340 U. S. 450 (1951), decided on the same day as *Rock Island,* we upheld the Commission's imposition of restrictions in a § 207 case. In *Texas & Pacific,* however, the proceeding involved the power of the Commission to impose the restrictions, a question not before us here.

We repeat, as was said in those cases, that the underlying policy of § 5 (2)(b) must not be divorced from proceedings for new certificates under § 207. Indeed, the

Commission must take "cognizance" of the National Transportation Policy and apply the Act "as a whole." But, for reasons we have stated, we do not believe that the Commission acts beyond its statutory authority when in the public interest it occasionally departs from the auxiliary and supplementary limitations in a § 207 proceeding.

II.

We find no indications that the Commission has permitted the § 207 proceedings in this case to be used as a device to evade § 5 (2)(b) restrictions. Certificate proceedings under § 207 are separate and distinct from acquisition proceedings, although the same general policy governs both. If the public interest requires that a § 207 certificate be issued to a rail-owned carrier without restriction, we find no authority for denying the Commission power to grant the same simply because the carrier just emerged from a § 5 (2)(b) proceeding. Moreover, the approval here was expressly subject to the Commission's continuing examination of the activity of Motor Transit with a view of placing limitations on its operations if found necessary in the public interest. A further condition makes all contractual arrangements between Motor Transit and its parent subject to revision by the Commission.

Finally, if under our interpretation a "loophole" exists in the Act, the Commission has shown no inclination to permit its use as such. Should the Commission prove to be less stringent in the future, appellants not only have recourse to the Congress, but also to the courts for review of the Commission's finding that "special circumstances" exist.

III.

Appellants' last contention relates to the sufficiency of the evidence to support the Commission's finding of

public convenience and necessity. Appellants concede that public need may be found for peddle traffic between the smaller points along the routes, but contest the findings of public need for unrestricted service between such major points as Davenport, Cedar Rapids, Des Moines, and Council Bluffs, Iowa, and Omaha, Nebraska.

The evidence before the Commission was such that we are not inclined to disturb the findings. Approval of the application was urged by the Iowa State Commerce Commission, 149 shippers and receivers, 8 motor carriers who interline traffic with Motor Transit (including some members of appellant Motor Trucking Association), and several Chambers of Commerce and commercial organizations. There was evidence of a serious need for less-than-truckload peddle service: other carriers frequently failed to handle such traffic, and gave service inferior to that of Motor Transit when they did operate. There was testimony that the weight and key-point limitations operated to make even the Motor Transit service less than adequate. It appeared that the peddle traffic alone was not profitable, and that if confined to it Motor Transit could no longer render the caliber of peddle service it had maintained prior to the imposition of the temporary restrictions. Further, there was evidence that 11 points would be totally without peddle service if the auxiliary and supplemental restrictions were applied. Apart from the effect of restricted operations on peddle service, the record indicates that other carriers sometimes had been reluctant to accept even truckloads in certain low-rated commodities.

This evidence leaves us unwilling to suggest that public convenience and necessity could only be advanced by confining Motor Transit to service of the smaller communities, while leaving the more profitable business to others. Public need for Motor Transit's operation in truckload traffic to some extent can be grounded on the

need for its operation in peddle traffic, since economic justification for carrying on a costly peddle operation depends on combining it with a more lucrative truckload operation. While it is true that railroads were not allowed to enter the motor trucking industry primarily to build an independently profitable trucking operation, there is no foundation in the Interstate Commerce Act for so construing § 207 as to require that any railroad operation in the motor trucking field be unprofitable. Observance of economic realities in ascertaining public need is no less due a rail-owned motor carrier than an independent motor carrier.

If, as appellants fear, the unrestricted operations are destructive of competition or otherwise detrimental to the public interest, we believe the situation would not be without remedy. The Commission has retained jurisdiction "to impose in the future whatever restrictions or conditions, if any, appear necessary in the public interest by reason of material changes in conditions or circumstances surrounding applicant's operations in relation to those of competing motor carriers." 63 M. C. C., at 108. This reservation gives it continuing jurisdiction to make certain that the unlimited certificate issued here does not operate to defeat the National Transportation Policy. *United States* v. *Rock Island Motor Transit Co., supra.*

Affirmed.

MR. JUSTICE DOUGLAS dissents.

MOORE *v.* MICHIGAN.

CERTIORARI TO THE SUPREME COURT OF MICHIGAN.

No. 42. Argued October 15–16, 1957.—Decided December 9, 1957.

In a Michigan State Court in 1938, petitioner, a Negro then 17 years old and with only a seventh-grade education, said that he did not desire counsel, pleaded guilty to murder and was sentenced to solitary confinement at hard labor for life without possibility of parole, the maximum sentence permitted under Michigan law. In 1950, he filed a delayed motion for new trial, as permitted by Michigan law, claiming that his conviction and sentence were invalid because he did not have the assistance of counsel at the time of his plea and sentence. This motion was denied by the trial court and the State Supreme Court affirmed. It appeared from the record that, at the time of his trial, petitioner had several possible defenses involving questions of considerable technical difficulty obviously beyond his capacity to understand and that his waiver of counsel and plea of guilty may have been induced by fear of mob violence resulting from statements made to him by the Sheriff. *Held:* On the record in this case, petitioner had sustained his ultimate burden of proving that his plea of guilty was invalidly accepted without benefit of counsel and that he did not validly waive his right to counsel; and the judgment is reversed and the cause remanded for further proceedings. Pp. 156–165.

(a) Petitioner's case falls within that class in which the intervention of counsel, unless intelligently waived, is an essential element of a fair hearing. P. 159.

(b) The circumstances compel the conclusion that petitioner's rights could not have been fairly protected without the assistance of counsel. Pp. 159–160.

(c) Where a person convicted in a state court has not intelligently and understandingly waived the benefit of counsel and where the circumstances show that his rights could not have been fairly protected without counsel, the Due Process Clause invalidates his conviction. Pp. 160–161.

(d) Where the right to counsel is of such critical importance as to be an element of Due Process under the Fourteenth Amendment, a finding of waiver is not lightly to be made. P. 161.

(e) In this case, petitioner had the burden of showing, by a preponderance of the evidence, that he did not intelligently and understandingly waive his right to counsel. Pp. 161–162.

(f) The fear of mob violence planted by the Sheriff in petitioner's mind raises an inference that his refusal of counsel was motivated by a desire to be removed from the local jail at the earliest possible moment; this is consistent with the trial judge's report of his interview with petitioner; and a rejection of federal constitutional rights motivated by fear cannot, in the circumstances of this case, constitute an intelligent waiver of counsel. Pp. 162–165.

344 Mich. 137, 73 N. W. 2d 274, reversed and cause remanded.

William H. Culver, acting under appointment by the Court, 352 U. S. 958, argued the cause and filed a brief for petitioner.

Samuel J. Torina, Solicitor General of Michigan, argued the cause for respondent. With him on the brief were *Thomas M. Kavanagh,* Attorney General, *Jacob A. Dalm, Jr.* and *J. Douglas Cook.*

Mr. Justice Brennan delivered the opinion of the Court.

On October 29, 1938, the Circuit Court of Kalamazoo County, Michigan, accepted the petitioner's plea of guilty to an information charging him with the murder of an elderly white lady. He was sentenced to solitary confinement at hard labor for life in Michigan's Jackson Prison, where he has since been confined.[1] Petitioner, a Negro with a seventh-grade education, was 17 years old at the time. On May 26, 1950, he filed a delayed motion for a new trial in the Circuit Court. He asserted constitutional invalidity in his conviction and sentence because he did not have the assistance of counsel at the time of his plea and sentence. The Circuit Court, after hearing, denied the motion, and the Supreme Court of

[1] Michigan long ago abolished capital punishment. The sentence is the maximum sentence for murder. Mich. Stat. Ann., Henderson 1938, § 28.548. See *Quicksall* v. *Michigan,* 339 U. S. 660, 664.

Michigan affirmed.[2] We granted certiorari to decide the important question raised involving a plea of guilty to a charge of murder where the accused was without the benefit of counsel.[3]

The petitioner was arrested during the afternoon of October 26, 1938, a few hours after the murder was committed. He was confined in a Kalamazoo jail and was questioned by local law authorities from time to time until the afternoon of October 28, when he orally confessed to the crime.[4] On Saturday morning, October 29, 1938, he was arraigned in the Circuit Court where he pleaded guilty, was adjudged guilty of murder in the first degree, and, after sentence, was transferred from the Kalamazoo jail to the Jackson Prison.

In accordance with the then prevailing procedure no stenographic transcript was taken of the proceedings in the Circuit Court at the time of the arraignment and plea. However, at the hearing held on the delayed motion for a new trial, two witnesses, who were present in the courtroom on October 29, 1938, testified as to what then transpired. On the basis of their testimony the Circuit Court in denying the motion for new trial found as a fact—which finding is, of course, accepted by us—that before the petitioner tendered the plea of guilty the trial judge asked the petitioner "whether he had a lawyer and

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[2] *People* v. *Moore,* 344 Mich. 137, 73 N. W. 2d 274. The majority opinion relied upon *Quicksall* v. *Michigan,* 339 U. S. 660; the dissenting opinion upon *De Meerleer* v. *Michigan,* 329 U. S. 663.

[3] 352 U. S. 907.

[4] Defendant was questioned on the night of his arrest until approximately 2 or 3 o'clock in the morning of the following day. On October 27, 1938, he was questioned from approximately 8 a. m. until 10 or 11 p. m. On October 28, 1938, he was questioned from approximately 8 a. m. until noon and again in the afternoon when he orally confessed. He was then taken before a municipal court justice where he waived examination and was bound over to Circuit Court for trial.

438765 O—58——16

whether he desired to have a lawyer, and that [the petitioner] gave a negative reply to both of these inquiries, and stated that he wanted to get the matter over with."

The record further discloses that at the arraignment the trial judge, acting in conformity with Michigan procedure, which required him to conduct an investigation into the voluntariness of any plea of guilty,[5] conferred privately with petitioner for "some five to ten minutes" in chambers. Upon the return of the judge and petitioner to the courtroom, the judge stated that the plea would be accepted and proceeded to conduct the hearing required by Michigan law[6] to determine the degree of the offense of murder. At this hearing several witnesses testified to the details of the crime. The petitioner took no part in the examination of these witnesses nor did he testify. At the conclusion of the testimony, the trial judge pronounced judgment that the petitioner was guilty of murder in the first degree, and imposed sentence.

The judge made a statement, stenographically transcribed, that, over the previous three years, the petitioner had "been in trouble four or five times, consisting of breaking and entering and unlawful taking of automobiles" and had been handled as a juvenile offender on such occasions. He also stated that the petitioner had "discussed the whole affair [the murder] very freely with me in all its revolting details" and that "in my private interview with respondent, I assured him that he must not plead guilty unless he really is guilty; that he was not required to plead guilty; that he could have a trial by jury if he desired it. He assured me freely and voluntarily that he is guilty and that his one desire is to have it all over, to get to the institution to which he is to be

[5] Mich. Stat. Ann., 1954, § 28.1058. For present practice see Mich. Acts 1957, No. 256; Mich. Court Rule 35–A, adopted June 4, 1947, effective September 1, 1947.

[6] Mich. Stat. Ann., 1954, § 28.550.

committed, and to be under observation and to be examined. . . ." The judge at this point recited the details of the crime as told to him by the petitioner and then stated: "Such is his story to me in private, told very calmly; without any compulsion whatever. He insists that there is something wrong with his head; that he has had something akin to queer sensations before this."

We may reasonably infer from the record that neither the trial judge nor the Michigan courts which considered the delayed motion thought that the petitioner's plight required the assistance of counsel to satisfy the requisites of the fair hearing secured by the Due Process Clause of the Fourteenth Amendment in a state prosecution. The principles determining the extent to which this constitutional right to counsel is secured in a state prosecution have been discussed in a long series of decisions of this Court.[7] We hold that the petitioner's case falls within that class in which the intervention of counsel, unless intelligently waived by the accused, is an essential element of a fair hearing.

The petitioner was 17 years of age and had a seventh-grade education. Cf. *De Meerleer* v. *Michigan,* 329 U. S. 663; *Wade* v. *Mayo,* 334 U. S. 672; *Williams* v. *Huff,* 79 U. S. App. D. C. 326, 146 F. 2d 867. He was charged with

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[7] *Powell* v. *Alabama,* 287 U. S. 45; *Smith* v. *O'Grady,* 312 U. S. 329; *Betts* v. *Brady,* 316 U. S. 455; *Williams* v. *Kaiser,* 323 U. S. 471; *Tomkins* v. *Missouri,* 323 U. S. 485; *House* v. *Mayo,* 324 U. S. 42; *Rice* v. *Olson,* 324 U. S. 786; *Hawk* v. *Olson,* 326 U. S. 271; *Canizio* v. *New York,* 327 U. S. 82; *Carter* v. *Illinois,* 329 U. S. 173; *De Meerleer* v. *Michigan,* 329 U. S. 663; *Foster* v. *Illinois,* 332 U. S. 134; *Gayes* v. *New York,* 332 U. S. 145; *Marino* v. *Ragen,* 332 U. S. 561; *Bute* v. *Illinois,* 333 U. S. 640; *Wade* v. *Mayo,* 334 U. S. 672; *Gryger* v. *Burke,* 334 U. S. 728; *Townsend* v. *Burke,* 334 U. S. 736; *Uveges* v. *Pennsylvania,* 335 U. S. 437; *Gibbs* v. *Burke,* 337 U. S. 773; *Quicksall* v. *Michigan,* 339 U. S. 660; *Palmer* v. *Ashe,* 342 U. S. 134; *Chandler* v. *Fretag,* 348 U. S. 3; *Massey* v. *Moore,* 348 U. S. 105; *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U. S. 116.

a crime carrying Michigan's maximum penalty, *viz.*, solitary confinement at hard labor for life without possibility of parole. Mich. Stat. Ann., 1954, §§ 28.548, 28.2304. Cf. *Powell* v. *Alabama,* 287 U. S. 45. The record shows possible defenses which might reasonably have been asserted at trial, but the extent of their availability raised questions of considerable technical difficulty obviously beyond his capacity to comprehend. For instance, one possible defense was insanity, suggested by the trial judge's statements that "his one desire is to have it all over, to get to the institution to which he is to be committed, and to be under observation and to be examined . . ."; "he insists that there is something wrong with his head; that he has had something akin to queer sensations before this." Another possible defense was mistaken identity, suggested by the fact that the evidence pointing to him as the perpetrator of the crime was entirely circumstantial. Cf. *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U. S. 116; *Rice* v. *Olson,* 324 U. S. 786. Moreover, the proceedings to determine the degree of murder, the outcome of which determined the extent of punishment, introduced their own complexities. With the aid of counsel, the petitioner, who, as we have said, neither testified himself in the proceeding nor cross-examined the prosecution's witnesses, might have done much to establish a lesser degree of the substantive crime, or to establish facts and make arguments which would have mitigated the sentence. The right to counsel is not a right confined to representation during the trial on the merits. *Reece* v. *Georgia,* 350 U. S. 85. The circumstances compel the conclusion that the petitioner's rights could not have been fairly protected without the assistance of counsel to help him with his defense.

However, we may also infer from the record that the Michigan courts held that even if petitioner was constitutionally entitled to the assistance of counsel he waived

this right when he told the trial judge that "he didn't want one, didn't have one, he wanted to get it over with." The constitutional right, of course, does not justify forcing counsel upon an accused who wants none. See *Carter* v. *Illinois,* 329 U. S. 173, 174. But, "where a person convicted in a state court has not intelligently and understandingly waived the benefit of counsel and where the circumstances show that his rights could not have been fairly protected without counsel, the Due Process Clause invalidates his conviction . . . ." *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U. S. 116, 118. Where the right to counsel is of such critical importance as to be an element of Due Process under the Fourteenth Amendment, a finding of waiver is not lightly to be made. Cf. *Johnson* v. *Zerbst,* 304 U. S. 458, 464; *Glasser* v. *United States,* 315 U. S. 60, 70; *Von Moltke* v. *Gillies,* 332 U. S. 708, 723.

This Court held in *Johnson* v. *Zerbst, supra,* that when a judgment of conviction entered in a federal court is collaterally attacked upon the ground that the defendant did not have the benefit of counsel, he has the burden of showing, by a preponderance of the evidence, that he did not have counsel and did not competently and intelligently waive his constitutional right to the assistance of counsel. We have found that the petitioner was entitled to the benefit of counsel to secure the fair hearing guaranteed to him by the Due Process Clause of the Fourteenth Amendment. Whatever may be the differences in the substantive right to counsel in federal and state cases, when the defendant in a state case has established his constitutional right to the benefit of counsel, he should carry the same burden of proving nonwaiver as is required of a defendant in a federal case. We therefore hold that the rule of *Johnson* v. *Zerbst* applies in this case and that the petitioner had the burden of showing, by a

preponderance of the evidence, that he did not intelligently and understandingly waive his right to counsel.

Notwithstanding the petitioner's express disavowal, before his plea, of a desire for counsel, the petitioner developed evidence at the hearing on the delayed motion which sustained his burden of showing that the disavowal was not intelligently and understandingly made and hence was not a waiver. *Williams* v. *Huff*, 79 U. S. App. D. C. 326, 146 F. 2d 867. This crucial evidence, apparently not known to the trial judge, was brought out on the cross-examination of the Sheriff of Kalamazoo County at the hearing on the delayed motion, and concerned conversations between the Sheriff and the petitioner before the petitioner orally confessed on the afternoon of October 28, 1938:

> "Q. You didn't advise him it would probably be best to plead guilty?
>
> "A. Well, the only way I could answer that right is just to give you a little of the conversation there, perhaps, if you wish me to.
>
> "Q. Relate that, that will probably be helpful.
>
> "A. In talking with Willie Moore—that was before he had made any statement—I told him that if he was guilty of it he might better own up on it because I says there could be trouble. Tension is very high outside and there could be trouble. If you are not guilty of it, why then, I says, I would stand pat forever after. Then I told—I spoke to him about what would be required of him and I would have to take him to the Municipal Court for his arraignment in the lower court and then back over there, and I told him he would be entitled to a hearing in lower court and I says, 'There you will have the Judge read to you and you can waive or demand an examination. You are entitled to an examination over there. It is

my duty, and it is up to me, to protect you, to use every effort at my command to protect you,' but, I says, *'the tension is high out there and I am just telling you what could happen if it was started by someone.'* I don't know the language I used.

. . . . . .

"Q. Did you also tell him if he plead guilty he would be sent to Jackson immediately? Do you remember saying anything like that?

"A. I don't know as I come out and said at any time for him to plead one way or the other, *but what I was putting over to him was the fact that if you are guilty and will be sent away you might better be getting away before trouble* because I had had information there was certain colored fellows, a group of them, that was going to interfere with me, and also that there was a bunch of Holland fellows going to meet me when I go to Jackson, they would meet me there at Galesburg there, and, therefore, when he was sentenced I avoided the main route and went way through by Gull Lake and across over in the hills there." (Emphasis supplied.)

Although the trial judge rejected the petitioner's testimony as not worthy of belief, in this instance the Sheriff corroborated the petitioner's testimony, given before the Sheriff took the stand, that the Sheriff had told him "that if I didn't plead guilty to this crime, they couldn't protect me, under those conditions, they says, during the riot, that they didn't know what people they would do, and that they couldn't protect me." Petitioner further testified that he pleaded guilty because of that statement of the Sheriff: "After the man tell me he couldn't protect me then there wasn't nothing I could do. I was mostly scared than anything else."

The Circuit Court found the Sheriff's testimony insignificant because other evidence showed that there was in fact "no threat of mob violence, no congregation of anything that could by any stretch of reasoning be considered a mob or a riotous gathering, and that while the Sheriff felt inclined to take certain precautions and did take certain precautions to avoid any trouble, there was nothing in the situation then existing to indicate that the Respondent had been coerced into a false plea, or that he had been placed in fear of insisting upon his constitutional rights." But plainly it is of no moment to the inquiry that the situation described to the petitioner by the Sheriff did not exist. The petitioner saw only law officers while being held continuously in close confinement from a time just hours after the murder until he orally confessed, and was hardly in a position to know or test the accuracy of what the Sheriff told him. The Sheriff's statement must be evaluated for its effect upon the capacity of this 17-year-old Negro youth of limited education and mental capacity to make an intelligent, understanding waiver of constitutional rights of supreme importance to him in his situation.

We believe that the expectation of mob violence, planted by the Sheriff in the mind of this then 17-year-old Negro youth, raises an inference of fact that his refusal of counsel was motivated to a significant extent by the desire to be removed from the Kalamazoo jail at the earliest possible moment. The trial judge's report of his interview with the petitioner is consistent with this inference in that the report states that the petitioner told the judge that "his one desire is to have it all over, to get to the institution to which he is to be committed, and to be under observation and to be examined." A rejection of federal constitutional rights motivated by fear cannot, in the circumstances of this case, constitute an intelligent waiver. This conclusion against an intelligent waiver is

fortified by the inferences which may be drawn from the age of petitioner, *Williams* v. *Huff,* 79 U. S. App. D. C. 326, 146 F. 2d 867, and the evidence of emotional disturbance, *Hallowell* v. *United States,* 197 F. 2d 926.

We thus conclude that the petitioner had sustained his ultimate burden of proving that his plea of guilty was invalidly accepted as obtained without the benefit of counsel and that he did not waive his right to counsel.

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

Reversed and remanded.

MR. JUSTICE BURTON, with whom MR. JUSTICE FRANKFURTER, MR. JUSTICE CLARK and MR. JUSTICE HARLAN concur, dissenting.

The Court's decision rests upon its view that, despite the contrary conclusions of the Circuit and Supreme Courts of Michigan, petitioner has shown that he was in fact so alarmed that he was not able freely, intelligently and understandingly to plead guilty and to waive his right to counsel. But for that issue, this case should be summarily affirmed on the authority of *Quicksall* v. *Michigan,* 339 U. S. 660, which dealt with a comparable situation that arose before the same trial judge under like procedure.

The only contemporaneous evidence as to petitioner's attitude and equanimity at the time of his trial, in 1938, is the statement which Circuit Judge Weimer made while presiding at the trial. He made it following his private interview with petitioner, and immediately preceding his acceptance of petitioner's plea of guilty. He portrayed petitioner as having, in that interview, "very calmly; without any compulsion whatever" "freely and voluntarily" discussed his crime, his guilt and "his one desire . . . to have it all over . . . ." When making

this statement the judge's attention was focused directly upon his responsibility to determine the capacity of petitioner to plead guilty and to waive his constitutional privileges. The statement accordingly commands respect and is entitled to great weight.

By 1950, Judge Weimer had died and the prosecuting attorney, who had conducted the trial for the State, had suffered a stroke rendering him incapable of testifying. However, two witnesses did testify, in 1950, as to their recollection of petitioner's demeanor in 1938.

One was the chief deputy sheriff, who, in 1938, as a deputy sheriff, had been in charge of taking petitioner to and from the courtroom and to the lobby when petitioner was leaving for the penitentiary. His testimony included the following:

> "Q. What did you notice, if anything, about his appearance that would have anything to do with the question whether or not he appeared to be in fear or relaxed or what?
>
> "A. He was very relaxed. There was no sign of fear and no showing, either physically or by speech.
>
> "Q. Anything that would lead you to that conclusion?
>
> "A. To not being in fear?
>
> "Q. Yes.
>
> "A. He was nonchalant. . . ."

The other witness was a Circuit Judge, who, in 1938, had participated, as an assistant prosecutor, in the interrogation of petitioner when the latter confessed his crime. This witness testified:

> ". . . I, of course, felt that his answers were fair—were honest and candid in his final statement that he made. That is just my opinion, but he answered the questions that were put to him. To me he seemed very calm and not excited in the least. He

> spoke about it quite in a matter of fact way. His whole attitude was such that it was hard for me to understand his lack of emotion in telling the story of just what happened or what he claimed happened, what he did and what she did."

As against this, petitioner offered his own statement, quoted by the Court, *ante,* p. 163. Judge Sweet, who presided in 1950, gave little credence to it and said in his opinion:

> "While this Court has not disregarded the testimony of the [petitioner], but on the contrary has carefully considered it, it is the conclusion of this Court that the [petitioner's] testimony is not worthy of belief. This conclusion is arrived at because of the manner of the witness while testifying, his interest in the outcome of these proceedings, and the many points of conflict between his testimony and the testimony of the two witnesses herein referred to."*

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*The following are examples of the conflicts presented by petitioner's testimony:

He testified that a large number of people hammered at his cell door, whereas the sheriff and deputy sheriffs denied this and said that it was physically impossible for a group of people to reach petitioner's cell and that his cell door was not of a type conducive to hammering.

Petitioner said that the judge, in arraigning him, did not inform him of his right to counsel. Several witnesses testified to the contrary and Judge Sweet, presiding at the hearing on the delayed motion, said:

"It is the further conclusion of this Court that before such plea was accepted by the late Judge Weimer, the [petitioner] was informed of his right to a trial by jury and of his right to be represented by counsel, and that the [petitioner] indicated his desire to proceed without counsel and without a trial, and his desire to have his plea of guilty received by the Court and sentence imposed without further delay."

Petitioner, in testifying as to what took place at his private interview with Judge Weimer, said repeatedly and unequivocally that the

This leaves for consideration the sheriff's statement, quoted by the Court, *ante*, pp. 162–163. His recollection was that he told petitioner that, as sheriff, it was his duty to protect petitioner and that he would use every effort at his command to do so, but that he added " 'the tension is high out there and I am just telling you what could happen if it was started by someone.' I don't know the language I used." He did not testify as to petitioner's mental or emotional condition. Furthermore, his recollection as to what he had said about tension must be read in comparison with the abundant testimony of others supporting Judge Sweet's conclusion that, in 1938, there had been little community tension and "no threat of mob violence . . . ." That the judge discounted the effect of the sheriff's testimony appears from his denial of petitioner's motion on the express ground that he believed that petitioner's plea of guilty "was freely and voluntarily made . . . ."

The issue is one of fact as to what occurred 19 years ago. Three times the state courts have concluded that petitioner acted freely, intelligently and understandingly. On this record, I would affirm that judgment.

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sheriff came with petitioner into the judge's chambers and not only was present, but did much of the talking and leading of petitioner's examination. The sheriff and others, however, testified that it was the sheriff's practice not to attend such private sessions of the judge, and that the sheriff was not present on this occasion which Judge Weimer described as his "private interview" with petitioner.

UNITED STATES EX REL. LEE KUM HOY ET AL. *v.* MURFF, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE.

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

No. 32. Argued November 21, 1957.—Decided December 9, 1957.

Three Chinese children sought entry into the United States, claiming to be children of an American citizen, but they were excluded on the ground that blood grouping tests showed that the American citizen was not their parent. It appeared that the blood grouping tests were in some respects inaccurate and the reports thereof partly erroneous and conflicting. *Held:* The judgments heretofore entered are vacated and the case is remanded to the District Court with directions that the hearings before the Special Inquiry Officer or a Board of Special Inquiry be reopened, so that new, accurate blood grouping tests may be made under appropriate circumstances, and that relevant evidence may be received as offered on the issues involved.

237 F. 2d 307, judgments vacated and case remanded.

Benjamin Gim argued the cause for petitioners. With him on the brief was *Edward J. Ennis.*

John F. Davis argued the cause for respondent. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Olney, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg.*

PER CURIAM.

In view of the representation in the Solicitor General's argument at the Bar that the blood grouping test requirement here involved is presently and has been for some time applied without discrimination "in every case, irrespective of race, whenever deemed necessary," and in view of our remand of the case, we need not now pass upon the claim of unconstitutional discrimination.

It appearing that the blood grouping tests made herein were in some respects inaccurate and the reports thereof partly erroneous and conflicting, the judgments heretofore entered are vacated and the case is remanded to the District Court with directions that the hearings before the Special Inquiry Officer or a Board of Special Inquiry be reopened, so that new, accurate blood grouping tests may be made under appropriate circumstances, and that relevant evidence may be received as offered on the issues involved. The excludability of petitioners remains to be determined upon those proceedings.

BARR *v.* MATTEO ET AL.

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

No. 409. Decided December 9, 1957.

The petition for certiorari in this case presents the question of absolute immunity of government officials from defamation suits. A narrower question, the defense of qualified privilege, had been urged in the District Court and the Court of Appeals, but not considered by the Court of Appeals on the ground that it had been waived. *Held:* Certiorari is granted, the judgment of the Court of Appeals is vacated, and the case is remanded to that court with directions to consider the defense of qualified privilege. Pp. 171–173.

244 F. 2d 767, judgment vacated and case remanded.

Solicitor General Rankin, Assistant Attorney General Doub, Paul A. Sweeney and *Bernard Cedarbaum* for petitioner.

PER CURIAM.

The petition for certiorari is granted. The petition presents this question: "Whether the absolute immunity from defamation suits accorded officials of the Government with respect to acts done within the scope of their official authority, extends to statements to the press by high policy-making officers, below cabinet or comparable rank, concerning matters committed by law to their control or supervision."

In the District Court and the Court of Appeals the litigation was not so confined. By his motion for a directed verdict and requested instructions petitioner also presented to the District Court the defense of qualified privilege. On appeal to the Court of Appeals petitioner, in his brief, raised only the question of absolute immunity, but on reconsideration he urged the court also

to pass on the defense of qualified privilege. This that court refused to do on the ground that petitioner, because of the position he had initially taken on the appeal, had waived the defense. In so holding, the court relied on its Rule 17 (c)(7), requiring an appellant to set forth in his brief a statement of the points on which he intends to rely, and Rule 17 (i), which provides that "Points not presented according to the rules of the court, will be disregarded, though the court, at its option, may notice and pass upon a plain error not pointed out or relied upon." 244 F. 2d 767.

The scope of the litigation in the Court of Appeals cannot lessen this Court's duty to confine itself to the proper exercise of its jurisdiction and the appropriate scope of judicial review. Thus, an advisory opinion cannot be extracted from a federal court by agreement of the parties, see *Swift & Co.* v. *Hocking Valley R. Co.*, 243 U. S. 281, 289, and no matter how much they may favor the settlement of an important question of constitutional law, broad considerations of the appropriate exercise of judicial power prevent such determinations unless actually compelled by the litigation before the Court. *United States* v. *C. I. O.*, 335 U. S. 106, 110. Likewise, "Courts should avoid passing on questions of public law even short of constitutionality that are not immediately pressing. Many of the same reasons are present which impel them to abstain from adjudicating constitutional claims against a statute before it effectively and presently impinges on such claims." *Eccles* v. *Peoples Bank*, 333 U. S. 426, 432. Especially in a case involving on the one hand protection of the reputation of individuals, and on the other the interest of the public in the fullest freedom of officials to make disclosures on matters within the scope of their public duties, this Court should avoid rendering a decision beyond the obvious requirements of the record. In the present case a ground

far narrower than that on which the Court of Appeals rested its decision, the defense of qualified privilege, was consistently pressed in the District Court and in fact urged in the Court of Appeals itself. In these circumstances we think that the broad requirements of judicial power and its proper exercise should lead to consideration of the defense of qualified privilege.

To that end, the judgment of the Court of Appeals is vacated, and the case remanded to that Court with directions to pass upon petitioner's claim of a qualified privilege.

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE joins, agrees with the disposition of this case as expressed in the last paragraph.

MR. JUSTICE BRENNAN would grant the petition and consider the question presented.

MR. JUSTICE DOUGLAS, dissenting.

The Court of Appeals ruled that the question of the defense of qualified privilege on which we vacate and remand had been "waived" by petitioner and therefore should not be considered by the Court of Appeals under its Rules. That question therefore is not here for us nor should it be reached by the Court of Appeals. I cannot say that the Court of Appeals misconstrued its own Rules* or committed palpable error in refusing to consider

*"A concise statement of the points on which appellant intends to rely, set forth in separate, numbered paragraphs. Each point shall refer to the alleged error upon which appellant intends to rely." Rule 17 (c)(7).

"Points not presented according to the rules of the court, will be disregarded, though the court, at its option, may notice and pass upon a plain error not pointed out or relied upon." Rule 17 (i).

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the question or unceremoniously and improperly reached for a constitutional question which it should have sought to avoid. Under these circumstances it is an unwarranted exercise of our supervisory powers to require that the question be considered by the Court of Appeals. Instead, we should exercise our discretion by denying certiorari.

INTERSTATE COMMERCE COMMISSION *v.* BALTIMORE & OHIO RAILROAD CO. ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

No. 463. Decided December 9, 1957.*

The District Court, reviewing an order of the Interstate Commerce Commission establishing the tariff relationship on imported iron ore shipped by railroad to Central Freight Association territory from the ports of New York, Philadelphia and Baltimore, vacated that portion of the order relating to New York as being without basis in the record and remanded to the Commission for more explicit findings that portion of the order dealing with the relationship between Philadelphia and Baltimore rates. *Held:* In carrying out the District Court's direction regarding the Philadelphia and Baltimore rates, the Commission should be left free to take into account the effect of New York rates on the tariff relationship between Philadelphia and Baltimore and the effect of that relationship on New York and to enter such orders with respect to all three ports as the Commission may find to be required by their interrelationship. Pp. 176–178.

151 F. Supp. 258, decree vacated in part and case remanded.

Robert W. Ginnane and *Isaac K. Hay* for appellant in No. 463.

Guernsey Orcutt, Richard R. Bongartz and *William Pepper Constable* for appellant in No. 464.

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*Together with No. 464, *Pennsylvania Railroad Co.* v. *Baltimore & Ohio Railroad Co. et al.;* No. 465, *Erie Railroad Co. et al.* v. *Baltimore & Ohio Railroad Co. et al.;* No. 466, *New York Central Railroad Co.* v. *Baltimore & Ohio Railroad Co. et al.;* No. 467, *Armco Steel Corp. et al.* v. *Baltimore & Ohio Railroad Co. et al.;* No. 468, *Delaware River Port Authority et al.* v. *Baltimore & Ohio Railroad Co. et al.;* and No. 473, *United States* v. *Baltimore & Ohio Railroad Co. et al.*, also on appeals from the same Court.

Sidney Goldstein, Francis A. Mulhern, Arthur L. Winn, Jr., J. Stanley Payne and *Samuel H. Moerman* for appellants in No. 465.

Robert D. Brooks and *Richard J. Murphy* for appellant in No. 466.

John F. Donelan for appellants in No. 467.

Warren Price, Jr. for the Delaware River Port Authority, *David Berger* for the City of Philadelphia, and *Frederick H. Knight* for the Chamber of Commerce of Greater Philadelphia, appellants in No. 468.

Solicitor General Rankin, Assistant Attorney General Hansen and *Daniel M. Friedman* for the United States, appellant in No. 473.

Edwin H. Burgess, Anthony P. Donadio, Norman C. Melvin, Jr., William C. Purnell and *Jervis Langdon, Jr.* for the Baltimore & Ohio Railroad Co. et al., *William L. Marbury* for the Maryland Port Authority, *Harry C. Ames* and *Charles McD. Gillan* for the Baltimore Association of Commerce, *Francis D. Murnaghan, Jr.* for the Canton Railroad Co. and *Thomas N. Biddison* for the Mayor and City Council of Baltimore, appellees.

PER CURIAM.

This litigation involves the validity of an order of the Interstate Commerce Commission dealing with the proper relationship, under the National Transportation Policy (§ 1 of the Transportation Act of 1940, 54 Stat. 899, 49 U. S. C., at p. 7107), of railroad tariffs on imported iron ore shipped to a steel-producing area in Pennsylvania, Ohio and West Virginia (the so-called "differential territory" of the Central Freight Association) from the ports of New York, Philadelphia and Baltimore. A tariff differential in favor of Baltimore had existed prior to this

controversy. In a succession of tariff reductions, railroads serving New York and Philadelphia filed schedules designed to establish parity of rates among the several ports, while railroads serving Baltimore filed schedules designed to maintain the differential. Upon protest against the New York and Philadelphia schedules by Baltimore civic and commercial interests and railroads serving that port, the Interstate Commerce Commission instituted an investigation as a result of which Division 2 of the Commission filed a report approving the tariff schedules giving Philadelphia parity with Baltimore but finding all other schedules that had been issued in this series of reductions to be not just and reasonable. 291 I. C. C. 527. On petition of various parties, the Commission reopened the proceedings, and on October 1, 1956, the full Commission modified the findings of the Division 2 report to the extent of finding the New York schedules, as well as the Philadelphia schedules, to be just and reasonable, 299 I. C. C. 195. The full Commission's order was challenged in a proceeding instituted under 28 U. S. C. § 1336, and an appropriate District Court held that the Commission's approval of parity between New York and Baltimore was without basis in the record and ordered that portion of the Commission's order vacated. The court further held that the Commission's approval of parity between Philadelphia and Baltimore was not supported by essential findings as to ocean freight costs and anticipated traffic and remanded that portion of the Commission's order for more explicit findings. The court also granted other relief subsidiary to these actions. 151 F. Supp. 258. These are the only portions of the decision below with which we are here concerned. We put to one side those provisions of the decree below in which the District Court affirmed other portions of the Commission's order.

From what appears, it is not precluded that the Commission may find an interrelationship, within the purview of the National Transportation Policy, *supra,* among lawful tariffs to be established between these three ports and the "differential territory." In this light we deem it appropriate that, in reconsidering the relationship between the Philadelphia and Baltimore schedules pursuant to the remand of the District Court, the Commission should be free to reconsider and take action upon the New York schedules. In carrying out the District Court's direction regarding the Philadelphia rates, the Commission should be permitted to take into account the effect of New York rates on the tariff relationship between Philadelphia and Baltimore and the effect of that relationship on New York and to enter such orders with respect to all three ports as the Commission may find to be required by their interrelationship. Accordingly, on the appeals before us, so much of the decree of the District Court as did not affirm the order of the Commission is vacated, and the cause is remanded for appropriate disposition not inconsistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE and MR. JUSTICE BLACK would affirm the judgment of the District Court.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* DIXIE CARRIERS, INC., ET AL.

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

No. 60. Decided December 9, 1957.*

Upon suggestion of mootness, judgment vacated and case remanded with directions to dismiss the complaint.

Reported below: 143 F. Supp. 844.

Robert H. Bierma, Richard J. Murphy and *Harvey Huston* for the Atchison, Topeka & Santa Fe Railway Co. et al., appellants in No. 60.

Solicitor General Rankin, Assistant Attorney General Hansen, Robert W. Ginnane and *H. Neil Garson* for the United States, appellant in No. 61, and the Interstate Commerce Commission, appellant in No. 62.

Donald Macleay, Harry C. Ames, Harry C. Ames, Jr., Nuel D. Belnap, T. S. Christopher and *John C. Ridley* for appellees.

PER CURIAM.

Upon the suggestion of mootness the judgment of the United States District Court for the Southern District of Texas is vacated and the case is remanded with directions to dismiss the complaint.

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*Together with No. 61, *United States* v. *Dixie Carriers, Inc., et al.*, and No. 62, *Interstate Commerce Commission* v. *Dixie Carriers, Inc., et al.*, also on appeal from the same Court.

MOUNCE *v.* UNITED STATES.

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

No. 542. Decided December 9, 1957.

Upon consideration of the record and confession of error by the Solicitor General, the judgment of the Court of Appeals is vacated and the case is remanded to the District Court for consideration in the light of *Roth* v. *United States*, 354 U. S. 476.

Reported below: 247 F. 2d 148.

O. John Rogge for petitioner.

Solicitor General Rankin for the United States.

PER CURIAM.

The petition for writ of certiorari is granted. Upon consideration of the entire record and confession of error by the Solicitor General the judgment of the United States Court of Appeals for the Ninth Circuit is vacated and the case is remanded to the United States District Court for consideration in light of *Roth* v. *United States*, 354 U. S. 476.

WORLD INSURANCE CO. *v.* BETHEA, ADMINISTRATRIX.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 510. Decided December 9, 1957.

Appeal dismissed for want of a substantial federal question. Reported below: —— Miss. ——, 93 So. 2d 624.

Harold D. Cohen for appellant.

W. Arlington Jones for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

SEATRAIN LINES, INC., *v.* UNITED STATES ET AL.

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

No. 522. Decided December 9, 1957.

152 F. Supp. 619, affirmed.

S. S. Eisen and *Raoul Berger* for appellant.

Solicitor General Rankin, Assistant Attorney General Hansen, Charles W. Weston, Robert W. Ginnane and *H. Neil Garson* for the United States and the Interstate Commerce Commission, and *Warren Price, Jr.* for the Pan-Atlantic Steamship Corporation, appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

CANO ET AL. *v.* PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

No. 538. Decided December 9, 1957.

Appeal dismissed and certiorari denied.
Reported below: 389 Pa. 639, 133 A. 2d 800.

William T. Coleman, Jr. for appellants.

Thomas D. McBride, Attorney General of Pennsylvania, and *Leon Ehrlich,* Deputy Attorney General, for appellee.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

KECO INDUSTRIES, INC., ET AL. *v.* CINCINNATI & SUBURBAN BELL TELEPHONE CO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 543. Decided December 9, 1957.

Appeal dismissed and certiorari denied.
Reported below: 166 Ohio St. 254, 141 N. E. 2d 465.

Joseph A. Segal for appellants.

Carl M. Jacobs, Jr. for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

IN RE RETENELLER.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

No. 546. Decided December 9, 1957.

Appeal dismissed and certiorari denied.

Jacob J. Kilimnik for appellant.

David Berger filed a motion for the City of Philadelphia to dismiss the appeal.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

WALSH *v.* FIRST NATIONAL BANK & TRUST CO. OF SCRANTON, PA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

No. 553. Decided December 9, 1957.

Appeal dismissed and certiorari denied.
Reported below: 389 Pa. 197, 132 A. 2d 212.

Appellant *pro se.*

Murdaugh Stuart Madden for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

GREEN *v.* UNITED STATES.

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

No. 46. Argued April 25, 1957.—Restored to the calendar for reargument June 24, 1957.—Reargued October 15, 1957.—Decided December 16, 1957.

Petitioner was indicted and tried in a federal court for first degree murder. The judge instructed the jury that it could find him guilty of either first degree murder or second degree murder. The jury found him guilty of second degree murder, and its verdict was silent on the charge of first degree murder. The trial judge accepted the verdict, entered judgment, dismissed the jury and sentenced petitioner to imprisonment. On appeal, his conviction was reversed and the case was remanded for a new trial. On remand, petitioner was tried again for first degree murder under the original indictment, convicted of first degree murder and sentenced to death, notwithstanding his plea of former jeopardy. *Held:* Petitioner's second trial for first degree murder placed him in jeopardy twice for the same offense in violation of the Fifth Amendment, and the conviction is reversed. Pp. 185–198.

(a) Petitioner's jeopardy for first degree murder came to an end when the jury was discharged at the conclusion of his first trial, and he could not be retried for that offense. Pp. 190–191.

(b) By making a successful appeal from his improper conviction of second degree murder petitioner did not waive his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge. Pp. 191–193.

(c) In order to secure the reversal of an erroneous conviction of one offense, a defendant need not surrender his valid defense of former jeopardy on a different offense for which he was not convicted and which was not involved in his appeal. Pp. 193–194.

(d) *Trono* v. *United States,* 199 U. S. 521, distinguished. Pp. 194–198.

98 U. S. App. D. C. 413, 236 F. 2d 708, reversed.

George Blow argued the cause on the original argument. *George Rublee, II,* was with him on the reargument. With them on the briefs was *Charles E. Ford.*

Leonard B. Sand argued the cause for the United States. With him on the briefs were *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg. Carl H. Imlay* was also on the brief on the original argument.

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

This case presents a serious question concerning the meaning and application of that provision of the Fifth Amendment to the Constitution which declares that no person shall

> ". . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ."

The petitioner, Everett Green, was indicted by a District of Columbia grand jury in two counts. The first charged that he had committed arson by maliciously setting fire to a house.[1] The second accused him of causing the death of a woman by this alleged arson which if true amounted to murder in the first degree punishable by death.[2] Green entered a plea of not guilty to both counts and the case was tried by a jury. After each side had presented its evidence the trial judge instructed the jury that it could find Green guilty of arson under the first count and of either (1) first degree murder or (2) second degree murder under the second count. The trial judge treated second degree murder, which is defined by the District Code as the killing of another with malice

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[1] D. C. Code, 1951, § 22–401.

[2] D. C. Code, 1951, § 22–2401. "Whoever, being of sound memory and discretion . . . without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22–401 . . . is guilty of murder in the first degree."

Section 22–2404 provides that the "punishment of murder in the first degree shall be death by electrocution."

aforethought and is punishable by imprisonment for a term of years or for life,[3] as an offense included within the language charging first degree murder in the second count of the indictment.

The jury found Green guilty of arson and of second degree murder but did not find him guilty on the charge of murder in the first degree. Its verdict was silent on that charge. The trial judge accepted the verdict, entered the proper judgments and dismissed the jury. Green was sentenced to one to three years' imprisonment for arson and five to twenty years' imprisonment for murder in the second degree. He appealed the conviction of second degree murder. The Court of Appeals reversed that conviction because it was not supported by evidence and remanded the case for a new trial. 95 U. S. App. D. C. 45, 218 F. 2d 856.

On remand Green was tried again for first degree murder under the original indictment. At the outset of this second trial he raised the defense of former jeopardy but the court overruled his plea. This time a new jury found him guilty of first degree murder and he was given the mandatory death sentence. Again he appealed. Sitting *en banc,* the Court of Appeals rejected his defense of former jeopardy, relying on *Trono* v. *United States,* 199 U. S. 521, and affirmed the conviction. 98 U. S. App. D. C. 413, 236 F. 2d 708. One judge concurred in the result, and three judges dissented expressing the view that Green had twice been placed in jeopardy in violation of the Constitution. We granted certiorari, 352 U. S. 915. Although Green raises a number of other contentions here

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[3] D. C. Code, 1951, § 22–2403. "Whoever with malice aforethought except as provided in [§] 22–2401 . . . kills another, is guilty of murder in the second degree."

§ 22–2404. "The punishment of murder in the second degree shall be imprisonment for life, or for not less than twenty years."

we find it necessary to consider only his claim of former jeopardy.

The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. In his Commentaries, which greatly influenced the generation that adopted the Constitution, Blackstone recorded:

> ". . . the plea of *auterfoits acquit,* or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence." [4]

Substantially the same view was taken by this Court in *Ex parte Lange,* 18 Wall. 163, at 169:

> "The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted." [5]

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity,

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[4] 4 Blackstone's Commentaries 335.

[5] And see *United States* v. *Ball,* 163 U. S. 662, 669:
"The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial."

as well as enhancing the possibility that even though innocent he may be found guilty.

In accordance with this philosophy it has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and even when "not followed by any judgment, is a bar to a subsequent prosecution for the same offence." *United States* v. *Ball,* 163 U. S. 662, 671. Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous. *United States* v. *Ball, supra; Peters* v. *Hobby,* 349 U. S. 331, 344–345. Cf. *Kepner* v. *United States,* 195 U. S. 100; *United States* v. *Sanges,* 144 U. S. 310.

Moreover it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again. *Wade* v. *Hunter,* 336 U. S. 684; *Kepner* v. *United States,* 195 U. S. 100, 128. In general see American Law Institute, Administration of The Criminal Law: Double Jeopardy 61–72 (1935). This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict. At the same time jeopardy is not regarded as having come to an end so as to bar a second trial in those cases where "unforeseeable circumstances . . . arise during [the first] trial making its completion impossible, such as the failure of a jury to agree on a verdict." *Wade* v. *Hunter,* 336 U. S. 684, 688–689.

At common law a convicted person could not obtain a new trial by appeal except in certain narrow instances.[6] As this harsh rule was discarded courts and legislatures provided that if a defendant obtained the reversal of a conviction by his own appeal he could be tried again for the same offense.[7] Most courts regarded the new trial as a second jeopardy but justified this on the ground that the appellant had "waived" his plea of former jeopardy by asking that the conviction be set aside.[8] Other courts viewed the second trial as continuing the same jeopardy which had attached at the first trial by reasoning that jeopardy did not come to an end until the accused was acquitted or his conviction became final.[9] But whatever the rationalization, this Court has also held that a defendant can be tried a second time for an offense when his prior conviction for that same offense had been set aside on appeal. *United States* v. *Ball,* 163 U. S. 662.

In this case, however, we have a much different question. At Green's first trial the jury was authorized to find him guilty of either first degree murder (killing while

[6] See 1 Stephen, History of the Criminal Law of England, c. x; *United States* v. *Gibert,* 25 Fed. Cas. 1287.

[7] Under English law the appellate court has no power to order a new trial after any appeal except in certain cases where the first trial was a complete "nullity," as for example when the trial court was without jurisdiction over the person or subject matter. See 4 Stephen, Commentaries on the Laws of England (21st ed. 1950), 284. The English appellate court does have power to substitute a finding of guilt of a lesser offense if the evidence warrants, but it cannot find the defendant guilty of an offense for which he was acquitted or increase his sentence. See 10 Halsbury, Laws of England (Simonds ed. 1955), 539–541, and the cases cited there.

[8] See, *e. g., Brewster* v. *Swope,* 180 F. 2d 984; *State* v. *McCord,* 8 Kan. 232, 12 Am. Rep. 469; *Cross* v. *Commonwealth,* 195 Va. 62, 77 S. E. 2d 447; *Smith* v. *State,* 196 Wis. 102, 219 N. W. 270.

[9] See, *e. g., State* v. *Aus,* 105 Mont. 82, 69 P. 2d 584. Cf. *Griffin* v. *Illinois,* 351 U. S. 12, 18.

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perpetrating a felony) or, alternatively, of second degree murder (killing with malice aforethought).[10] The jury found him guilty of second degree murder, but on his appeal that conviction was reversed and the case remanded for a new trial. At this new trial Green was tried again, not for second degree murder, but for first degree murder, even though the original jury had refused to find him guilty on that charge and it was in no way involved in his appeal.[11] For the reasons stated hereafter, we conclude that this second trial for first degree murder placed Green in jeopardy twice for the same offense in violation of the Constitution.[12]

Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gantlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter. In this situation the great majority of cases in this country have regarded the jury's verdict as an implicit acquittal on the charge of first degree murder.[13] But the result in this case need not rest alone

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[10] In substance the situation was the same as though Green had been charged with these different offenses in separate but alternative counts of the indictment. The constitutional issues at stake here should not turn on the fact that both offenses were charged to the jury under one count.

[11] It should be noted that Green's claim of former jeopardy is not based on his previous conviction for second degree murder but instead on the original jury's refusal to convict him of first degree murder.

[12] Many of the state courts which have considered the problem have concluded that under circumstances similar to those of this case a defendant cannot be tried a second time for first degree murder. Other state cases take a contrary position. In general see the Annotations at 59 A. L. R. 1160, 22 L. R. A. (N. S.) 959, and 5 L. R. A. (N. S.) 571. Of course, many of the state decisions rest on local constitutional or statutory provisions.

[13] See cases collected in the Annotations cited in n. 12, *supra*, and the Annotation at 114 A. L. R. 1406.

on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. Therefore it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense. *Wade* v. *Hunter,* 336 U. S. 684. In brief, we believe this case can be treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict which expressly read: "We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree."

After the original trial, but prior to his appeal, it is indisputable that Green could not have been tried again for first degree murder for the death resulting from the fire. A plea of former jeopardy would have absolutely barred a new prosecution even though it might have been convincingly demonstrated that the jury erred in failing to convict him of that offense. And even after appealing the conviction of second degree murder he still could not have been tried a second time for first degree murder had his appeal been unsuccessful.

Nevertheless the Government contends that Green "waived" his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge by making a *successful* appeal of his improper conviction of second degree murder. We cannot accept this paradoxical contention. "Waiver" is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right. Cf. *Johnson* v. *Zerbst,* 304 U. S. 458. When a man has been convicted

of second degree murder and given a long term of imprisonment it is wholly fictional to say that he "chooses" to forego his constitutional defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of the lesser offense. In short, he has no meaningful choice. And as Mr. Justice Holmes observed, with regard to this same matter in *Kepner* v. *United States,* 195 U. S. 100, at 135: "Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States."

It is true that in *Kepner,* a case arising in the Philippine Islands under a statutory prohibition against double jeopardy, Mr. Justice Holmes dissented from the Court's holding that the Government could not appeal an acquittal in a criminal prosecution. He argued that there was only one continuing jeopardy until the "case" had finally been settled, appeal and all, without regard to how many times the defendant was tried, but that view was rejected by the Court. The position taken by the majority in *Kepner* is completely in accord with the deeply entrenched principle of our criminal law that once a person has been acquitted of an offense he cannot be prosecuted again on the same charge. This Court has uniformly adhered to that basic premise. For example, in *United States* v. *Ball,* 163 U. S. 662, 671, a unanimous Court held:

> "The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution."

And see *Peters* v. *Hobby,* 349 U. S. 331, 344–345; *United States* v. *Sanges,* 144 U. S. 310.

Using reasoning which purports to be analogous to that expressed by Mr. Justice Holmes in *Kepner,* the Government alternatively argues that Green, by appealing, prolonged his original jeopardy so that when his conviction for second degree murder was reversed and the case remanded he could be tried again for first degree murder without placing him in new jeopardy. We believe this argument is also untenable. Whatever may be said for the notion of continuing jeopardy with regard to an offense when a defendant has been convicted of that offense and has secured reversal of the conviction by appeal, here Green was not convicted of first degree murder and that offense was not involved in his appeal. If Green had only appealed his conviction of arson and that conviction had been set aside surely no one would claim that he could have been tried a second time for first degree murder by reasoning that his initial jeopardy on that charge continued until every offense alleged in the indictment had been finally adjudicated.

Reduced to plain terms, the Government contends that in order to secure the reversal of an erroneous conviction of one offense, a defendant must surrender his valid defense of former jeopardy not only on that offense but also on a different offense for which he was not convicted and which was not involved in his appeal. Or stated in the terms of this case, he must be willing to barter his constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal from an erroneous conviction of another offense for which he has been sentenced to five to twenty years' imprisonment. As the Court of Appeals said in its first opinion in this case, a defendant faced with such a "choice" takes a "desperate chance" in securing the reversal of the erroneous conviction. The law should not, and in our judgment does not, place the defendant in such an incredible dilemma. Conditioning an appeal of one

offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy.[14]

The Government argues, however, that we should accept *Trono* v. *United States,* 199 U. S. 521, as a conclusive precedent against Green's claim of former jeopardy.[15] The *Trono* case arose in the Philippine Is-

[14] The suggestion is made that under the District Code second degree murder is not an offense included in a charge of first degree murder for causing a death in the course of perpetrating a felony (commonly referred to as "felony murder") because it involves elements different from those necessary to establish the felony murder, and that therefore Green could not legally have been convicted of second degree murder under the indictment. We fail to comprehend how this suggestion aids the Government. In the first place, the District of Columbia Court of Appeals has expressly held that second degree murder is a lesser offense which can be proved under a charge of felony murder. *Goodall* v. *United States,* 86 U. S. App. D. C. 148, 180 F. 2d 397; *Green* v. *United States,* 95 U. S. App. D. C. 45, 218 F. 2d 856. Even more important, Green's plea of former jeopardy does not rest on his conviction for second degree murder but instead on the first jury's refusal to find him guilty of felony murder.

It is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense. If anything, the fact that it cannot be classified as "a lesser included offense" under the charge of felony murder buttresses our conclusion that Green was unconstitutionally twice placed in jeopardy. American courts have held with uniformity that where a defendant is charged with two offenses, neither of which is a lesser offense included within the other, and has been found guilty on one but not on the second he cannot be tried again on the second even though he secures reversal of the conviction and even though the two offenses are related offenses charged in the same indictment. See, *e. g.,* Annotation, 114 A. L. R. 1406.

[15] With the exception of *Trono,* the Government appears to concede in its brief, pp. 38–39, that the double jeopardy problem raised in this case has not been squarely before this Court. *Palko* v. *Connecticut,* 302 U. S. 319, *Brantley* v. *Georgia,* 217 U. S. 284, and *Kring* v. *Missouri,* 107 U. S. 221, are not controlling here since they involved

lands, shortly after they had been annexed by the United States, under a statutory prohibition against double jeopardy. At that time a sharply divided Court took the view that not all constitutional guarantees were "applicable" in the insular possessions, particularly where the imposition of these guarantees would disrupt established customs. *Downes* v. *Bidwell,* 182 U. S. 244. In *Trono* the defendants had been charged with murder but were acquitted by the trial court which instead found them guilty of the lesser offense of assault. They appealed the assault conviction to the Philippine Supreme Court. That court, acting under peculiar local procedures modeled on pre-existing Spanish practices, which allowed it to review the facts and law and to substitute its findings for those of the trial judge, set aside their acquittal, found them guilty of murder and increased their sentences.

On review by this Court, Mr. Justice Peckham, writing for himself and three other Justices, took the position that by appealing the conviction for assault the defendants waived their plea of former jeopardy with regard to the charge of murder. He said:

> "We do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment . . . . No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it . . . he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense . . . ." 199 U. S., at 533.

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trials in state courts. *Stroud* v. *United States,* 251 U. S. 15, is clearly distinguishable. In that case a defendant was retried for first degree murder after he had successfully asked an appellate court to set aside a prior conviction for that same offense.

Mr. Justice Holmes refused to join the Peckham opinion but concurred in the result. Just the year before, in *Kepner* v. *United States,* 195 U. S. 100, 135, he had sharply denounced the notion of "waiver" as indefensible. There is nothing which indicates that his views had changed in the meantime. As pointed out above, he did dissent from the holding in *Kepner*—that the Government could not appeal an acquittal—on the ground that a new trial after an appeal by the Government was part of a continuing jeopardy rather than a second jeopardy. But that contention has been consistently rejected by this Court.

Chief Justice Fuller and Justices Harlan, White, and McKenna dissented in *Trono.* Mr. Justice McKenna wrote a dissent which was concurred in by Justices White and Harlan. During the course of this opinion he stated:

> "It is, in effect, held that because the defendants . . . appealed and sought a review, as authorized by the statute, of the minor offense for which they were convicted, the United States was given the right to try them for the greater offense for which they were acquitted. . . . I think that the guarantees of constitutions and laws should not be so construed. . . . I submit that the State seeks no convictions except in legal ways, and because it does not it affords means of review of erroneous rulings and judgments, and freely affords such means. It does not clog them with conditions or forfeit by their exercise great and constitutional rights.
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> . . . . . .
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> "Here and there may be found a decision which supports the exposition of once in jeopardy expressed in the [Peckham] opinion. Opposed to it is the general consensus of opinion of American text books on criminal law and the overwhelming weight of American decided cases." 199 U. S., at 538–539, 540.

We do not believe that *Trono* should be extended beyond its peculiar factual setting to control the present case. All that was before the Court in *Trono* was a statutory provision against double jeopardy pertaining to the Philippine Islands—a territory just recently conquered with long-established legal procedures that were alien to the common law.[16] Even then it seems apparent that a majority of the Court was unable to agree on any common ground for the conclusion that an appeal of a lesser offense destroyed a defense of former jeopardy on a greater offense for which the defendant had already been acquitted. As a matter of fact, it appears that each of the rationalizations advanced to justify this result was rejected by a majority of the Court. As Mr. Justice Holmes, who concurred in the result, effectively demonstrated, the "waiver theory" is totally unsound and indefensible. On the other hand Mr. Justice Holmes' theory of continuing jeopardy has never outwardly been adhered to by any other Justice of this Court.[17]

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[16] In the course of his opinion Mr. Justice Peckham made some general observations to the effect that he regarded the statutory provision as having the same effect as the Fifth Amendment. Those remarks were not essential to the decision so that even if they had been accepted by the full Court they would not be conclusive in this case where the interpretation of the Fifth Amendment is necessarily decisive. Cf. *Cohens* v. *Virginia*, 6 Wheat. 264, 399; *Humphrey's Executor* v. *United States*, 295 U. S. 602, 626–627.

[17] Mr. Justice White and Mr. Justice McKenna who dissented with Mr. Justice Holmes in *Kepner* refused to agree with the Court in *Trono*. In his dissent in the latter case Mr. Justice McKenna attributed his vote in *Kepner* to the fact that the Philippine Islands had a system of jurisprudence which was totally different from ours in that it provided no trial by jury and traditionally had permitted appellate courts to review both the law and the facts in criminal cases and to substitute their findings for those made by the trial judge. Justice Peckham, in his opinion, also recognized the peculiar nature of these Philippine procedures.

We believe that if either of the rationales offered to support the *Trono* result were adopted here it would unduly impair the constitutional prohibition against double jeopardy. The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued. If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance. We do not feel that *Trono* or any other decision by this Court compels us to forego the conclusion that the second trial of Green for first degree murder was contrary to both the letter and spirit of the Fifth Amendment.

Reversed.

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

On the basis of the following facts the Court has concluded that petitioner has twice been put in jeopardy of life in violation of the Fifth Amendment to the Constitution.[1]

Petitioner was tried under an indictment on two counts. The first count charged arson under D. C. Code, 1951, § 22–401. The second count charged murder in the first degree under D. C. Code, 1951, § 22–2401, in that in perpetrating the arson petitioner had caused the death of one Bettie Brown. In submitting the case to the jury under the second count, the trial court instructed on both first and second degree murder. The jury returned a verdict finding petitioner guilty of arson under the first count and of second degree murder under the second count; the verdict was silent on the charge of first degree

[1] "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."

murder. The court entered judgment on the verdict, and sentenced petitioner to terms of imprisonment of one to three years on the first count of the indictment and five to twenty years on the second count.

Petitioner appealed his conviction of second degree murder, contending that there was no evidence to support a verdict for that offense. The Court of Appeals sustained this claim. It reversed the conviction and ordered a new trial on the ground that, since there was no basis in the evidence for finding petitioner guilty of murder in the second degree, it was error to instruct the jury on that issue. 95 U. S. App. D. C. 45, 218 F. 2d 856.[2] Petitioner was retried on the second count of the indictment, convicted of first degree murder, and sentenced to death. The Court of Appeals, the nine judges sitting *en banc,* affirmed this conviction, rejecting petitioner's contention that he had been put twice in jeopardy of his life in violation of the Federal Constitution, 98 U. S. App. D. C. 413, 236 F. 2d 708, Chief Judge Edgerton and Judges Bazelon and Fahy dissenting.

Since the prohibition in the Constitution against double jeopardy is derived from history, its significance and scope must be determined, "not simply by taking the words and a dictionary, but by considering [its] . . . origin and the line of [its] . . . growth." *Gompers* v. *United States,* 233 U. S. 604, 610.

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[2] In reversing petitioner's conviction the court observed that: "In seeking a new trial at which—if the evidence is substantially as before—the jury will have no choice except to find him guilty of first degree murder or to acquit him, Green is manifestly taking a desperate chance. He may suffer the death penalty. At oral argument we inquired of his counsel whether Green clearly understood the possible consequence of success on this appeal, and were told the appellant, who is 64 years of age, says he prefers death to spending the rest of his life in prison. He is entitled to a new trial." 95 U. S. App. D. C. 45, 48, 218 F. 2d 856, 859.

The origin of this constitutional protection is found in the common-law pleas of *autrefois acquit* and *autrefois convict*. In *Vaux's Case,* 4 Co. Rep. 44a, 45a, it was accepted as established that "the life of a man shall not be twice put in jeopardy for one and the same offence, and that is the reason and cause that *auterfoits* acquitted or convicted of the same offence is a good plea . . . ." Likewise Blackstone stated that "the plea of *auterfoits acquit,* or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime." 4 Bl. Comm. 335. To try again one who had been previously convicted or acquitted of the same offense was "abhorrent to the law of England." *Regina* v. *Tancock,* 13 Cox C. C. 217, 220; see *The King* v. *Emden,* 9 East 437, 445–447.

A principle so deeply rooted in the law of England, as an indispensable requirement of a civilized criminal procedure, was inevitably part of the legal tradition of the English Colonists in America. The Massachusetts Body of Liberties of 1641, an early compilation of principles drawn from the statutes and common law of England, declared that, "No man shall be twise sentenced by Civill Justice for one and the same Crime, offence, or Trespasse," and that "Everie Action betweene partie and partie, and proceedings against delinquents in Criminall causes shall be briefly and destinctly entered on the Rolles of every Court by the Recorder thereof. That such actions be not afterwards brought againe to the vexation of any man." Colonial Laws of Massachusetts 43, 47.

Thus the First Congress, which proposed the Bill of Rights, came to its task with a tradition against double jeopardy founded both on ancient precedents in the English law and on legislation that had grown out of colonial experience and necessities. The need for the principle's general protection was undisputed, though its scope was not clearly defined. Fear of the power of the newly established Federal Government required "an explicit avowal in [the Constitution] . . . of some of the plainest and best established principles in relation to the rights of the citizens, and the rules of the common law." *People* v. *Goodwin,* 18 Johns. (N. Y.) 187, 202. Although many States in ratifying the Constitution had proposed amendments considered indispensable to secure the rights of the citizen against the Federal Government, New York alone proposed a prohibition against double jeopardy. This is not surprising in view of the fact that only in New Hampshire had the common-law principle been embodied in a constitutional provision. 2 Poore, Federal and State Constitutions, Colonial Charters and other Organic Laws (2d ed.), 1282. The bill of rights adopted by the New York convention, and transmitted to Congress with its ratification of the Constitution, included a declaration that, "no Person ought to be put twice in Jeopardy of Life or Limb for one and the same Offence, nor, unless in case of impeachment, be punished more than once for the same Offence." Documents Illustrative of the Formation of the Union, H. R. Doc. No. 398, 69th Cong., 1st Sess. 1035. This declaration was doubtless before Madison when he drafted the constitutional amendments to be proposed to the States.

The terms in which Madison introduced into the House what became the specific provision that is our present concern were these: "No person shall be subject, except in cases of impeachment, to more than one punishment

or one trial for the same offence . . . ." 1 Annals of Cong. 434. Debate on this provision in the Committee of the Whole evidenced a concern that the language should express what the members understood to be the established common-law principle. There was fear that, as proposed by Madison, it might be taken to prohibit a second trial even when sought by a defendant who had been convicted. Representative Benson of New York objected to the provision because he presumed it was meant to express the established principle "that no man's life should be more than once put in jeopardy for the same offence; yet it was well known, that they were entitled to more than one trial." 1 Annals of Cong. 753. Others who spoke agreed that although of course there could be no second trial following an acquittal, the prohibition should not extend to a second trial when a conviction had been set aside. The provision as amended by the Senate, S. J., 1st Cong., 1st Sess. 77, and eventually ratified as part of the Fifth Amendment to the Constitution, was substantially in the language used by Representative Benson to express his understanding of the common law.

The question that had concerned the House in debating Madison's proposal, the relation between the prohibition against double jeopardy and the power to order a new trial following conviction, was considered at length by Mr. Justice Story, on circuit, in *United States* v. *Gibert*, 25 Fed. Cas. 1287, 1294–1303 (1834). The defendants in that case had been found guilty of robbery on the high seas, a capital offense, and moved for a new trial. Mr. Justice Story, after full consideration of the English and American authorities, concluded that the court had no power to grant a new trial when the first trial had been duly had on a valid indictment before a court of competent jurisdiction. According to his view, the prohibition against double jeopardy applied equally whether the de-

fendant had been acquitted or convicted, and there was no exception for a case where the new trial was sought by the defendant for his own benefit. Earlier, Mr. Justice Story had himself taken a non-literal view of the constitutional provision in *United States* v. *Perez,* 9 Wheat. 579, where, writing for the Court, he found that discharge of a jury that had failed to agree was no bar to a second trial. See also 3 Story, Commentaries on The Constitution (1833), 659–660.

Story's conclusion that English law prohibited, except in rare instances, granting a new trial after conviction of a felony was undoubtedly correct, see *The King* v. *Mawbey,* 6 T. R. 619, 638, and on occasion this result has been expressly made to depend on the maxim prohibiting double jeopardy. *The Queen* v. *Murphy,* 2 L. R. P. C. 535, 547–548; see *The Attorney-General* v. *Bertrand,* 1 L. R. P. C. 520, 531–534; but see *The Queen* v. *Scaife,* 17 Q. B. 238. To this day the Court of Criminal Appeals has ordinarily no power to order a new trial even after quashing a conviction on appeal by the defendant, Criminal Appeal Act, 7 Edw. VII, c. 23, s. 4 (2), and repeated efforts to secure this power for the court have met with the argument that a new trial would, at least in spirit, offend the principle that a defendant may not be put twice in jeopardy for the same offense. See 176 H. L. Deb. (5th ser. 1952) 759–763.

The old practice of the English courts, and the position taken by Mr. Justice Story, however, was generally rejected in the United States. The power to grant a new trial in the most serious cases appears to have been exercised by many American courts from an early date in spite of provisions against double jeopardy. *United States* v. *Fries,* 3 Dall. 515 (treason); see *People* v. *Morrison,* 1 Parker's Crim. Rep. (N. Y.) 625, 626–643 (rape). In *United States* v. *Keen,* 26 Fed. Cas. 686, 687–690, a decision rendered only five years after *United States* v.

Gibert, supra, Mr. Justice McLean, on circuit, vigorously rejected the view that the constitutional provision prohibited a new trial on the defendant's motion after a conviction, or that it "guarantees to him the right of being hung, to protect him from the danger of a second trial." See 26 Fed. Cas., at 690. Other federal courts that had occasion to consider the question also rejected Mr. Justice Story's position, see *United States* v. *Williams,* 28 Fed. Cas. 636, 641; *United States* v. *Harding,* 26 Fed. Cas. 131, 136–138, and statements by this Court cast serious doubt on its validity. See *Ex parte Lange,* 18 Wall. 163, 173–174, and Mr. Justice Clifford dissenting at 201–204. In *Hopt* v. *Utah,* 104 U. S. 631, 110 U. S. 574, 114 U. S. 488, 120 U. S. 430, the defendant was in fact retried three times following reversals of his convictions.

Finally, *United States* v. *Ball,* 163 U. S. 662–671, expressly rejected the view that the double jeopardy provision prevented a second trial when a conviction had been set aside. Two of the defendants in the case had been convicted of murder, and on writ of error the judgments were reversed with directions to quash the indictment. The same defendants were then convicted on a new indictment. In affirming these convictions the Court said, "it is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offence of which he had been convicted." 163 U. S., at 672. On a literal reading of the constitutional provision, with an eye exclusively to the interests of the defendants, they had been "once in jeopardy," and were entitled to the benefit of a reversal of their convictions without the hazard of a new trial. The Court recognized, however, that such a wooden interpretation would distort the purposes of the constitutional provision to the prejudice of society's legitimate interest in convicting the guilty as much as,

in *United States* v. *Gibert,* they had been distorted to the prejudice of the defendants. See also *Murphy* v. *Massachusetts,* 177 U. S. 155, 158–160.

The precise question now here first came before a federal court in *United States* v. *Harding,* 26 Fed. Cas. 131. There three defendants had been jointly indicted and tried for murder. One was convicted of murder and two of manslaughter, and all moved for a new trial. A new trial was ordered for the defendant convicted of murder, and as to the other two defendants the case was continued to allow them to decide whether they would take a new trial or abide by their convictions. Mr. Justice Grier warned these defendants:

> "You ought clearly to understand and weigh well the position in which you now stand. You have been once tried and acquitted of the higher grade of offence charged against you in this indictment, the penalty affixed to which is death; but . . . you have escaped. . . . But let me now solemnly warn you to consider well the choice you shall make. Another jury instead of acquitting you altogether, may find you guilty of the whole indictment, and thus your lives may become forfeit to the law." 26 Fed. Cas., at 138.

In thus assuming that the defendants could be retried for the greater offense of murder without violating the prohibition against double jeopardy, Mr. Justice Grier evidently drew upon a familiar background and what he took to be established practice in the federal courts. To one versed in these traditions, the choice to which the defendants were put in abiding by their convictions or obtaining a new trial, on which the entire question of their guilt would be open to re-examination, seemed legally speaking a matter of course.

Not until *Trono* v. *United States,* 199 U. S. 521 (1905), more than fifty years after the *Harding* case, did the ques-

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tion that had there been passed upon by Mr. Justice Grier first come before this Court. *Trono* v. *United States* came here from the Philippine Islands. The plaintiffs in error had been proceeded against in a court of first instance on a complaint accusing them of murder in the first degree. They were acquitted of this charge, but convicted of the included offense of assault. They appealed to the Supreme Court of the Philippines, and that court, exercising a jurisdiction similar to that conferred by Spanish law on the former Audiencia to review the whole case both on the facts and the law, reversed the judgment of the court of first instance, convicted the plaintiffs in error of the crime of "homicide," or murder in the second degree, and increased the punishment imposed by the court of first instance. The plaintiffs in error then sought review by this Court, claiming that the action of the Supreme Court of the Philippines had placed them twice in jeopardy in contravention of the declaration of rights contained in § 5 of the Act of July 1, 1902, for the Government of the Philippines. The provision in the statute relied on by the plaintiffs in error declared that, "no person for the same offense shall be twice put in jeopardy of punishment . . . ." 32 Stat. 692. This language, it will be noted, is substantially identical with that in the Fifth Amendment to the Constitution, upon which petitioner in the present case relies. Its legal relation to the Fifth Amendment calls for later consideration.

This Court affirmed the judgment of the Supreme Court of the Philippines, holding that since the plaintiffs in error had appealed their convictions of the lower offense in order to secure a reversal, there was no bar to convicting them of the higher offense in proceedings in the appellate court that were tantamount to a new trial. After canvassing state and federal precedents, Mr. Justice Peckham concluded that, "the better doctrine is that

which does not limit the court or jury, upon a new trial, to a consideration of the question of guilt of the lower offense of which the accused was convicted on the first trial, but that the reversal of the judgment of conviction opens up the whole controversy and acts upon the original judgment as if it had never been." 199 U. S., at 533. It was pointed out that in permitting retrial for the greater offense the Court only applied the principle laid down in *United States* v. *Ball, supra,* and that the result was justified not only on the theory that the accused had "waived" their right not to be retried, but also on the ground that, "the constitutional provision was really never intended to, and, properly construed, does not cover, the case of a judgment under these circumstances, which has been annulled by the court at the request of the accused . . . ." 199 U. S., at 534.

The Court in *Trono* left no doubt that its decision did not turn on any surviving peculiarities of Spanish procedure, or on the fact that the plaintiffs in error relied on a statutory provision rather than on the Fifth Amendment itself. "We may regard the question as thus presented," stated Mr. Justice Peckham, "as the same as if it arose in one of the Federal courts in this country, where, upon an indictment for a greater offense, the jury had found the accused not guilty of that offense, but guilty of a lower one which was included in it, and upon an appeal from that judgment by the accused a new trial had been granted by the appellate court, and the question was whether, upon the new trial accorded, the accused could be again tried for the greater offense . . . ." 199 U. S., at 530. The dissenters did not dispute this view of the case, but on the contrary were concerned with the Court's holding precisely because of its constitutional implications. Mr. Justice Harlan adhered to the view he had taken in earlier cases that the Bill of Rights applied to the Islands, and Mr. Justice McKenna in the principal

dissent observed that, "Let it be remembered that we are dealing with a great right, I may even say a constitutional right, for the opinion of the court discusses the case as though it were from a Circuit Court of the United States." 199 U. S., at 539.

The scope and significance of the *Trono* case is underscored by the Court's decision in *Kepner* v. *United States,* 195 U. S. 100, rendered only a year before. That case also arose in the Philippine Islands. The plaintiff in error had been acquitted by the court of first instance of the offense with which he was charged. On appeal by the Government to the Supreme Court of the Islands, the judgment was reversed and the plaintiff in error convicted. In this Court both the Attorney General for the Philippines and the Solicitor General of the United States contended that § 5 of the Act of July 1, 1902, which included the same prohibition against double jeopardy involved in the *Trono* case, should be construed in the light of the system of law prevailing in the Philippines before they were ceded to the United States. Brief for the Attorney General of the Philippines, pp. 6–16, 29–38; Brief for the Solicitor General, pp. 34–44. Under that jurisprudence, proceedings in the Supreme Court, or Audiencia, were regarded not as a new trial but as an extension of preliminary proceedings in the court of first instance. The entire proceedings constituted one continuous trial, and the jeopardy that attached in the court of first instance did not terminate until final judgment had been rendered by the Audiencia.

The Court rejected the Government's contention and held that the proceedings after acquittal had placed the accused twice in jeopardy. Whatever the Spanish tradition, the purpose of Congress was "to carry some at least of the essential principles of American constitutional jurisprudence to these islands and to engraft them upon the law of this people, newly subject to our jurisdiction."

"This case does not . . . require determination of the question whether the jeopardy clause [of the Fifth Amendment] became the law of the islands . . . without Congressional action, as the act of Congress made it the law of these possessions when the accused was tried and convicted." 195 U. S., at 121–122, 125. The Court also rejected the suggestion that the rights enumerated in the Act of Congress could have been used "in any other sense than that which has been placed upon them in construing the instrument from which they were taken . . . ." 195 U. S., at 124. Mr. Justice Holmes, dissenting, found the case "of great importance, not only in its immediate bearing upon the administration of justice in the Philippines, but, since the words used in the Act of Congress are also in the Constitution, even more because the decision necessarily will carry with it an interpretation of the latter instrument." 195 U. S., at 134.

The legislative history of the Philippine Bill of Rights, § 5 of the Act of July 1, 1902, made inevitable the Court's conclusion that by its enactment Congress extended to the Islands the double jeopardy provision of the Fifth Amendment, notwithstanding surviving Spanish procedures, so that the Court should construe the statute as it would the constitutional provision itself. President McKinley, in his famous instructions to the Philippine Commission, dated April 7, 1900, drawn by a leader of the American Bar, Secretary of War Elihu Root, had stated that

> "the Commission should bear in mind, and the people of the Islands should be made plainly to understand, that there are certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the maintenance of individual freedom, and of which they have, unfortunately, been denied the experience possessed by us; that there are also certain practical rules of government which

we have found to be essential to the preservation of these great principles of liberty and law, and that these principles and these rules of government must be established and maintained in their islands for the sake of their liberty and happiness, however much they may conflict with the customs or laws of procedure with which they are familiar. It is evident that the most enlightened thought of the Philippine Islands fully appreciates the importance of these principles and rules, and they will inevitably within a short time command universal assent. Upon every division and branch of the Government of the Philippines, therefore, must be imposed these inviolable rules:

"That no person shall be deprived of life, liberty, or property without due process of law; that private property shall not be taken for public use without just compensation; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense; that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offense . . . ." 1 Public Laws of the Philippine Commission, p. LXVI.[3]

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[3] These instructions were drawn up for the guidance of the Commission headed by William Howard Taft. In 1912, W. Cameron Forbes, then Governor General of the Philippines, asked Taft "what the history of the formation of the Philippine policy was, who it was that had written the instructions by President McKinley to the Taft Commission. He informed me that this was the work of Secretary Root, who wrote the letter of instructions, after which

As the Court pointed out, "These principles were not taken from the Spanish law; they were carefully collated from our own Constitution, and embody almost verbatim the safeguards of that instrument for the protection of life and liberty." 195 U. S., at 124. In the Act of July 1, 1902, Congress adopted, almost in the language of the President's instructions, the fundamental provisions he considered must be engrafted onto Philippine law, and the historical context in which Congress acted leaves no doubt that it was also actuated by the same purpose as the President, to extend to the Philippines "certain great principles of government which have been made the basis of our governmental system . . . ." 1 Public Laws of the Philippine Commission, p. LXVI. In the double jeopardy provision of § 5 Congress did not fashion a novel principle specially adapted to Philippine conditions and different from what was familiar to American constitu-

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he had read them over to him (Judge Taft) and other members of his Commission, and that some suggestions and modifications were made but that the main work was intact." 1 Forbes, The Philippine Islands, 130, n. 2. In an address in 1913, Taft stated that the instructions "had a conspicuous place in the history of our relations to the Philippines, and a Congressional indorsement, given to but few documents in the whole history of our country. It secured to the Philippine people all the guaranties of our Bill of Rights except trial by jury and the right to bear arms. It was issued by President McKinley as commander-in-chief of the Army and Navy in the exercise of a power which Congress was glad to leave to him without intervention for four years. He had thus the absolute control of what should be done in the way of establishing government in the Philippine Islands, and this letter to Mr. Root was the fundamental law of a civil government established under military authority. Subsequently, in 1902, when Congress assumed responsibility, it formally adopted and expressly ratified this letter of instructions, and declared that it, as supplemented by the remaining provisions of the statute, should be the Constitution of the Government of the Philippine Islands, and the charter of the liberties of the Filipino people." 2 Forbes, The Philippine Islands, 500.

tional thought. On the contrary, it extended over those newly subject to our jurisdiction the specific command of the Fifth Amendment, as construed and developed in the decisions of this Court. The Court in the *Kepner* and *Trono* cases, therefore, following the statutory language itself, emphasized by its legislative history, construed the double jeopardy provision of § 5 as though it were construing the same provision in the United States Constitution. See also *Weems* v. *United States,* 217 U. S. 349, 367–368. The background of these decisions, and the expressed understanding of the Court on the nature and scope of the provision construed, make them direct authority in all cases arising under the double jeopardy provision of the Fifth Amendment.

The decision in *Trono* was emphatically a decision of the Court. Although Mr. Justice Holmes concurred in the result only, and not in the opinion of Mr. Justice Peckham, there can be no doubt of where he stood. He had dissented in the *Kepner* case on the ground that trial and retrial constituted one procedure entailing one continuous jeopardy, and that there could be no second jeopardy until a conviction or acquittal free from legal error had been obtained. He was dissatisfied with the opinion of Mr. Justice Peckham in the *Trono* case, therefore, not remotely because it upheld the accused's conviction of the greater offense, but because it did not go further and adopt the continuing jeopardy theory Mr. Justice Holmes had espoused in the *Kepner* case. If there was no double jeopardy for him when the Government appealed an acquittal, obviously there was none when the defendant appealed a conviction. Indeed, in *Kepner* he explicitly stated that he considered state cases that held the defendant could not be retried for the greater offense to be wrong.

Many statements by this Court since *Trono* show that the principle of that case cannot in all good conscience

be rested on the criminal procedure of the Philippine Islands, but on a construction of the Fifth Amendment itself, and as such binding on the entire federal judiciary. In *Burton* v. *United States,* 202 U. S. 344, 378, a case arising in the continental United States, the Court referred to the principle established by the *Trono* decision without any suggestion that it was confined to cases arising in the Philippines. In *Brantley* v. *Georgia,* 217 U. S. 284, the defendant was convicted of manslaughter under an indictment for murder. On appeal to the State Court of Appeals, the conviction was reversed and the defendant retried and convicted of murder. Although the case concerned the Due Process Clause, the Court comprehensively stated that this "was not a case of twice in jeopardy under any view of the Constitution of the United States." 217 U. S., at 285.

Of special relevance is *Stroud* v. *United States,* 251 U. S. 15, 17–18. In that case the defendant was indicted for murder, and the jury returned a verdict of "guilty as charged in the indictment without capital punishment." The judgment was reversed and a new trial had on which the defendant was again found guilty of murder, but without a recommendation against capital punishment. He was then sentenced to death. This Court expressly relied on *Trono* in affirming the judgment and rejecting the contention that the imposition of a greater punishment had placed the defendant twice in jeopardy. As a practical matter, and on any basis of human values, it is scarcely possible to distinguish a case in which the defendant is convicted of a greater offense from one in which he is convicted of an offense that has the same name as that of which he was previously convicted but carries a significantly different punishment, namely death rather than imprisonment.

Whatever formal disclaimers may be made, neither *Trono* itself nor the reliance placed upon it for more than

half a century permits any other conclusion than that the Court today overrules that decision. It does so, furthermore, in a case where the defendant's position is far less persuasive than it was in *Trono*. There the plaintiffs in error had been expressly acquitted of the greater offense, whereas in the present case petitioner relies on an "implied acquittal" based on his conviction of the lesser offense of second degree murder and the jury's silence on the greater offense. Surely the silence of the jury is not, contrary to the Court's suggestion, to be interpreted as an express finding that the defendant is not guilty of the greater offense. All that can with confidence be said is that the jury was in fact silent. Every trial lawyer and every trial judge knows that jury verdicts are not logical products, and are due to considerations that preclude accurate guessing or logical deduction. Insofar as state cases speak of the jury's silence as an "acquittal," they give a fictional description of a legal result: that when a defendant is found guilty of a lesser offense under an indictment charging a more serious one, and he is content to accept this conviction, the State may not again prosecute him for the greater offense. A very different situation is presented, with considerations persuasive of a different legal result, when the defendant is not content with his conviction, but appeals and obtains a reversal. Due regard for these additional considerations is not met by stating, as though it were a self-evident proposition, that the jury's silence has, for all purposes, "acquitted" the defendant.

Moreover, the error of the District Court, which was the basis for petitioner's appeal from his first conviction, was of a kind peculiarly likely to raise doubts that the jury on the first trial had made a considered determination of petitioner's innocence of first degree murder. By instructing on second degree murder when the evidence did not warrant a finding of such an offense, the court

gave the jury an opportunity for compromise and lenity that should not have been available. The fact of the matter is that by finding petitioner guilty of arson under count one of the indictment, and of second degree murder under count two, the jury found him guilty of all the elements necessary to convict him of the first degree felony murder with which he was charged, but the judge's erroneous instruction permitted the jury, for its own undisclosed reason, to render an irrational verdict.

We should not be so unmindful, even when constitutional questions are involved, of the principle of *stare decisis,* by whose circumspect observance the wisdom of this Court as an institution transcending the moment can alone be brought to bear on the difficult problems that confront us. The question in the present case is effectively indistinguishable from that in *Trono.* Furthermore, we are not here called upon to weigh considerations generated by changing concepts as to minimum standards of fairness, which interpretation of the Due Process Clause inevitably requires. Instead, the defense of double jeopardy is involved, whose contours are the product of history. In this situation the passage of time is not enough, and the conviction borne to the mind of the rightness of an overturning decision must surely be of a highly compelling quality to justify overruling a well-established precedent when we are presented with no considerations fairly deemed to have been wanting to those who preceded us. Whatever might have been the allowable result if the question of retrying a defendant for the greater offense were here for the first time, to fashion a policy *in favorem vitae,* it is foreclosed by the decision in *Trono* v. *United States.*

Even if the question were here for the first time, we would not be justified in erecting the holding of the present case as a constitutional rule. Yet the opinion of the Court treats the question, not as one within

our supervisory jurisdiction over federal criminal procedure, but as a question answered by the Fifth Amendment itself, and which therefore even Congress cannot undertake to affect.

Such an approach misconceives the purposes of the double jeopardy provision, and without warrant from the Constitution makes an absolute of the interests of the accused in disregard of the interests of society. In *Palko* v. *Connecticut*, 302 U. S. 319, we held that a State could permit the prosecution to appeal a conviction of second degree murder and on retrial secure a conviction of first degree murder without violating any "fundamental principles of liberty and justice." Since the State's interest in obtaining a trial "free from the corrosion of substantial legal error" was sufficient to sustain the conviction of the greater offense after an appeal by the State, it would of course sustain such a conviction if the defendant had himself appealed. Although this case defined conduct permissible under the Due Process Clause of the Fourteenth Amendment, it cannot wisely be ignored in tracing the constitutional limits imposed on the Federal Government. Nor should we ignore the fact that a substantial body of opinion in the States permits what today the Court condemns as violative of a "vital safeguard in our society." [4] The Court restricts Congress within limits

[4] Of the 36 States that have considered the question, 19 permit retrial for the greater offense:

Colorado.—See *Young* v. *People*, 54 Colo. 293, 298–307.

Connecticut.—See *State* v. *Lee*, 65 Conn. 265, 271–278; *State* v. *Palko*, 122 Conn. 529, 538–539, 541, aff'd 302 U. S. 319.

Georgia.—*Brantley* v. *State*, 132 Ga. 573, 574–579, aff'd 217 U. S. 284; *Perdue* v. *State*, 134 Ga. 300, 302–303.

Indiana.—See *Ex parte Bradley*, 48 Ind. 548, 549–558; *State ex rel. Lopez* v. *Killigrew*, 202 Ind. 397, 403–406.

Kansas.—*State* v. *McCord*, 8 Kan. 232, 240–244; see *In re Christensen*, 166 Kan. 671, 675–677.

(*Footnote 4 continued on pp. 217, 218.*)

that in the experience of many jurisdictions are not a part of the protection against double jeopardy or required by its underlying purpose, and have not been imposed

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Kentucky.—*Hoskins* v. *Commonwealth,* 152 Ky. 805, 807–808.

Mississippi.—*Jones* v. *State,* 144 Miss. 52, 60–73, motion for leave to proceed *in forma pauperis* denied for want of substantial federal question, 273 U. S. 639 (citing *Trono* v. *United States*); *Butler* v. *State,* 177 Miss. 91, 100.

Missouri.—See *State* v. *Simms,* 71 Mo. 538, 540–541; *State* v. *Stallings,* 334 Mo. 1, 5.

Nebraska.—*Bohanan* v. *State,* 18 Neb. 57, 58–77, submission of cause set aside because of escape of plaintiff in error, 125 U. S. 692; *Macomber* v. *State,* 137 Neb. 882, 896.

Nevada.—*In re Somers,* 31 Nev. 531, 532–539; see *State* v. *Teeter,* 65 Nev. 584, 610.

New Jersey.—See *State* v. *Leo,* 34 N. J. L. J. 340, 341–342, 356.

New York.—*People* v. *Palmer,* 109 N. Y. 413, 415–420; *People* v. *McGrath,* 202 N. Y. 445, 450–451.

North Carolina.—*State* v. *Correll,* 229 N. C. 640, 641–642; see *State* v. *Matthews,* 142 N. C. 621, 622–623.

Ohio.—*State* v. *Behimer,* 20 Ohio St. 572, 576–582; *State* v. *Robinson,* 100 Ohio App. 466, 470–472.

Oklahoma.—*Watson* v. *State,* 26 Okla. Cr. 377, 379–390; see *Pierce* v. *State,* 96 Okla. Cr. 76, 79.

South Carolina.—See *State* v. *Gillis,* 73 S. C. 318, 319–324; *State* v. *Steadman,* 216 S. C. 579, 588–592.

Utah.—*State* v. *Kessler,* 15 Utah 142, 144–147.

Vermont.—See *State* v. *Bradley,* 67 Vt. 465, 472–474; *State* v. *Pianfetti,* 79 Vt. 236, 246–247.

Washington.—*State* v. *Ash,* 68 Wash. 194, 197–203; *State* v. *Hiatt,* 187 Wash. 226, 236.

In eight of these States, Indiana, Kansas, Kentucky, Nevada, New York, Ohio, Oklahoma, and Utah, this result is based to some extent on statutes defining the effect of granting a new trial. In four, Colorado, Georgia, Mississippi and Missouri, on special constitutional provisions that permit retrial for the greater offense. Connecticut, North Carolina, and Vermont have no constitutional provisions as to double jeopardy, but recognize the common-law prohibition.

In 17 States the defendant cannot be retried for the greater offense:

Alabama.—See *Thomas* v. *State,* 255 Ala. 632, 635–636.

Arkansas.—*Johnson* v. *State,* 29 Ark. 31, 32–46; see *Hearn* v. *State,* 212 Ark. 360, 361.

upon the States in the exercise of their governmental powers.

Undeniably the framers of the Bill of Rights were concerned to protect defendants from oppression and from

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California.—*People* v. *Gilmore,* 4 Cal. 376; *People* v. *Gordon,* 99 Cal. 227, 228–232; *In re Hess,* 45 Cal. 2d 171, 175–176; but see *People* v. *Keefer,* 65 Cal. 232, 234–235; *People* v. *McNeer,* 14 Cal. App. 2d 22, 27–30; *In re Moore,* 29 Cal. App. 2d 56.

Delaware.—See *State* v. *Naylor,* 28 Del. 99, 114–115, 117.

Florida.—*State ex rel. Landis* v. *Lewis,* 118 Fla. 910, 911–916; see *McLeod* v. *State,* 128 Fla. 35, 37; *Simmons* v. *State,* 156 Fla. 353, 354.

Illinois.—*Brennan* v. *People,* 15 Ill. 511, 517–519; *People* v. *Newman,* 360 Ill. 226, 232–233.

Iowa.—*State* v. *Tweedy,* 11 Iowa 350, 353–358; *State* v. *Coleman,* 226 Iowa 968, 976.

Louisiana.—See *State* v. *Harville,* 171 La. 256, 258–262.

Michigan.—*People* v. *Farrell,* 146 Mich. 264, 266, 269, 272–273, 294; *People* v. *Gessinger,* 238 Mich. 625, 627–629.

New Mexico.—*State* v. *Welch,* 37 N. M. 549, 559; *State* v. *White,* 61 N. M. 109, 113.

Oregon.—*State* v. *Steeves,* 29 Ore. 85, 107–111; *State* v. *Wilson,* 172 Ore. 373, 382.

Pennsylvania.—*Commonwealth* v. *Deitrick,* 221 Pa. 7, 17–18; *Commonwealth* v. *Flax,* 331 Pa. 145, 157–158.

Tennessee.—See *Slaughter* v. *State,* 6 Humph. 410, 413–415; *Reagan* v. *State,* 155 Tenn. 397, 400–402.

Texas.—*Jones* v. *State,* 13 Tex. 168, 184–185; *Brown* v. *State,* 99 Tex. Cr. R. 19, 21–22; but see *Hill* v. *State,* 126 Tex. Cr. R. 79, 80–81; *Joubert* v. *State,* 136 Tex. Cr. R. 219, 220–221; *Beckham* v. *State,* 141 Tex. Cr. R. 438, 442; *Hall* v. *State,* 145 Tex. Cr. R. 192, 194; *Ex Parte Byrd,* 157 Tex. Cr. R. 595, 597–598.

Virginia.—*Stuart* v. *Commonwealth,* 28 Gratt. 950, 953–964; see *Taylor* v. *Commonwealth,* 186 Va. 587, 589–590, 592.

West Virginia.—See *State* v. *Franklin,* 139 W. Va. 43, 64.

Wisconsin.—*Radej* v. *State,* 152 Wis. 503, 511–513; but see *State* v. *B————,* 173 Wis. 608, 616–628; *State* v. *Witte,* 243 Wis. 423, 427–431; *State* v. *Evjue,* 254 Wis. 581, 586–592.

In two of these States, Virginia and Texas, the result is based to some extent on statutes prohibiting retrial for the greater offense, and in New Mexico on a constitutional provision to the same effect.

efforts to secure, through the callousness of repeated prosecutions, convictions for whose justice no man could vouch. On the other hand, they were also aware of the countervailing interest in the vindication of criminal justice, which sets outer limits to the protections for those accused of crimes. Thus if a defendant appeals his conviction and obtains a reversal, all agree, certainly in this country, that he may be retried for the same offense. The reason is, obviously, not that the defendant has consented to the second trial—he would much prefer that the conviction be set aside and no further proceedings had—but that the continuation of the proceedings by an appeal, together with the reversal of the conviction, are sufficient to permit a re-examination of the issue of the defendant's guilt without doing violence to the purposes behind the Double Jeopardy Clause. The balance represented by that clause leaves free another appeal to law. Since the propriety of the original proceedings has been called in question by the defendant, a complete re-examination of the issues in dispute is appropriate and not unjust. In the circumstances of the present case, likewise, the reversal of petitioner's conviction was a sufficient reason to justify a complete new trial in order that both parties might have one free from errors claimed to be prejudicial. As Mr. Justice Peckham pointed out in *Trono,* "the constitutional provision was really never intended to, and, properly construed, does not cover, the case of a judgment under these circumstances, which has been annulled by the court at the request of the accused . . . ." 199 U. S., at 534.

I would affirm the judgment.

McGEE *v.* INTERNATIONAL LIFE INSURANCE CO.

CERTIORARI TO THE COURT OF CIVIL APPEALS OF TEXAS, FIRST SUPREME JUDICIAL DISTRICT.

No. 50. Argued November 20, 1957.—Decided December 16, 1957.

Petitioner's son, a resident of California, bought a life insurance policy from an Arizona corporation, naming petitioner as beneficiary. Later, respondent, a Texas corporation, agreed to assume the insurance obligations of the Arizona corporation and mailed a reinsurance certificate to petitioner's son in California, offering to insure him in accordance with his policy. He accepted this offer and paid premiums by mail from his California home to respondent's office in Texas. Neither corporation has ever had any office or agent in California or done any other business in that State. Petitioner sent proofs of her son's death to respondent, but it refused to pay the claim. Under a California statute subjecting foreign corporations to suit in California on insurance contracts with residents of California, even though such corporations cannot be served with process within the State, petitioner sued respondent and obtained judgment in a California court, process being served only by registered mail to respondent's principal place of business in Texas. *Held:*

1. The Due Process Clause of the Fourteenth Amendment did not preclude the California court from entering a judgment binding on respondent, since the suit was based on a contract which had a substantial connection with California. Pp. 223–224.

2. Respondent's insurance contract was not unconstitutionally impaired by the fact that the California statute here involved did not become effective until after respondent had assumed the obligation of the insurance policy. P. 224.

288 S. W. 2d 579, reversed and remanded.

Arthur J. Mandell argued the cause and filed a brief for petitioner.

Stanley Hornsby argued the cause and filed a brief for respondent.

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

Petitioner, Lulu B. McGee, recovered a judgment in a California state court against respondent, International Life Insurance Company, on a contract of insurance. Respondent was not served with process in California but by registered mail at its principal place of business in Texas. The California court based its jurisdiction on a state statute which subjects foreign corporations to suit in California on insurance contracts with residents of that State even though such corporations cannot be served with process within its borders.[1]

Unable to collect the judgment in California petitioner went to Texas where she filed suit on the judgment in a Texas court. But the Texas courts refused to enforce her judgment holding it was void under the Fourteenth Amendment because service of process outside California could not give the courts of that State jurisdiction over respondent. 288 S. W. 2d 579. Since the case raised important questions, not only to California but to other States which have similar laws, we granted certiorari. 352 U. S. 924. It is not controverted that if the California court properly exercised jurisdiction over respondent the Texas courts erred in refusing to give its judgment full faith and credit. 28 U. S. C. § 1738.

The material facts are relatively simple. In 1944, Lowell Franklin, a resident of California, purchased a life insurance policy from the Empire Mutual Insurance Company, an Arizona corporation. In 1948 the respondent agreed with Empire Mutual to assume its insurance obligations. Respondent then mailed a reinsurance certificate to Franklin in California offering to insure him in accordance with the terms of the policy he held with Empire Mutual. He accepted this offer and from that

[1] Cal. Insurance Code, 1953, §§ 1610–1620.

438765 O—58——20

time until his death in 1950 paid premiums by mail from his California home to respondent's Texas office. Petitioner, Franklin's mother, was the beneficiary under the policy. She sent proofs of his death to the respondent but it refused to pay claiming that he had committed suicide. It appears that neither Empire Mutual nor respondent has ever had any office or agent in California. And so far as the record before us shows, respondent has never solicited or done any insurance business in California apart from the policy involved here.

Since *Pennoyer* v. *Neff*, 95 U. S. 714, this Court has held that the Due Process Clause of the Fourteenth Amendment places some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries. But just where this line of limitation falls has been the subject of prolific controversy, particularly with respect to foreign corporations. In a continuing process of evolution this Court accepted and then abandoned "consent," "doing business," and "presence" as the standard for measuring the extent of state judicial power over such corporations. See Henderson, The Position of Foreign Corporations in American Constitutional Law, c. V. More recently in *International Shoe Co.* v. *Washington*, 326 U. S. 310, the Court decided that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.*, at 316.

Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions

touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

Turning to this case we think it apparent that the Due Process Clause did not preclude the California court from entering a judgment binding on respondent. It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State. Cf. *Hess* v. *Pawloski,* 274 U. S. 352; *Henry L. Doherty & Co.* v. *Goodman,* 294 U. S. 623; *Pennoyer* v. *Neff,* 95 U. S. 714, 735.[2] The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof. Often the crucial witnesses—as here on the company's defense of suicide—will be found in the insured's locality.

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[2] And see *Ace Grain Co.* v. *American Eagle Fire Ins. Co.,* 95 F. Supp. 784; *Storey* v. *United Ins. Co.,* 64 F. Supp. 896; *S. Howes Co.* v. *W. P. Milling Co.,* 277 P. 2d 655 (Okla.); *Compania de Astral, S. A.* v. *Boston Metals Co.,* 205 Md. 237, 107 A. 2d 357, cert. denied, 348 U. S. 943; *Zacharakis* v. *Bunker Hill Mut. Ins. Co.,* 281 App. Div. 487, 120 N. Y. S. 2d 418; *Smyth* v. *Twin State Improvement Co.,* 116 Vt. 569, 80 A. 2d 664.

Of course there may be inconvenience to the insurer if it is held amenable to suit in California where it had this contract but certainly nothing which amounts to a denial of due process. Cf. *Travelers Health Assn.* v. *Virginia ex rel. State Corporation Comm'n,* 339 U. S. 643. There is no contention that respondent did not have adequate notice of the suit or sufficient time to prepare its defenses and appear.

The California statute became law in 1949, after respondent had entered into the agreement with Franklin to assume Empire Mutual's obligation to him. Respondent contends that application of the statute to this existing contract improperly impairs the obligation of the contract. We believe that contention is devoid of merit. The statute was remedial, in the purest sense of that term, and neither enlarged nor impaired respondent's substantive rights or obligations under the contract. It did nothing more than to provide petitioner with a California forum to enforce whatever substantive rights she might have against respondent. At the same time respondent was given a reasonable time to appear and defend on the merits after being notified of the suit. Under such circumstances it had no vested right not to be sued in California. Cf. *Bernheimer* v. *Converse,* 206 U. S. 516; *National Surety Co.* v. *Architectural Decorating Co.,* 226 U. S. 276; *Funkhouser* v. *J. B. Preston Co.,* 290 U. S. 163.

The judgment is reversed and the cause is remanded to the Court of Civil Appeals of the State of Texas, First Supreme Judicial District, for further proceedings not inconsistent with this opinion.

It is so ordered.

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

LAMBERT *v.* CALIFORNIA.

APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY.

No. 47. Argued April 3, 1957.—Restored to the docket for reargument June 3, 1957.—Reargued October 16–17, 1957.—Decided December 16, 1957.

A Los Angeles municipal ordinance makes it an offense for a person who has been convicted of a crime punishable in California as a felony to remain in the City for more than five days without registering with the Chief of Police. On appeal from a conviction for failure to register, *held:* When applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge, this ordinance violates the Due Process Clause of the Fourteenth Amendment. Pp. 226–230.

Reversed.

Samuel C. McMorris argued and reargued the cause and filed a brief for appellant.

Warren M. Christopher reargued the cause, as *amicus curiae,* in support of the appellant, at the invitation of the Court, 354 U. S. 936, and also filed a brief.

Philip E. Grey argued and reargued the cause for appellee. With him on the briefs was *Roger Arnebergh.*

Clarence A. Linn, Assistant Attorney General of California, reargued the cause and filed a brief for appellee pursuant to an invitation of the Court, 353 U. S. 979. With him on the brief was *Edmund G. Brown,* Attorney General.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Section 52.38 (a) of the Los Angeles Municipal Code defines "convicted person" as follows:

> "Any person who, subsequent to January 1, 1921, has been or hereafter is convicted of an offense punishable as a felony in the State of California, or who has been or who is hereafter convicted of any offense in any place other than the State of California, which offense, if committed in the State of California, would have been punishable as a felony."

Section 52.39 provides that it shall be unlawful for "any convicted person" to be or remain in Los Angeles for a period of more than five days without registering; it requires any person having a place of abode outside the city to register if he comes into the city on five occasions or more during a 30-day period; and it prescribes the information to be furnished the Chief of Police on registering.

Section 52.43 (b) makes the failure to register a continuing offense, each day's failure constituting a separate offense.

Appellant, arrested on suspicion of another offense, was charged with a violation of this registration law.* The evidence showed that she had been at the time of her arrest a resident of Los Angeles for over seven years. Within that period she had been convicted in Los Angeles of the crime of forgery, an offense which California punishes as a felony. Though convicted of a crime punishable as a felony, she had not at the time of her arrest registered under the Municipal Code. At the trial, appel-

*For a recent comprehensive review of these registration laws see Note, 103 U. of Pa. L. Rev. 60 (1954).

lant asserted that § 52.39 of the Code denies her due process of law and other rights under the Federal Constitution, unnecessary to enumerate. The trial court denied this objection. The case was tried to a jury which found appellant guilty. The court fined her $250 and placed her on probation for three years. Appellant, renewing her constitutional objection, moved for arrest of judgment and a new trial. This motion was denied. On appeal the constitutionality of the Code was again challenged. The Appellate Department of the Superior Court affirmed the judgment, holding there was no merit to the claim that the ordinance was unconstitutional. The case is here on appeal. 28 U. S. C. § 1257 (2). We noted probable jurisdiction, 352 U. S. 914, and designated *amicus curiae* to appear in support of appellant. The case having been argued and reargued, we now hold that the registration provisions of the Code as sought to be applied here violate the Due Process requirement of the Fourteenth Amendment.

The registration provision, carrying criminal penalties, applies if a person has been convicted "of an offense punishable as a felony in the State of California" or, in case he has been convicted in another State, if the offense "would have been punishable as a felony" had it been committed in California. No element of willfulness is by terms included in the ordinance nor read into it by the California court as a condition necessary for a conviction.

We must assume that appellant had no actual knowledge of the requirement that she register under this ordinance, as she offered proof of this defense which was refused. The question is whether a registration act of this character violates due process where it is applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge.

We do not go with Blackstone in saying that "a vicious will" is necessary to constitute a crime, 4 Bl. Comm. *21, for conduct alone without regard to the intent of the doer is often sufficient. There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition. See *Chicago, B. & Q. R. Co.* v. *United States,* 220 U. S. 559, 578. But we deal here with conduct that is wholly passive—mere failure to register. It is unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed. Cf. *Shevlin-Carpenter Co.* v. *Minnesota,* 218 U. S. 57; *United States* v. *Balint,* 258 U. S. 250; *United States* v. *Dotterweich,* 320 U. S. 277, 284. The rule that "ignorance of the law will not excuse" (*Shevlin-Carpenter Co.* v. *Minnesota, supra,* p. 68) is deep in our law, as is the principle that of all the powers of local government, the police power is "one of the least limitable." *District of Columbia* v. *Brooke,* 214 U. S. 138, 149. On the other hand, due process places some limits on its exercise. Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act. Recent cases illustrating the point are *Mullane* v. *Central Hanover Trust Co.,* 339 U. S. 306; *Covey* v. *Town of Somers,* 351 U. S. 141; *Walker* v. *Hutchinson City,* 352 U. S. 112. These cases involved only property interests in civil litigation. But the principle is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case.

Registration laws are common and their range is wide. Cf. *Bryant* v. *Zimmerman,* 278 U. S. 63; *United States* v. *Harriss,* 347 U. S. 612; *United States* v. *Kahriger,* 345 U. S. 22. Many such laws are akin to licensing statutes in that they pertain to the regulation of business activities. But the present ordinance is entirely different. Violation of its provisions is unaccompanied by any activity whatever, mere presence in the city being the test. Moreover, circumstances which might move one to inquire as to the necessity of registration are completely lacking. At most the ordinance is but a law enforcement technique designed for the convenience of law enforcement agencies through which a list of the names and addresses of felons then residing in a given community is compiled. The disclosure is merely a compilation of former convictions already publicly recorded in the jurisdiction where obtained. Nevertheless, this appellant on first becoming aware of her duty to register was given no opportunity to comply with the law and avoid its penalty, even though her default was entirely innocent. She could but suffer the consequences of the ordinance, namely, conviction with the imposition of heavy criminal penalties thereunder. We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand. As Holmes wrote in The Common Law, "A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear." *Id.,* at 50. Its severity lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it. Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently

with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.

Reversed.

MR. JUSTICE BURTON dissents because he believes that, as applied to this appellant, the ordinance does not violate her constitutional rights.

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

The present laws of the United States and of the forty-eight States are thick with provisions that command that some things not be done and others be done, although persons convicted under such provisions may have had no awareness of what the law required or that what they did was wrongdoing. The body of decisions sustaining such legislation, including innumerable registration laws, is almost as voluminous as the legislation itself. The matter is summarized in *United States* v. *Balint*, 258 U. S. 250, 252: "Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*."

Surely there can hardly be a difference as a matter of fairness, of hardship, or of justice, if one may invoke it, between the case of a person wholly innocent of wrongdoing, in the sense that he was not remotely conscious of violating any law, who is imprisoned for five years for conduct relating to narcotics, and the case of another person who is placed on probation for three years on condition that she pay $250, for failure, as a local resident, convicted under local law of a felony, to register under

a law passed as an exercise of the State's "police power."* Considerations of hardship often lead courts, naturally enough, to attribute to a statute the requirement of a certain mental element—some consciousness of wrongdoing and knowledge of the law's command—as a matter of statutory construction. Then, too, a cruelly disproportionate relation between what the law requires and the sanction for its disobedience may constitute a violation of the Eighth Amendment as a cruel and unusual punishment, and, in respect to the States, even offend the Due Process Clause of the Fourteenth Amendment.

But what the Court here does is to draw a constitutional line between a State's requirement of doing and not doing. What is this but a return to Year Book distinctions between feasance and nonfeasance—a distinction that may have significance in the evolution of common-law notions of liability, but is inadmissible as a line between constitutionality and unconstitutionality. One can be confident that Mr. Justice Holmes would have been the last to draw such a line. What he wrote about "blameworthiness" is worth quoting in its context:

> "It is not intended to deny that criminal liability, as well as civil, is founded on blameworthiness. Such a denial would shock the moral sense of any civilized community; or, to put it another way, a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear." (This pas-

*This case does not involve a person who, convicted of a crime in another jurisdiction, must decide whether he has been convicted of a crime that "would have been punishable as a felony" had it been committed in California. Appellant committed forgery in California, and was convicted under California law. Furthermore, she was convicted in Los Angeles itself, and there she resided for over seven years before the arrest leading to the present proceedings.

sage must be read in the setting of the broader discussion of which it is an essential part. Holmes, The Common Law, at 49–50.)

If the generalization that underlies, and alone can justify, this decision were to be given its relevant scope, a whole volume of the United States Reports would be required to document in detail the legislation in this country that would fall or be impaired. I abstain from entering upon a consideration of such legislation, and adjudications upon it, because I feel confident that the present decision will turn out to be an isolated deviation from the strong current of precedents—a derelict on the waters of the law. Accordingly, I content myself with dissenting.

UNITED STATES *v.* SHOTWELL MANUFACTURING CO. ET AL.

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

No. 1. Argued October 17, 1957.—Decided December 16, 1957.

In a jury trial in a federal court, respondents were convicted of willfully attempting to evade federal corporate income taxes. The Court of Appeals reversed on the ground that their privilege against self-incrimination had been violated by the admission of evidence obtained as a result of timely voluntary disclosures made by them in good faith in the hope of obtaining immunity from criminal prosecution under a policy then followed by the Treasury Department. After petitioning this Court for certiorari, the Government moved that the case be remanded to the District Court for further proceedings, on the ground that newly discovered evidence revealed that testimony at the trial concerning the timeliness and good faith of respondents' disclosures was perjured and fraudulent. *Held:* This Court will not review a case on the basis of a record so challenged as being tainted with perjury and fraud; the judgment of the Court of Appeals is vacated; and the case is remanded to the District Court for re-examination in further proceedings on the issues relating to respondents' allegedly voluntary disclosures. Pp. 234–246.

(a) This Court will not review a case when the record is challenged, on the basis of newly discovered evidence, as being so tainted with perjury and fraud. *Communist Party* v. *Subversive Activities Control Board,* 351 U. S. 115; *Mesarosh* v. *United States,* 352 U. S. 1. Pp. 241–242.

(b) Here a convincing showing has been made that newly discovered evidence will show that testimony concerning crucial questions as to the timeliness and good faith of respondents' disclosures was perjured and fraudulent; and this Court will not review the decision of the Court of Appeals until these charges have been resolved. Pp. 242–243.

(c) Since respondents were found guilty by the jury, the motion to remand involves no question of double jeopardy. P. 243.

(d) The Government's new showing does not relate to an issue submitted to the jury but to a preliminary question relating to the admissibility of evidence; and, since the Court of Appeals set aside the verdict on that point, fair administration of justice requires that the Government have an opportunity to show that that decision was obtained by respondents on a corrupt record attributable to their own fraud. Pp. 243–244.

(e) This Court will not sanction a rule which would prohibit appellate review upon a record suspect of taint when the taint might operate to the disadvantage of the defendants, but which would require review when the taint might operate to their advantage. P. 244.

(f) Since the charges as to the integrity of the record must be fully aired and the District Court is the proper forum for that purpose, it would be unnecessary and wasteful to remand this case to the Court of Appeals. Pp. 244–245.

(g) On remand, additional evidence to be presented by both sides will be confined to the issue whether certain evidence admitted at the trial should have been suppressed; and the District Court will make appropriate new findings of fact on that issue and enter appropriate new final judgments on the basis of such findings. Pp. 245–246.

225 F. 2d 394, judgment vacated and case remanded to District Court.

Philip Elman argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Rice, Leonard B. Sand* and *Joseph M. Howard.*

George B. Christensen argued the cause for respondents. With him on the brief were *Howard Ellis* and *William T. Kirby.*

Mr. Justice Harlan delivered the opinion of the Court.

This case presents an unusual question involving the integrity of a criminal trial in the federal courts.

The Solicitor General has filed a motion in this Court to remand the case to the District Court for further proceedings. This motion is based on a proffer of evidence

alleged to have come into the possession of the Government after the United States had petitioned for certiorari to review a decision of the Court of Appeals setting aside the conviction of the respondents. It is claimed that such evidence shows that the decision of the Court of Appeals was based upon a perjurious record attributable to the fraud of the respondents.

A clear appreciation of both the proceedings in the lower courts and the peculiar circumstances in which the Government's motion arises is essential to an understanding of why we believe the motion to remand must be granted.

In 1953 the respondents and Frank J. Huebner, after a jury trial in the United States District Court for the Northern District of Illinois, were convicted of willfully attempting to evade the 1945 and 1946 federal corporate income taxes of the Shotwell Manufacturing Company.[1] Prior to trial they moved for dismissal of the indictment on the ground that their voluntary and timely disclosure of these tax derelictions to the taxing authorities entitled them to immunity from prosecution under the Treasury's former "voluntary disclosure policy." [2] This motion was denied by the District Court after a pretrial hearing. Respondents and Huebner then moved, on the same

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[1] Internal Revenue Code of 1939, § 145 (b), 53 Stat. 63. The Shotwell Company manufactured candy and marshmallows. Cain was President, Sullivan, Executive Vice President and General Counsel, and Huebner, Vice President. Huebner is no longer a respondent here. See notes 6 and 7, *infra*.

[2] Under that policy, first announced by the Treasury Department in 1945, the Department did not refer to the Department of Justice for prosecution cases of intentional income tax evasion where the taxpayers had made a clean breast of things to the Treasury before any investigation had been initiated by the Revenue Service. This policy was set forth in various informal announcements by Treasury officials, but was never formalized by statute or regulation. The policy was abandoned in January 1952.

ground, for suppression of the evidence obtained from them by the taxing authorities as a result of their alleged disclosure. After a further pretrial hearing, the District Court also denied this motion, later filing an opinion in which it found that the disclosure was not made in good faith.[3]

On appeal, the Court of Appeals affirmed as to the dismissal motion but reversed as to the suppression motion, set aside the convictions, and remanded the case for a new trial. 225 F. 2d 394.[4] The Court of Appeals found that the respondents' disclosure was bona fide, and also ruled that the disclosure was timely, an issue which the District Court had not reached.[5] The Government petitioned us for certiorari on the suppression issue and the respondents and Huebner cross-petitioned on the dismissal issue.[6] Thereafter, the Government filed its motion to remand, on which, as later amended and supplemented, respond-

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[3] The propriety of this pretrial procedure is not before us.

[4] The Court of Appeals did not pass on other contentions made by the respondents in support of a reversal of their conviction.

[5] More specifically, the Court of Appeals held that there was an effective voluntary disclosure and that the Government's use of the evidence thereby obtained from the respondents violated their rights under the Self-Incrimination Clause of the Fifth Amendment. The District Court simply held that the alleged voluntary disclosure was defective, and did not discuss the Fifth Amendment. In the present posture of this case we do not reach the correctness of these rulings of the two lower courts, or any other question going to the merits of the respondents' conviction.

[6] We deferred consideration of the petition and cross-petitions for certiorari for some months on the basis of representations made by the Solicitor General in his letters of December 6, 1955, and June 1, 1956, which culminated in the filing of the Government's motion to remand. See 351 U. S. 980. As originally filed, the cross-petition was conditional on the Government's petition being granted. After the Government moved to remand, respondents withdrew the conditional limitation, and Huebner withdrew his cross-petition in its entirety.

ents and Huebner joined issue by the filing of answers.[7] Considering that the matters presented by the motion to remand raised an important issue affecting the proper administration of justice in the federal courts, we granted the Government's petition for certiorari, "limited to the issues raised in the amended motion to remand and supplement thereto and the respondents' answer to the amended motion to remand."[8] 352 U. S. 997. We denied the cross-petition for certiorari. 352 U. S. 998.

For an understanding of the significance of the newly discovered evidence[9] proffered by the Government some knowledge is required of the position taken by the defendants in the District Court on the suppression issue. The substance of that position was presented by Leon J. Busby, Shotwell's accountant, who testified at both the hearing on the motion to suppress and at the trial. He stated that the Shotwell Company in each of the years 1945 and 1946 had received substantial cash payments for black-market candy sales above O. P. A.

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[7] Huebner later withdrew his answer and consented to the Government's motion.

[8] Respondents point out that this limitation of our writ in effect amounted to a denial of the Government's petition for certiorari, and therefore that the motion to remand, which was not before the Court of Appeals, must be regarded as an attempt to invoke an original jurisdiction which we do not possess. We shall dispose of respondents' point by vacating our limited writ and granting, *nunc pro tunc*, the Government's petition for certiorari, without restriction. This removes all question as to our jurisdiction, 28 U. S. C. § 2106; *Mesarosh* v. *United States*, 352 U. S. 1, and prejudices neither party because we shall decide only the issues raised by the motion to remand.

[9] Respondents have made no such showing in opposition to the Government's motion as would justify our questioning the accuracy of the Solicitor General's representation that the Government's proffered evidence is "newly discovered."

438765 O—58——21

ceiling prices; [10] that these receipts were not recorded on Shotwell's books and were not reported in its income tax returns; that he first learned of these facts in the course of conversations with H. Stanley Graflund, Shotwell's comptroller, during a trip they took to New York early in January 1948; that immediately upon his return to Chicago he discussed the matter with respondents Cain and Sullivan; that he recommended disclosing the omissions to the taxing authorities; and that, at the direction of respondents, he revealed the entire affair to Ernest J. Sauber, Deputy Collector in Chicago, in a series of conferences beginning in the latter part of January 1948, at one or more of which conferences he was accompanied by Cain. He also testified that thereafter, acting under Sauber's instructions and assurances that only a civil liability was involved, he and his staff, with the assistance of Cain, Huebner and Graflund, conducted an exhaustive investigation over a period of several months to reconstruct the Shotwell figures on the black-market transactions. He said that these figures were furnished in August 1948 to a revenue agent for scrutiny.

Sauber and Cain gave similar testimony, except that Sauber fixed Busby's first visit to him at about the middle of March 1948. Cain's explanation of Shotwell's failure to report the black-market receipts in its income tax returns was that he believed such receipts were not taxable since they were used by Shotwell to purchase black-market supplies [11] and therefore gave rise to no profit.[12]

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[10] The Government puts the figure at some $380,000; the respondents' figure is about $160,000.

[11] Except for the amount of $6,000 which was reported in the Shotwell returns.

[12] Although the Treasury policy at the time denied deductibility to such black-market expenditures, the courts later held that this kind of expenditure was deductible. See *Sullenger* v. *Commissioner*, 11 T. C. 1076.

In support of its motion the Government has filed with the Court the affidavits of Huebner and Graflund, which they executed after the Government filed its petition for certiorari. These affidavits paint a sharply different picture of the entire affair; indeed, they flatly contradict the tale unfolded on behalf of the respondents in the District Court. More specifically: (1) Graflund swears that the first time he discussed the black-market transactions with Busby was at Busby's home in late June 1948, at which time Busby gave no indication that he had previously known of these transactions; [13] (2) Graflund and Huebner swear that at no time prior to a meeting held in July 1948 were they ever advised or led to believe by respondents that Shotwell's black-market receipts had been disclosed to the Treasury; (3) Huebner swears that it was at this July 1948 meeting that Cain first told him that a voluntary disclosure would be made, and that Cain also gave him to understand that it had been "agreed" that the date of the disclosure "would be set at June 15, 1948"; [14] (4) Graflund and Huebner swear that prior to the middle of July 1948 no work was done by anyone to assemble records or data for the purpose of making a disclosure to

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[13] According to Graflund's affidavit, it would appear that the respondents were spurred into action after Sam Krane, a Special Agent of the Internal Revenue Service, visited the Shotwell office on June 21, 1948. The affidavit states that Krane requested records and information relating to Shotwell's transactions with one David G. Lubben, from whom Shotwell had been receiving large sums of money which were not recorded in its regular books; that Graflund made certain records available to Krane and was "criticized" by the respondents for having done so; and that Graflund conferred with Busby within a few days after Krane's visit.

[14] In his affidavit Huebner states: "On November 13, 1952, Sauber testified at the hearing on the defendant's motion to suppress evidence that Busby and Cain had contacted him in March, 1948. After hearing Sauber testify, I told Cain I thought the voluntary disclosure date was supposed to be June 15, 1948. Cain said to me, 'Ssshhh! There is nobody that knows anything about this. Keep quiet.' "

the tax authorities, and that the alleged offsetting payments for black-market supplies were in fact concocted "out of thin air" at the July meeting; and (5) Huebner swears that in July and August 1948 he gave Cain $10,000 which Cain said he needed "to fix the tax difficulty we were in." [15] Huebner says in his affidavit that he was not asked to testify in the District Court "because I had stated I would not lie on the stand."

It is obvious that the Government's new evidence casts the darkest shadow upon the truthfulness of the disclosure testimony given by or on behalf of the respondents in the District Court. If true, it indicates that what the respondents have sought to represent in the District Court, the Court of Appeals, and in this Court as a voluntary disclosure, made in a timely manner and in good faith, was instead but a further step in a conspiracy to "fix" Shotwell's tax difficulties, possibly involving the cor-

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[15] The Solicitor General represents that if the motion to remand is granted Revenue Agent Joseph M. Lima will testify that on July 30, 1948 he was instructed by his Group Supervisor, Ralph Johnson, to make an immediate audit of Shotwell's 1946 return; that thereafter he was instructed by Johnson to allow (as offsets) over-ceiling purchases totaling more than $300,000, which were wholly unsubstantiated and whose allowance was contrary to the existing Revenue Service policy; and that he then prepared a report showing a tax deficiency for 1945 and 1946 of about $20,000, which report he destroyed at Johnson's direction in September 1948, after the Intelligence Unit of the Service had made inquiries about the case. In this connection Huebner states in his affidavit:

"Cain also told me, sometime in about late July, 1948, that he was about to settle the tax case. Shortly thereafter, Cain told me he had settled the tax case for a tax deficiency of $20,000.00.

"In October, 1948, Busby told me that there had been a meeting in the fraud division at the Internal Revenue office and that hell had broken loose; that some Internal Revenue people had a heck of a time destroying papers that had been made up for the purpose of billing Shotwell for taxes."

ruption of government officials,[16] and certainly entailing an attempt to perpetrate a fraud upon the courts. Were we to undertake to review the Court of Appeals upon a record as suspect as this, we might very well be lending ourselves to the consummation of a fraud which may already have made the Court of Appeals its unwitting victim. In these circumstances it is imperative that the case be remanded to the District Court for a full exploration of where the truth lies before the case is allowed to proceed further. The integrity of the judicial process demands no less.

The path to our decision is clearly marked by this Court's actions and pronouncements in two recent cases, *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, and *Mesarosh* v. *United States*, 352 U. S. 1. In each case the Court refused to consider the questions presented for review in the face of a challenge to the integrity of the record based on newly discovered evidence. In *Communist Party* the Court remanded the case to the Board with directions to resolve the charges of taint, and to make a fresh determination on the merits, if taint were found.[17] In *Mesarosh* the Court, believing that the record clearly demonstrated that a key government witness had been wholly discredited, took more drastic action by reversing the convictions of the petitioners and remanding the case to the District Court for a new trial. The basic reason for the Court's action in

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[16] See note 15, *supra*.

[17] Section 14 (a) of the Subversive Activities Control Act expressly authorizes courts of appeals to remand cases to the Board for the taking of further evidence. 64 Stat. 987, at 1001–1002. Our authority to act in similar fashion is found in the broad provisions of 28 U. S. C. § 2106, which grants us power, incident to our appellate jurisdiction, to "vacate . . . any judgment" brought "before [us] for review" and to "require such further proceedings to be had as may be just under the circumstances."

both cases was made manifest in its opinions. In *Communist Party, supra,* at pp. 124–125, the Court said:

> "The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See *McNabb* v. *United States,* 318 U. S. 332. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted. . . . We cannot pass upon a record containing such challenged testimony. We find it necessary to dispose of the case on the grounds we do, not in order to avoid a constitutional adjudication but because the fair administration of justice requires it."

In *Mesarosh, supra,* at p. 14, the Court said:

> "This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. [Citing *McNabb, supra,* in a footnote.] If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity."

A convincing showing is of course necessary to bring these principles into play. We think that such a showing has been made here. The newly discovered evidence contained in the affidavits from the prospective witnesses Graflund and Huebner cuts to the very heart of the testimony adduced by respondents to show that they made a timely and bona fide disclosure to the Treasury, the sole issue involved in the suppression hearings and the issue on which the outcome of the case in the Court of Appeals turned. It is plain that either the testimony in the Dis-

trict Court was untrue or these affidavits themselves are the product of fraud. This is a matter for the District Court to determine. One thing is clear. This Court cannot be asked to review the decision of the Court of Appeals until these charges have been resolved.

In both the *Communist Party* and *Mesarosh* cases, *supra,* the action of the Court enured to the benefit of the defendants. In this instance the further proceedings below may work to the advantage of the Government.[18] In the circumstances of this case we think that the distinction makes no difference. Because they were found guilty by the jury, respondents concede, as they must, that the motion to remand involves no question of double jeopardy. See *United States* v. *Ball,* 163 U. S. 662, 672. Their objection that it is "unfair" to allow the Government at this stage of the proceedings to "bolster" the record relating to the suppression issue is likewise unacceptable. It is undeniable, of course, that upon appellate reversal of a conviction the Government is not limited at a new trial to the evidence presented at the first trial, but is free to strengthen its case in any way it can by the introduction of new evidence. We think that in the peculiar circumstances of this case the fair administration of justice requires that the Government should have a similar opportunity here. For if the Government's evidence is found to be true, it would then appear that the Court of Appeals' decision setting aside the verdict was obtained by the respondents on a corrupt record attributable to their own fraud. In the further proceedings in the District Court the respondents will of course have a reciprocal opportunity to sustain the validity of their asserted voluntary disclosures.

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[18] The Government does not concede the correctness of the Court of Appeals' decision upon the existing record. Cf. *United States* v. *Johnson,* 327 U. S. 106, 111, 112.

We should not lose sight of the fact that the Government's new showing does not relate to an issue submitted to the jury in the proceedings below, but rather to a preliminary question as to the admissibility of evidence.[19] Hence, to grant the Government's motion is not to permit it to "bolster" the evidence upon which the verdict of guilty was returned by the jury in this case. That verdict clearly must stand or fall on the sufficiency of the evidence already introduced at the trial.

In these circumstances, acceptance of the respondents' position on this motion would be tantamount to sanctioning a rule which would prohibit appellate review upon a record suspect of taint, if the taint might operate to the disadvantage of the defendants, but which would nevertheless require review if the taint might operate to their advantage. We cannot subscribe to that quixotic result. The fair administration of justice is not such a one-way street.

The respondents contend that the motion to remand should originally have been addressed to the Court of Appeals, and that we should now send the Government back to that court.[20] This contention is essentially one

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[19] Respondents did not urge below, nor do they suggest here, that the question of admissibility of the disputed evidence was properly an issue for the jury. Rather their contention has been that the *judge* should have sustained the motion to suppress.

[20] It has also been suggested that these charges of fraud could be dealt with at the new trial which the Court of Appeals has ordered. But as the Court of Appeals has directed suppression of the evidence obtained by the Government as a result of the alleged voluntary disclosure, it seems clear that at the new trial the Government could not use that evidence, or the fruits thereof, unless the "suppression" aspect of the judgment of the Court of Appeals is vacated. We think that the sound administration of justice precludes that course because, if the Government's evidence is true, the net effect would be to grant the respondents a new trial, not otherwise justified, procured by their own fraud.

addressed to our discretion, and in the circumstances of this case we find it unavailing. The Government was not in a position to make the motion until after its petition for certiorari had been filed in this Court. The course of this litigation has already been protracted. We are abundantly satisfied that the charges as to the integrity of the record must be fully aired, and that the proper forum for this is the District Court because of its intimate familiarity with the record and its facilities for sifting controverted facts. In this state of affairs we think that it would be both unnecessary and wasteful to remit the Government to the Court of Appeals. Cf. *Mesarosh, supra,* at p. 13.

We conclude with a word about the nature of the further proceedings in the District Court. The additional evidence to be presented by both sides will be confined to the suppression issue. The District Court will make such new findings of fact on this issue as may be appropriate in light of the further evidence and the entire existing record (see *Carroll* v. *United States,* 267 U. S. 132, 162), including findings on the question of the timeliness of respondents' alleged disclosures.[21] If the District Court decides, on the basis of its new findings, to

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[21] Respondents have contended that the Government's new evidence is irrelevant to the issue of timeliness because, even assuming its truth, the disclosure was timely since no formal investigation was initiated by the Revenue Service until after July 1948, the time that the Government's new evidence indicates that the respondents first communicated with the Treasury. We find it unnecessary to deal with this contention because the new evidence is in any event clearly relevant to the question whether a bona fide disclosure was in fact ever made. Moreover, in the present state of the record this Court should not pass on respondents' argument as to timeliness because (a) the District Court has not yet made a finding on this issue, and (b) the Treasury "voluntary disclosure policy" was never formulated with sufficient precision to enable us to apply it mechanically.

adhere to its original decision on the motion to suppress, it will then enter new final judgments based upon the record as supplemented by its new findings, thereby preserving to all parties the right to seek further appellate review, including respondents' right to have reviewed by the Court of Appeals alleged errors in the original trial which that court did not reach in the previous appeal. If, on the other hand, the District Court concludes after the further proceedings that the motion to suppress should have been granted, it would then become its duty to accord the respondents a new trial.

In accordance with the views set forth in this opinion, we make the following disposition of this case: (1) this Court's order of February 25, 1957, which granted with limitations the Government's petition for certiorari, is vacated and such petition is granted without restriction; (2) the judgment of the Court of Appeals is vacated; and (3) the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

Dissenting opinion of MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS concur, announced by MR. JUSTICE DOUGLAS.

By remanding this case so that the Government can introduce additional evidence to save the conviction thrown out by the Court of Appeals, I think the Court takes unnecessary and unprecedented action which may have far-reaching and unfortunate ramifications not yet clearly foreseen. I would deny certiorari and thus permit the case in its regular course to go back to the District Court for a new trial pursuant to the decision of the Court of Appeals. At this trial the Government could introduce any evidence which it now has, new or otherwise, and a full hearing could be had on its charges of perjury and fraud.

The Court of Appeals held that defendants' incriminating disclosures were secured by promises of immunity made by various government officials and that such disclosures could not be used to convict defendants because of their privilege against self-incrimination under the Fifth Amendment. Now this Court sends the case back to the District Court to hear new evidence and make new findings with respect to whether defendants' disclosures were made in good faith and in full accordance with certain vague conditions attached to the offers of immunity.[1] The majority asserts that it is not ruling on the merits of the defendants' Fifth Amendment claims but it seems to me a vain and wasteful act for the majority to return the case to the District Court for these supplemental proceedings unless it assumes that neither the Fifth Amendment nor any rule of evidence in the federal courts bars the use of incriminating admissions induced by promises of immunity where the disclosures are not made with pure motives. If we are going to concern ourselves with the case at all, I believe we should at least give full consideration to the legal problems involved in defendants' requests for suppression before remanding the case for any further proceedings.

I think the Fifth Amendment questions raised here are important, unsettled and not susceptible to offhand resolution, particularly with respect to incriminating evidence which the defendants actually turned over to the Government in hope of securing immunity from prosecution. In *Bram* v. *United States,* 168 U. S. 532, 542–543, the Court referred with approval to the rule that

> "'. . . a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted

[1] "We are not concerned with the motivating force behind an individual's deciding to come in and talk to us about his evasion. If he 'gets religion' before we have done anything, he will not be prosecuted." Treasury Press Release, May 14, 1947.

> by any sort of threats or violence, *nor obtained by any direct or implied promises, however slight,* nor by the exertion of any improper influence. . . . A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.' " (Emphasis supplied.)

In accord with this statement it appears to have been generally assumed in this Court that the Fifth Amendment bars the use against a defendant in a criminal prosecution of confessions or admissions secured from him by promises of immunity. See, *e. g., Hardy* v. *United States,* 186 U. S. 224, 229; *Ziang Sung Wan* v. *United States,* 266 U. S. 1, 14; *Smith* v. *United States,* 348 U. S. 147, 150. And so far as I can tell this Court has never considered whether lack of good faith deprives a suspect of the Fifth Amendment's protection when he makes disclosures under a promise of immunity, or under just what circumstances and to what extent this might be true. I do not mean to intimate any view on the merits of this problem now, but I do register a protest against the manner in which the majority disposes of the case.

I believe the majority has also disregarded another significant and crucial consideration—the role of the jury in passing on the admissibility of defendants' disclosures. In *Wilson* v. *United States,* 162 U. S. 613, 624, the Court laid down a rule which it has never questioned:

> "When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant."

Just recently in *Smith* v. *United States,* 348 U. S. 147, 151, the Court stated that the question of voluntariness was properly left to the jury where a taxpayer claimed he had made certain disclosures on the strength of promises of immunity by revenue officers. Cf. *Kent* v. *Porto Rico,* 207 U. S. 113, 118–119.

In the lower federal courts there seems to be considerable difference of opinion as to whether the *Wilson* case makes it mandatory that the jury participate in the process of determining whether a confession is voluntary or whether the jury's participation is a matter of discretion with the trial judge.[2] *E. g.,* compare *United States* v. *Leviton,* 193 F. 2d 848, 852, cert. denied, 343 U. S. 946, with *Lewis* v. *United States,* 74 F. 2d 173, 178–179. In at least the District of Columbia Circuit the rule appears to be settled that the trial judge must submit the question of voluntariness to the jury for its independent determination. *McAffee* v. *United States,* 70 App. D. C. 142, 105 F. 2d 21. In the States a number of different methods of allocating the burden of determining the voluntariness of a confession between the judge and jury have been followed, but the trend seems to be that the judge should determine voluntariness in the first instance and if he finds that the confession is voluntary then should submit the case to the jury with instructions not to consider the confession as evidence unless they also find it voluntary. As a matter of fact the Court in *Wilson* relied on state cases which had laid down this so-called "humane" rule. I myself favor such a rule, which is particularly beneficial where, as here, the question of admissibility turns to a large extent on the credibility of witnesses.

I think that the principles established in *Wilson* and subsequent cases clearly apply to the questions of admis-

[2] The entire subject is annotated in great detail at 170 A. L. R. 567. Also see 85 A. L. R. 870.

sibility raised in this case. Under these principles the trial judge, at a minimum, has the option of submitting such questions to the jury. But the majority's disposition of this case precludes that possibility at the partial new trial which it orders. It attempts to avoid this infirmity by saying, "the Government's new showing does not relate to an issue submitted to the jury in the proceedings below, but rather to a preliminary question as to the admissibility of evidence." And it continues, "Respondents did not urge below, nor do they suggest here, that the question of admissibility of the disputed evidence was properly an issue for the jury." But these answers are obviously inadequate. We are not concerned with what has happened or what was urged but with how this case will be handled in the future. If the new trial ordered by the Court of Appeals had been allowed to stand the defendants would not have been barred from demanding that the question of admissibility be submitted to the jury just because they had not made a similar request at the first trial or on appeal.

The Court now gives the Government an opportunity to introduce new evidence in an attempt to save a conviction it has lost in the Court of Appeals. If this does not technically infringe the protection against double jeopardy it seems to me to violate its spirit. Cf. *Green* v. *United States,* 355 U. S. 184; *Kepner* v. *United States,* 195 U. S. 100, 128–129. In fact it is even worse in some respects. Only the Government stands to benefit from this partial new trial while the defendants must fight to keep what they already have. Not a single case has been referred to or discovered where defendants have been subjected to such piecemeal prosecution.[3] To my knowledge

[3] Neither *Mesarosh* v. *United States,* 352 U. S. 1, nor *Communist Party* v. *Subversive Activities Control Bd.,* 351 U. S. 115, serves as any authority for the Court's action. In the *Mesarosh* case the Government had secured a conviction which had been upheld by the

it is a new idea that the Government can supplement a trial record in order to retain a conviction which an appellate court would otherwise reverse.

Both the Government and the Court concede that the action taken here is extraordinary but such disposition is justified on the ground that this is an exceptional case which called for extraordinary action. I do not agree. In essence all the Government proposes to do on remand is to impeach the testimony of certain witnesses for both sides with alleged newly discovered evidence. No witness has recanted nor do the defendants concede that their testimony was false. If the Government can partially reopen a case to impeach witnesses what rational basis is there for denying it a similar right in any case when new facts appear which persuasively suggest that it could strengthen its evidence in order to save a conviction on appeal? This possibility emphasizes the anomalous nature of what is done here.

The Court proceeds on the assumption that it would be improper for us to review the suppression question on a record which might contain materially false testimony

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Court of Appeals. In this Court the Government came forward with evidence that one of its principal witnesses at the trial had committed perjury and the Court reversed the conviction and remanded the case for a full new trial. Here the United States has lost a conviction in the Court of Appeals. It now asks us to send the case back to the trial court so that it can introduce additional evidence in an attempt to salvage the reversed conviction. The difference between the two cases is manifest and crucial.

In the *Communist Party* case administrative findings were challenged and this Court remanded the case to the agency so that it might consider the record free of any perjurious testimony by government witnesses. The administrative proceeding there can hardly be equated with the criminal prosecution involved here. Moreover, in both the *Mesarosh* and *Communist Party* cases the Court's action operated to protect the rights of defendants, not as here to aid the Government. In view of our traditional methods of criminal justice this difference is not without importance.

and that it is better, although concededly unique, to send the case back for more evidence on that issue. But there is no need to resort to either undesirable alternative. As I stated in the beginning the case should simply be left alone and allowed to go back for a new trial. There the Government can offer all the evidence it has or can secure so that a new record can be made on the suppression issue. In my judgment it cannot seriously be contended that the Government would be barred from introducing evidence on that issue at a new trial. While it is true that the Court of Appeals ordered the disclosures suppressed, on the evidence in the record then before it, such ruling should not be construed as binding at a new trial where substantial newly discovered evidence is available. Cf. *Aetna Life Ins. Co.* v. *Wharton,* 63 F. 2d 378; *City of Sedalia ex rel. Ferguson* v. *Shell Petroleum Corp.,* 81 F. 2d 193. If need be—and I think not—this Court could vacate the judgment of the Court of Appeals to the extent necessary to allow the Government a *de novo* hearing on the suppression issue at the new trial. 28 U. S. C. § 2106. This would do full justice as far as the charges of tax evasion are concerned and if perjury has been committed it can be prosecuted as a separate crime.

I think this case is a dangerous precedent which should not be launched needlessly into the stream of the law.

UNITED STATES *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO.

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

No. 45. Argued November 20, 1957.—Decided December 16, 1957.

Pursuant to § 322 of the Transportation Act of 1940, the Government paid upon presentation and prior to audit bills presented by respondent railroad for transporting government property in 1944. On post-audit, the Government found that it had been overcharged and, upon refusal of respondent to refund the amount of the overcharge, deducted the amount from a bill for transportation services rendered by respondent in 1950. Respondent then sued the Government under the Tucker Act for the full amount of the 1950 bill. In its answer, the Government admitted the 1950 bill but claimed credit for the 1944 overcharge and its payment of the difference by check. Respondent then admitted receipt of the check, but claimed that the remainder of the 1950 bill was due and unpaid. *Held:* Respondent has the burden of proving that its 1944 charges were computed at lawful and authorized rates, and it is entitled to recovery only if it satisfies that burden. Pp. 254–264.

(a) It is clear from the legislative history of § 322 that both Congress and the railroads contemplated that the Government's protection against overcharges available under the preaudit practice should not be diminished and that the burden of the carriers to establish the correctness of their charges was to continue unabridged. Pp. 255–260.

(b) The burden of the carrier to establish the lawfulness of its charges is the same under § 322 as it was under the superseded practice, under which payment was withheld until the carrier established the correctness of its charges. Pp. 260–262.

(c) Conventional principles of contractual setoff should not govern the determination of the carrier's burden of proof in this action merely because the complaint frames an action for recovery of the full amount of the 1950 bill rather than the amount deducted therefrom. Pp. 262–263.

236 F. 2d 101, reversed and remanded.

438765 O—58——22

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

Edmund M. Sweeney argued the cause and filed a brief for respondent.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The General Accounting Office audited transportation bills of the respondent, rendered and paid in 1944, and determined that the Government was overcharged in the amount of $1,025.26. When the respondent did not refund this amount on demand, the Government exercised the right, reserved in § 322 of the Transportation Act of 1940,[1] to deduct the overpayments from a subsequent bill. The Government credited that amount against a bill of the respondent, admittedly owing, of $1,143.03 for 1950 transportation services, and paid the balance of $117.77 by check.

The respondent thereupon brought this action under the Tucker Act [2] in the District Court for Massachusetts. The complaint seeks recovery not of the $1,025.26 deducted, but of the full amount of the 1950 bill of $1,143.03. The Government's answer admits the 1950

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[1] Section 322 of the Transportation Act of September 18, 1940, 54 Stat. 955, 49 U. S. C. § 66, provides as follows:
"Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier."

[2] 24 Stat. 505, as amended, 28 U. S. C. § 1346 (a)(2).

bill but pleads its payment by the check of $117.77 and the credit of $1,025.26 in liquidation of the overcharges determined in the 1944 bills. The respondent filed a pleading in response to the government answer [3] admitting "that it did receive the check in the amount of $117.77, all as recited by the defendant, leaving the balance due and to this date unpaid in the amount of $1025.26."

The question presented in both courts below, and in this Court, is whether in this action the carrier has the burden of proving the correctness of the 1944 bills, or the Government the burden of proving that it was overcharged. The District Court held that the respondent carrier was pleading on a contract against which the Government was attempting to "set off" claims under other contracts, and that "whoever attempts to set off the other contractual claims has the burden of showing there are other claims." In the absence of government evidence proving the claimed overcharges in the 1944 bills, a motion of the respondent for summary judgment was granted. The judgment entered, however, was for $402.84, because the respondent accepted the amount of 1944 overcharges in the difference between that sum and the amount of the bill. The Court of Appeals for the First Circuit affirmed the judgment. 236 F. 2d 101. We granted certiorari, 352 U. S. 965.

Before enactment of § 322, the Government protected itself against transportation overcharges by not paying transportation bills until the responsible government officers, and, in doubtful cases, the General Accounting Office, first audited the bills and found that the charges were correct.[4] When charges were questioned the carrier

[3] The Pleading is captioned "Plaintiff's Answer to Defendant's Counterclaim."

[4] Government accounts generally are subject to audit prior to payment. 33 Op. Atty. Gen. 383. Prepayment examination of

was required to justify them. If administrative settlement was not reached and the carrier sued the United States to recover the amount of the bill, no one questions that it was the carrier's duty to sustain the burden of proving the correctness of the charges.[5] *Southern Pacific Co.* v. *United States,* 272 U. S. 445, 448.

Section 322, however, required the payment of such bills "upon presentation . . . prior to audit or settlement by the General Accounting Office . . . ." The audit pro-

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claims has statutory support in several statutes. See 55 Stat. 875, 31 U. S. C. § 82b; R. S. § 3620, 31 U. S. C. § 492; R. S. § 3622, 31 U. S. C. § 496; R. S. § 3623, 31 U. S. C. § 498; R. S. § 3633, 31 U. S. C. § 514; R. S. § 3648, 31 U. S. C. § 529; 37 Stat. 375, as amended, 31 U. S. C. § 82; 55 Stat. 875, 31 U. S. C. § 82c. The claimant must furnish proof satisfactorily establishing his claim. *Charles* v. *United States,* 19 Ct. Cl. 316. Doubtful accounts and claims are transmitted to the General Accounting Office for review. Section 1 of G. A. O. General Regulations No. 50, April 21, 1926, 4 CFR § 4.1.

[5] The correctness of the 1944 bills turned on the determination of fact whether freight cars of the shorter lengths ordered by the United States were available when the initial carrier supplied cars of larger sizes. A wartime measure permitted the charging of the tariffs applicable to the cars furnished if the carrier could not supply cars of the sizes ordered. 236 F. 2d 101, 103. The General Accounting Office determined the overpayment on a finding that the documents showed that longer cars were furnished than were ordered. On the question of whether cars of the sizes ordered were available, the Government stated its position in answer to interrogations: "Such information is peculiarly within the knowledge of plaintiff [respondent] and/or the initial carrier . . . ." The ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary. Cf. *Selma, R. & D. R. Co.* v. *United States,* 139 U. S. 560, 566; *United States* v. *Denver & R. G. R. Co.,* 191 U. S. 84, 91–92. The position of the respondent herein is that the Government had all the information known to the carriers as to the availability of cars of the sizes ordered.

cedures remained substantially the same as those in effect prior to the statute but the former means of protecting against overcharges—by not paying the bills until their correctness was proved—has, by force of the statute, been replaced by the method of collecting them from subsequent bills, under the right reserved by the section to the Government "to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier." We recently said in *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 74:

> ". . . This right [to deduct overpayment from subsequent bills of the carrier] was thought to be a necessary measure to protect the Government, since carriers' bills must be paid on presentation and before audit."

Again at page 75:

> "The fact that the Government paid the carrier's bills as rendered is without significance in light of § 322 of the Transportation Act, *supra,* requiring payment 'upon presentation' of such bills and postponing final settlement until audit."

This interpretation of § 322 finds full support in the legislative history of the section. The section was included in the omnibus transportation bill, which became the Transportation Act of 1940, in direct response to a demand of the railroads for legislation relieving them of the inordinate delays in payment of their bills attributable to the preaudit procedure, which tied up substantial amounts of accounts receivable and contributed to the financial difficulties which confronted the railroads during the depression years. The then President of the Association of American Railroads raised the issue in a letter to the Procurement Division of the Department of the Treasury dated October 5, 1937. (See Appendix to

this opinion, *post*, p. 264.) Proposed legislation in almost the identical language which became § 322 was thereupon introduced in 1938.[6] It failed of passage in the Seventy-fifth Congress and a number of similar proposals were therefore introduced in the Seventy-sixth Congress.[7] None of these passed, but in the following year the provision was included as § 322 of the Transportation Act of 1940.[8]

It is entirely clear that although the railroads sought, in the words of their spokesman, "corrective action . . . that will render impossible such long delays in payment for services rendered," to gain that end the railroads recognized that any remedy suggested on their behalf should be "both practical and legal and [one] which can easily be made operative without the assumption of any risk insofar as the Government is concerned." It was "with this thought in mind" that the railroads proposed the elimination of preaudit procedures and the prompt payment of transportation bills when rendered, with audit "after payment . . . [of] these bills referred to the General Accounting Office or such other governmental audit-

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[6] S. 3876, 75th Cong., 3d Sess., introduced April 20, 1938 (83 Cong. Rec. 5569). H. R. 10620, 75th Cong., 3d Sess., introduced May 12, 1938 (83 Cong. Rec. 6842).

[7] See, *e. g.*, S. 1915, 76th Cong., 1st Sess., introduced March 23, 1939 (84 Cong. Rec. 3143); S. 1990, 76th Cong., 1st Sess., introduced March 30, 1939 (84 Cong. Rec. 3509). Section 1 of both of these bills dealt with the elimination of land-grant rates; § 2 with the payment of transportation bills upon presentation.

H. R. 2531, 76th Cong., 1st Sess., introduced January 13, 1939 (84 Cong. Rec. 345); H. R. 4862, 76th Cong., 1st Sess., introduced March 8, 1939 (84 Cong. Rec. 2512). Section 501 of Title V of H. R. 2531 and §§ 201 and 202 of Title II of H. R. 4862 concerned government traffic. Their provisions were substantially the same as the provisions in S. 1915 and 1990.

[8] H. R. Rep. No. 2016, 76th Cong., 3d Sess.; H. R. Rep. No. 2832, 76th Cong., 3d Sess.

ing office as might be desired for audit." The plan contemplated that "in the event . . . this audit reveals an over-payment" the same "will be promptly paid by the railway, preserving, however, the right of the carrier to make further effort to recollect in the event that it does not believe the proper charges resulted from the Government's audit." [9]

In hearings before the House Committee on Interstate and Foreign Commerce held June 1, 1938,[10] in connection with one of the bills incorporating the proposal which became § 322, the then General Counsel of the Association of American Railroads, arguing in support of the

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[9] The postpayment audit of transportation bills by the General Accounting Office has been a large-scale operation since enactment of § 322. For example, the Annual Report of the Comptroller General for the fiscal year ending June 30, 1951, pages 31–32, reports that:

"During the fiscal year 1951, there was examined and reviewed in the regular audit of freight transportation payments—exclusive of special cases—a total of 633,706 vouchers covering 2,569,198 bills of lading, paid in the sum of $350,341,941 as to which there were stated for issuance 25,591 notices of overpayment totaling $6,301,799. There was examined and reviewed in the audit of passenger transportation payments a total of 400,639 vouchers covering 2,917,633 transportation requests, paid in the sum of $91,380,604, as to which there were stated for issuance 11,015 notices of overpayment totaling $672,708."

A general practice of making refunds following determination of overpayments has apparently developed under § 322. A footnote to the Government's brief states:

"We are advised by the General Accounting Office that, during the fiscal year ending June 30, 1956, carriers refunded a total of $40,941,188.78. The amount deducted from subsequent bills during that same period totaled $11,155,837.72. During the preceding fiscal year, the total amount refunded was approximately two and one-half times the amount deducted."

[10] Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives on H. R. 10620, 75th Cong., 3d Sess., June 1, 1938, pp. 34–35.

proposal, urged that "[i]f that section could be put in here, it would require the payment of the bills by the Government as they are rendered by the railroads, with the privilege, however, of course, if it should develop that there has been an overpayment, the Government may deduct that amount from subsequent bills."

The conclusion is inescapable from this history that the Congress was desirous of aiding the railroads to secure prompt payment of their charges,[11] but it is also clear that the Congress, and the railroads, contemplated that the Government's protection against overcharges available under the preaudit practice should not be diminished. The burden of the carriers to establish the correctness of their charges was to continue unabridged. The carriers were to be paid immediately upon submission of their bills but the carriers were in return promptly to refund overcharges when such charges were administratively determined. The carrier would then have "to recollect" the sum refunded by justifying its bills to the agency or by proving its claim in the courts. The footing upon which each of the parties stood when controversies over charges developed was not to be changed. The right of the United States to deduct overpayments from subsequent bills was the carriers' own proposal for securing the Government against the burden of having to prove the overpayment in proceedings for reimbursement.

In the light of this history, we are unable to agree with the holdings of the Court of Appeals that "[a]ll that § 322 does is to authorize and direct disbursing officers of the United States to pay transportation bills upon presentation, without waiting for audit or settlement by the Gen-

[11] The statute was broadened before final passage to apply to any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938. See Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives on H. R. 2531, 76th Cong., 1st Sess., p. 472.

eral Accounting Office," and that the reservation of the right of offset against subsequent bills is without significance—"We suppose that this provision was inserted out of an abundance of caution, because the availability of a setoff by the United States need not depend upon specific statutory authorization," citing *Gratiot* v. *United States,* 15 Pet. 336, 370. 236 F. 2d 101, 105.

Nor do we share the view of the Court of Appeals that "the position of the United States as shipper, so far as the present case is concerned, is no different from that of a private shipper." *Id.,* at 104. Even if we assume that "[i]f a private shipper or consignee should pay the carrier before satisfying himself of the correctness of the charges demanded—as he may be required to do pursuant to § 3 (2) of the Interstate Commerce Act, 49 U. S. C. A. § 3 (2) and regulations of the Commission thereunder—and later sues for a refund of alleged overpayments, or seeks to set off the amount of the overpayments against another claim admittedly due, in either case the shipper or consignee would have the burden of alleging and proving the fact and the amount of such overpayment," [12] the Court of Appeals overlooks the fact that the Government's statutory right of setoff was designed to be the substantial equivalent of its previous right to withhold payment altogether until the carrier established the correctness of its charges. Thus the issue of overcharges, after the enactment of § 322, arises in a different way, but the differing procedures by which the issue is presented should not control the placement of the

[12] The private shipper must pay freight charges promptly and has no expressed right of offset of any overpayment against charges for other transportation services. 24 Stat. 380, as amended, 49 U. S. C. § 3 (2). A limited exception allows carriers to extend credit for a period of 96 hours to private shippers under prescribed conditions and limitations. *Ex parte No. 73,* 57 I. C. C. 591.

burden of proof.[13] In effect the situation is that the railroad is suing to recover amounts which the Government initially paid conditionally, and then recaptured, under the § 322 procedure. We therefore hold that the burden of the carrier to establish the lawfulness of its charges is the same under § 322 as it was under the superseded practice.

Similarly, conventional principles of contractual setoff should not govern the determination of the carrier's burden of proof in this action merely because the complaint

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[13] Compare the practice followed in the Court of Claims, which has concurrent jurisdiction with the District Court of actions under the Tucker Act. A "Memorandum Order as to Procedure in Common Carrier Cases," issued March 11, 1953, by the Court of Claims (now, with some amendments, included as Appendix B in the Rules of the Court of Claims, revised December 2, 1957), expressly defines the "dispute" in cases of the instant kind, among others, brought in that court:

"The word 'dispute' . . . means the shipment or shipments with respect to which the General Accounting Office or other agency of the Government determined that the carrier's charges had been overpaid . . . rather than subsequent shipments which are not in dispute except for the fact that the overpayments determined as to the shipments in dispute have been deducted from the amount of the carrier's bills covering such subsequent shipments."

The memorandum prescribes a procedure for the framing of the issues arising from the "dispute" as so defined. The carrier bringing the action must furnish a detailed schedule as to "each of the carrier's bills for the shipments in dispute" and is required also to file, at the time of its petition or within 30 days thereafter, "a request for admission by the defendant [United States] of the genuineness of any relevant documents described in and exhibited with the request and of the truth of the material matters of fact relied on by the carrier for recovery in the action." The statements are expressly required to be "sufficiently explicit to show the nature of the dispute and the specific reason or reasons why the plaintiff believes it is entitled to recover higher rates or charges than those allowed by the Government." Failure to comply with the requirements of the memorandum may be cause for the imposition of sanctions, including dismissal of the carrier's petition.

frames an action for recovery of the full amount of the 1950 bill rather than the amount deducted therefrom. The respondent's brief concedes that "[w]henever a railroad brings an action against the Government, directly upon the deduction [as, on the facts of the case, to recover the alleged 1944 overpayments], it has the burden of alleging and proving the facts of the case and establishing the validity of its claim in the light of the contract and the applicable tariffs." There is also authority that the plaintiff has the same burden, although suing on the subsequent bill, when the claim for damages is for the amount of the deduction. *Suncook Mills* v. *United States,* 44 F. Supp. 744; *Eastport S. S. Co.* v. *United States,* 131 Ct. Cl. 210, 130 F. Supp. 333; *Buch Express, Inc.* v. *United States,* 132 Ct. Cl. 772, 132 F. Supp. 473.[14] We do not see that a different issue was shaped by the pleadings in this action. Cf. *Wisconsin Central R. Co.* v. *United States,* 164 U. S. 190, 212. Although the *ad damnum* clause of the complaint prays recovery of $1,143.03, respondent's pleading filed in response to the Government's answer admits the government payment of $117.77, and that the actual controversy concerns the balance of $1,025.26. The true dispute between the parties, arising from the determination and collection of the overpayments as authorized by § 322, involves the lawfulness of the 1944 bills. It is the substance, not the form, which should be our concern. Cf. *Alcoa S. S. Co.* v. *United States,* 338 U. S. 421; *Reynolds* v. *United States,* 292 U. S. 443. We hold that the respondent is entitled to recover only if it satisfies its

[14] But see *Atlantic Coast Line R. Co.* v. *United States,* 136 Ct. Cl. 1, 140 F. Supp. 569, 572. The Court of Claims there indicated that the burden would be on the United States while holding that the railroad had the duty to provide all the information it had on the issue of availability of cars.

burden of proving that its 1944 charges were computed at lawful and authorized rates.

We do not here intimate that the administrative determination of overpayment has binding effect in the judicial proceeding, see *Wisconsin Central R. Co.* v. *United States, supra,* at 211; *Grand Trunk Western R. Co.* v. *United States,* 252 U. S. 112, 120–121; and we agree with the Court of Appeals that the extrinsic fact, namely the availability of the freight cars in the sizes ordered, remains to be proved in the suit. Our conclusion is that the burden in that respect is upon the carrier.

The judgment of the Court of Appeals is reversed with direction to remand the case to the District Court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice Frankfurter dissents, on the basis of the opinion of Chief Judge Magruder in the court below, 236 F. 2d 101, and more particularly because the respondent was not the initial carrier.

APPENDIX TO OPINION OF THE COURT.

The letter, dated October 5, 1937, was addressed by J. J. Pelley, President of the Association of American Railroads, to Captain H. E. Collins, Assistant Director, Procurement Division, Treasury Department, and reads:

"Dear Captain Collins:

"The railroads members of the Association of American Railroads, which comprise about 98% of all the Class I railroads in the United States, have been very much concerned by the long delay in securing payment for transportation services rendered for the U. S. Government. We know further, from conferences with the officers of the American Short Line Railroad Association,

that their lines have been and are experiencing similar difficulty. These delays are not justified and the carriers should not be expected to finance the Government as they are now doing, insofar as transportation is concerned. Furthermore, the railroads are necessarily large borrowers and in that connection are required as a condition to their obtaining the necessary capital to pay substantial interest charges on all such borrowed money, whereas on the other hand the Government is paying no interest on its delayed payments to the railroad companies, which delays in many instances run over a year and invariably are not settled for sixty to ninety days. Although the railroads pay interest for the money they borrow, they cannot under the law collect interest from the Government no matter how long settlements may be delayed. This is obviously unfair.

"Under the law applicable to commercial shippers, transactions with railroads are required to be on substantially a cash basis. Shippers are required to pay freight charges within 48 hours, on a majority of the traffic, and in no case are they permitted credit in excess of 96 hours. It appears to us, and particularly under the present unfortunate financial position of the railroads, that the carriers ought to receive settlement from the Government within 96 hours after a bill has been presented and that would be possible providing the proper machinery were set up and the proper instructions issued.

"This matter is of very much greater importance today than it has been in years past, for the reason that under present conditions the Government is engaged in shipping to a very much greater extent than ever before. Due to the various bureaus and other agencies, particularly in connection with relief work and in connection with some of the governmental corporations that have been organized, the Government is today handling much tonnage which was previously commercial traffic so that the delay

in settlement for the transportation charges is much more serious to the railroads today than would have been the case a decade ago. It should also be borne in mind in connection with Government freight shipped under Government bills of lading the railroads are under the law not assessing their commercial rates but are making such discounts as the law requires because of land-grants and which in many instances today means the handling of this traffic on a basis below the actual cost of performing the service. These facts are mentioned only as indicating the very great importance of providing some sort of a system which will permit the more prompt payment of these charges.

"That you may have a picture of the situation, your attention is directed to the fact that as of July 1, 1937, there were 94,182 outstanding unpaid railroad bills against the Government amounting to $11,749,774, all of which bills had been rendered prior to May 1, 1937, and of these bills and this amount there was unpaid $4,683,946, representing 35,761 bills which had been rendered prior to January 1, 1937.

"We feel very sure that you and the other officers of the Government will agree that this situation is one that is grossly unfair and that corrective action should be taken that will render impossible such long delays in payment for services rendered.

"We are also of the opinion that it is not sufficient for us to simply complain of this situation but that in addition thereto we ought to suggest a remedy which in our judgment is both practical and legal and which can easily be made operative without the assumption of any risk insofar as the Government is concerned, providing you and your associates will put the suggested plan in operation and with such instructions issued as may be needed in connection therewith. With this thought in mind, we

very respectfully submit for your consideration the following:

"We believe that the delay in the payment of transportation charges by the Government to the railroads would be absolutely avoided if the various departments contracting for transportation were instructed to pay the bills as rendered and after payment have these bills referred to the General Accounting Office or such other governmental auditing office as might be desired for audit. In the event that this audit reveals an over-payment, then claim be presented to the carrier for the amount thereof which will be promptly paid by the railway, preserving, however, the right of the carrier to make further effort to recollect in the event that it does not believe the proper charges resulted from the Government's audit. Attention is further directed to the fact that the railroads would never have, under such a plan, more money than the Government lawfully owed for the reason that the Government is shipping daily and is currently obligated to the railroad companies for transportation charges. This would place the handling of governmental transportation charges on substantially the same basis as applies in connection with commercial transactions.

"I am very sure from our previous negotiations with you and others connected with the Government with regard to the same subject that there exists no differences as between us as to the necessity of more prompt payment than has heretofore prevailed. I hope that you and your associates may consider the suggestions contained herein as reasonable and practical and that we may rely upon your good offices to bring about some such arrangement. It may be that you may desire to discuss this matter and perhaps make some suggestions that differ somewhat from the plan proposed herein. Should this situation develop, I want to assure you that either the

officers of this Association or the appropriate officers of this Association with a committee of the lines will gladly discuss the subject with you at such time and place as may be mutually satisfactory. I feel sure that we both desire to obtain a very substantial improvement in the situation that now exists, and I am of the opinion that if these matters can be handled along lines somewhat similar to those which we have recommended that it will not only create a much better feeling as between the railroads and the Government, but in addition thereto will materially reduce the expenditures of both parties in the handling of these accounts and give to the railroads money which is due and greatly needed.

"With very kindest regards, I beg to remain.

"Yours most cordially,

"(Signed) J. J. PELLEY."

VIRGINIA *v.* MARYLAND.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.

No. 12, Original. Argued December 10, 1957.—Decided December 16, 1957.

Virginia granted leave to file bill of complaint; Maryland to file answer within 60 days.

C. F. Hicks, Assistant Attorney General of Virginia, and *Kenneth C. Patty,* Attorney General, argued the cause and filed a brief for plaintiff.

Joseph S. Kaufman, Assistant Attorney General of Maryland, and *C. Ferdinand Sybert,* Attorney General, argued the cause for defendant. With them on the brief was *Edward S. Digges,* Special Assistant Attorney General.

PER CURIAM.

The Court having heard oral argument by the Attorneys General of the States and having considered the printed briefs of counsel, the Court is of the opinion that the motion for leave to file the bill of complaint should be granted. The State of Maryland is directed to file an answer to the bill of complaint within 60 days and process is ordered to issue accordingly.

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RAILWAY EXPRESS AGENCY, INC., *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 557. Decided December 16, 1957.

153 F. Supp. 738, affirmed.

R. J. Fletcher, R. E. Johnson and *James V. Lione* for appellant.

Solicitor General Rankin, Assistant Attorney General Hansen, Robert W. Ginnane and *H. Neil Garson* for the United States and the Interstate Commerce Commission, and *Bernard G. Segal, Irving R. Segal* and *S. Harrison Kahn* for the United Parcel Service, Inc., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

CARSON *v.* CITY OF WASHINGTON COURT HOUSE, OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 583. Decided December 16, 1957.

Appeal dismissed and certiorari denied.

J. Harvey Crow for appellant.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

NELSON ET AL. *v.* TENNESSEE.

CERTIORARI TO THE SUPREME COURT OF TENNESSEE, EASTERN DISTRICT.

No. 56. Argued December 12, 1957.—Decided December 16, 1957.

Certiorari dismissed for want of properly presented federal question. Reported below: 200 Tenn. 462, 292 S. W. 2d 727.

Hobart F. Atkins argued the cause and filed a brief for petitioners.

James M. Glasgow, Assistant Attorney General of Tennessee, argued the cause for respondent. With him on the brief was *George F. McCanless,* Attorney General.

PER CURIAM.

The writ of certiorari is dismissed for want of a properly presented federal question.

MACDONALD *v.* LA SALLE NATIONAL BANK, CONSERVATOR.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 504. Decided December 16, 1957.

Appeal dismissed for want of a substantial federal question. Reported below: 11 Ill. 2d 122, 142 N. E. 2d 58.

Appellant *pro se.*

John R. Nicholson and *Charles M. Nisen* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

ROSENGARD ET AL. *v.* CITY OF BOSTON ET AL.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

No. 566. Decided December 16, 1957.

Appeal dismissed for want of a substantial federal question.
Reported below: 336 Mass. 224, 143 N. E. 2d 683.

Samuel P. Sears for appellants.

J. Edward Keefe, Jr. for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

HEIKKINEN *v.* UNITED STATES.

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

No. 89. Argued December 10, 1957.—Decided January 6, 1958.

An alien who had been ordered deported was convicted of violating § 20 (c) of the Immigration Act of 1917, as amended, by "willfully" (1) failing to depart from the United States, and (2) failing to make timely application for travel or other documents necessary to his departure, within six months from the date of the final order of deportation. *Held:* On the record in this case, the evidence was insufficient to support the verdict, and the conviction is reversed. Pp. 274–280.

1. There being no evidence that any country was willing to receive him, it cannot be said that there was any evidence to support a finding that he "willfully" failed to depart. P. 276.

2. In view of statements made to him by an Immigration Inspector indicating that the Immigration and Naturalization Service would take steps to obtain travel documents for him, and in view of a letter to him from the Officer in Charge stating that arrangements were being made to effect his deportation and that he would be notified when and where to present himself for deportation, it cannot be said that there was sufficient evidence to support a finding that he acted "willfully" in failing to make timely application for the documents necessary to his departure. Pp. 276–280.

240 F. 2d 94, reversed.

David Rein argued the cause for petitioner. With him on the brief were *Joseph Forer* and *M. Michael Essin.*

J. F. Bishop argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg.*

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

This case involves the legality of convictions of petitioner, an alien previously ordered deported, for (1) willful failure to depart from the United States, and (2) willful failure to make timely application in good faith for travel or other documents necessary to his departure, within six months from the date of the final order of deportation.

Section 20 (c) of the Immigration Act of 1917, 39 Stat. 890, as amended, 57 Stat. 553, 64 Stat. 1012, 8 U. S. C. (1946 ed., Supp. IV) § 156 (c), provided, in pertinent part, that "[a]ny alien against whom an order of deportation is outstanding . . . who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or from the date of the enactment of the Subversive Activities Control Act of 1950, whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, . . . shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years . . . ." It is the above-quoted provisions of § 20 (c) that are involved here.

Petitioner, a native of Finland, went to Canada in 1910 and later acquired Canadian citizenship. He entered the United States in 1916 and, except for several foreign trips, has since resided here. A final order of deportation was entered against him on April 9, 1952, under the Act of October 16, 1918, 40 Stat. 1012, as amended, 41 Stat. 1008, 54 Stat. 673, 64 Stat. 1006, 1008, 8 U. S. C. (1946 ed., Supp. IV) § 137,[1] by reason of his membership in the

[1] That Act provided, in pertinent part:

"[Sec. 1] That any alien who is a member of any one of the fol-

Communist Party of the United States from 1923 to 1930.[2]

On November 10, 1953, petitioner was indicted, in two counts, in the United States District Court for the Western District of Wisconsin. The first count charged him with willful failure to depart from the United States within six months from the date of the deportation order. The second count charged him with willful failure to make timely application in good faith for travel or other documents necessary to his departure from the United States within six months from the date of the deportation order. Upon a trial before a jury he was convicted on both counts. He was sentenced to imprisonment for a term of five years on Count 1, and imposition of sentence on Count 2 was suspended until completion of service of the sentence on Count 1. The Court of Appeals affirmed. 240 F. 2d 94. We granted certiorari. 353 U. S. 935.

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lowing classes shall be excluded from admission into the United States:

. . . . . .

"(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

. . . . . .

"(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States . . . ." (64 Stat. 1006.)

"SEC. 4. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, . . . a member of any one of the classes of aliens enumerated in section 1 (2) of this Act, shall upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States." (64 Stat. 1008.)

[2] He was asked at the deportation hearing to specify the country to which he would prefer to go, if deported from the United States, and he answered: "To my native country, Finland." Deportees are authorized to designate the country of their first choice by § 20 (a) of the Immigration Act of 1917, as amended.

Petitioner challenges the judgments of conviction on a number of grounds, but in the view we take of the case it is necessary to consider only the first ground, namely, that the evidence is insufficient to support the verdict on either count.

This is a criminal case. It is therefore necessary that the prosecution adduce evidence sufficient to support a finding of guilt beyond a reasonable doubt. This is no less true when the defendant is an alien. *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 586. The crucial element of the crime charged in the first count is that petitioner "did *willfully* fail to depart from the United States" within six months from the deportation order of April 9, 1952. (Emphasis supplied.) A thorough review of the record discloses no evidence that any country was willing, in that period, to receive petitioner.[3] There can be no willful failure to depart until "the country willing to receive the alien is identified." *United States* v. *Spector,* 343 U. S. 169, 171. It therefore cannot be said that there was any evidence to support the jury's finding that petitioner "did *willfully* fail to depart from the United States" within six months from the deportation order. The evidence on Count 1 is thus insufficient to support the verdict, and the judgment of conviction thereon must fall.

The Government argues that petitioner willfully failed to make timely application to Finland, or to some other

[3] There was evidence that after expiration of the period of six months from the issue of the deportation order on April 9, 1952, petitioner obtained a passport to Canada. But this evidence was irrelevant to the issue whether Canada was willing to receive petitioner during the period covered by the indictment, and, in fact, counsel for the Government objected to this evidence upon the ground that the Canadian passport did not show Canada's willingness to accept petitioner "within the six months' period [after April 9, 1952], which is the . . . period that we are concerned with in this indictment."

country, to receive him, and that if he had done so he might have been able to identify, within the time prescribed, a country to which he could go. While this argument has some relation to Count 1, it mainly involves, and therefore brings us to a consideration of, the adequacy of the evidence to support the verdict on Count 2. On April 18, 1952, nine days after entry of the order of deportation, the officer in charge of the Immigration and Naturalization Service at Duluth, Minnesota, at the request of the District Director of Immigration at Chicago, sent Inspector Maki to interview petitioner and obtain "personal data, usually called passport data." Maki admitted at the trial that, in that interview, he "told [petitioner] that [he] had been instructed to get this personal history; that [he] was going to prepare this on the Passport Data form, and that it would [be sent to Chicago where it] would be considered by [the] Service down there with a view towards [the] Service obtaining some travel document or other in [petitioner's] case," and that this was common procedure in such cases. Petitioner furnished the information requested, and it was forwarded by Maki, on April 21, 1952, to the District Director at Chicago. On April 30, 1952, petitioner received a letter from the officer in charge of the Immigration and Naturalization Office in Duluth, which, after reciting that an order directing petitioner's deportation from the United States had been entered on April 25, 1952,[4] said:

> "Arrangements to effect your deportation pursuant to such order are being made and when completed you will be notified when and where to present yourself for deportation."

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[4] This was, in fact, not the date of the deportation order, which was April 9, 1952, but, rather, was the date of the warrant of deportation ordering petitioner deported to Finland.

The letter continued, summarizing pertinent provisions of § 20 (c) of the Immigration Act of 1917, as amended,[5] and concluded: "Therefore, you will recognize the importance of making every effort in good faith to obtain passport or other travel documents so that you may effect your departure pursuant to the said order of deportation within the time prescribed by the quotation above from the [Immigration Act of 1917, as amended]."

On February 12, 1953, an investigator of the Service interviewed and took a written and signed statement from petitioner, which was put in evidence by the Government at the trial. In that statement petitioner corroborated Maki's statement to him of April 9, 1952, acknowledged receipt of the letter of April 30, 1952, and stated, in substance, that he had not applied for travel documents because, relying on Maki's statement and the letter mentioned, he had "been waiting for instructions from the immigration authorities" or "from Mr. Maki as to when [he] should start to make application for a passport, in case the Service had failed to get a visa or a passport." Petitioner's statement further recited that he had never received any request from the Service "to execute any passport application" and that he had not willfully refused to depart from the United States nor to apply in

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[5] That summary read as follows: "In this connection you are reminded that [§ 20 (c) of the Immigration Act of 1917, as amended] . . . declares that any such alien 'who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, . . . or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall connive or conspire, or take any other action, designed to prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony. . . .' "

good faith for travel documents, but wanted "to cooperate [with the Attorney General to get] a passport to Finland . . . ."

Is this evidence sufficient to support the jury's finding that petitioner "did *willfully* fail to make timely application in good faith for travel or other documents necessary to his departure from the United States"? We believe that it is not. There can be no *willful* failure by a deportee, in the sense of § 20 (c), to apply to, and identify, a country willing to receive him in the absence of evidence, or an inference permissible under the statute, of a "bad purpose" or "[non-]justifiable excuse," or the like. Cf. *United States* v. *Murdock,* 290 U. S. 389, 394; *Spies* v. *United States,* 317 U. S. 492, 497, 498. Inspector Maki had informed petitioner that his purpose, in procuring the "passport data" on April 9, 1952, was to send it to the District Director at Chicago, where it "would be considered . . . with a view towards . . . obtaining some travel document or other in his case." Moreover, the letter of April 30, 1952, from the officer in charge of the Duluth office, told petitioner, in the plainest language, that the Service was making the arrangements to effect his deportation and, when completed, he would be notified when and where to present himself for deportation. Surely petitioner was justified in relying upon the plain meaning of those simple words, and it cannot be said that he acted "willfully"—*i. e.,* with a "bad purpose" or without "justifiable excuse"—in doing so, until, at least, they were in some way countermanded, which was never done within the prescribed period. It is true that the last paragraph of that letter drew attention to the importance of making good-faith efforts to obtain the documents necessary to effect departure within the time prescribed, but that language did not in terms negate, and cannot fairly be said implicitly to have negated, the earlier paragraph of the letter, because, as stated, that paragraph of

the letter plainly told petitioner that the Service was itself making the necessary arrangements for his deportation and, when completed, he would be notified when and where to present himself for deportation. In this factual setting we believe there was not sufficient evidence to support the jury's finding that petitioner acted *willfully* in failing to apply for documents necessary to his departure within the time prescribed. The evidence on Count 2 is thus insufficient to support the verdict, and the judgment of conviction on that count must also fall.

Reversed.

BARTKUS *v.* ILLINOIS.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 39. Argued November 19, 1957.—Decided January 6, 1958.

7 Ill. 2d 138, 130 N. E. 2d 187, affirmed by an equally divided Court.

Walter T. Fisher, acting under appointment by the Court, 352 U. S. 958, argued the cause and filed a brief for petitioner.

William C. Wines, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *Latham Castle,* Attorney General, and *Theodore G. Maheras,* Assistant Attorney General.

PER CURIAM.

The judgment is affirmed by an equally divided Court.

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

LADNER *v.* UNITED STATES.

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

No. 41. Argued November 19, 1957.—Decided January 6, 1958.

230 F. 2d 726, affirmed by an equally divided Court.

Harold Rosenwald, acting under appointment by the Court, 352 U. S. 959, argued the cause and filed a brief for petitioner.

Leonard B. Sand argued the cause for the United States. On the brief were *Solicitor General Rankin, Warren Olney, III,* then Assistant Attorney General, *Beatrice Rosenberg* and *Julia P. Cooper.*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

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

SOUTHERN RAILWAY CO. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

No. 558. Decided January 6, 1958.

153 F. Supp. 57, affirmed.

Henry L. Walker, Arthur J. Dixon, Henry J. Karison and *R. Granville Curry* for appellants.

Solicitor General Rankin, Assistant Attorney General Hansen, Robert W. Ginnane and *B. Franklin Taylor, Jr.* for the United States and the Interstate Commerce Commission, and *J. P. Fishwich, R. B. Gwathmey, James W. Hoeland, W. L. Grubbs* and *Joseph L. Lenihan* for the Harlan County Coal Operators Association et al., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

N. H. LYONS & CO., INC., *v.* LUBIN, INDUSTRIAL COMMISSIONER OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 614. Decided January 6, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: 3 N. Y. 2d 60, 143 N. E. 2d 392.

C. Dickerman Williams and *Henry Alexander* for appellant.

Louis J. Lefkowitz, Attorney General of New York, *John R. Davison,* Solicitor General, and *Roy Wiedersum,* Assistant Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

GROSSMAN *v.* UNITED STATES ET AL.

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

No. 578. Decided January 6, 1958.

Appeal dismissed and leave to file petition for certiorari denied. Reported below: 101 U. S. App. D. C. 22, 246 F. 2d 709.

Appellant *pro se.*

Solicitor General Rankin for the United States and the United States Atomic Energy Commission, appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. The motion for leave to file petition for writ of certiorari is denied.

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

TROTTER *v.* HALL ET AL.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 262, Misc. Decided January 6, 1958.

Appeal dismissed and certiorari denied.
Reported below: —— Miss. ——, 94 So. 2d 808.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

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UNITED STATES *v.* SHARPNACK.

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

No. 35. Argued October 29, 1957.—Decided January 13, 1958.

The Assimilative Crimes Act of 1948, 18 U. S. C. § 13, is constitutional insofar as it makes applicable to a federal enclave a subsequently enacted criminal law of the State in which the enclave is situated. Pp. 286–297.

Reversed and remanded.

Beatrice Rosenberg argued the cause for the United States. With her on the brief were *Solicitor General Rankin, Warren Olney, III,* then Assistant Attorney General, and *Leonard B. Sand.*

Joel W. Westbrook argued the cause and filed a brief for appellee.

Mr. Justice Burton delivered the opinion of the Court.

The issue in this case is whether the Assimilative Crimes Act of 1948, 18 U. S. C. § 13, is constitutional insofar as it makes applicable to a federal enclave a subsequently enacted criminal law of the State in which the enclave is situated. For the reasons hereafter stated, we hold that it is constitutional.

A four-count indictment, in the United States District Court for the Western District of Texas, charged the appellee, Sharpnack, with committing sex crimes involving two boys in violation of 18 U. S. C. § 13, and Arts. 535b and 535c of Vernon's Texas Penal Code, 1952. The offenses were charged to have been committed in 1955 at the Randolph Air Force Base, a federal enclave in Texas.

Articles 535b and 535c had been enacted in 1950 and, at the time of the commission of the alleged offenses, were in force throughout the State. Also, since 1948, the Federal Assimilative Crimes Act has provided that, within such an enclave, acts not punishable by any enactment of Congress are punishable by the then effective laws of the State in which the enclave is situated.[1] Nevertheless, upon motion of Sharpnack, the District Court, in an unreported order, dismissed the indictment "for the reason that Congress may not legislatively assimilate and adopt criminal statutes of a state which are enacted by the state subsequent to the enactment of the Federal Assimilative Statute."[2] The United States appealed to this Court under 18 U. S. C. § 3731, and we noted probable jurisdiction. 352 U. S. 962.

The 1948 Assimilative Crimes Act was enacted as part of the Revised Criminal Code of the United States and reads as follows:

> "§ 13. Laws of States adopted for areas within Federal jurisdiction.
>
> "Whoever within or upon any of the places now existing or hereafter reserved or acquired as pro-

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[1] There is no contention that the acts here charged were punishable under any enactment of Congress other than by virtue of the Assimilative Crimes Act, and there is no contention that Randolph Air Force Base is not a federal enclave subject to 18 U. S. C. § 13.

[2] The order also included the following paragraph:

"It is further the opinion of this Court that Section 13, Title 18, United States Code, enacted in 1948, wherein it assimilates and adopts said criminal statutes enacted by the state subsequent to the enactment of said section, to-wit: Articles 535 (b) and 535 (c) of the Texas Penal Statutes, enacted in 1950, upon which all four counts of this indictment are predicated, is a delegation of Congress' legislative authority to the states in violation of the Constitution of the United States."

vided in section 7 [3] of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment." 18 U. S. C.

In the absence of restriction in the cessions of the respective enclaves to the United States, the power of Congress to exercise legislative jurisdiction over them is clearly stated in Article I, § 8, cl. 17, and Article IV, § 3, cl. 2, of the Constitution.[4] See *Collins* v. *Yosemite Park Co.*, 304 U. S. 518. The first Federal Crimes Act, enacted in 1790, 1 Stat. 112, defined a number of federal crimes and referred to federal enclaves. The need for dealing

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[3] Section 7 contains the following provision:

"The term 'special maritime and territorial jurisdiction of the United States,' as used in this title, includes:

. . . . . .

"(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building." 18 U. S. C.

[4] "Article. I.

. . . . . .

"Section. 8. The Congress shall have Power . . .

. . . . . .

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature

more extensively with criminal offenses in the enclaves was evident, and one natural solution was to adopt for each enclave the offenses made punishable by the State in which it was situated. See *United States* v. *Press Publishing Co.*, 219 U. S. 1, 9–13. Initially there was room for a difference of opinion as to the desirability of doing this by blanket legislation, rather than by a code enumerating and defining specific offenses applicable to the enclaves. Congress made its initial decision on this point in 1825 by adopting for otherwise undefined offenses the policy of general conformity to local law. On repeated occasions thereafter Congress has confirmed that policy by enacting an unbroken series of Assimilative Crimes Acts. During the same period, Congress has recognized a slowly increasing number of federal crimes in the field of major offenses by enacting for the enclaves specific criminal statutes which have defined those crimes and, to that extent, have excluded the state laws from that field.[5]

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of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . .

. . . . . .

"Article. IV.

. . . . . .

"Section. 3. . . .

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." U. S. Const.

[5] For example, the following offenses committed within federal enclaves are now made criminal by such enactments of Congress: arson, 18 U. S. C. § 81; assault, 18 U. S. C. § 113; maiming, 18 U. S. C. § 114; larceny, 18 U. S. C. § 661; receiving stolen property, 18 U. S. C. § 662; false pretenses "upon any waters or vessel within the special maritime and territorial jurisdiction of the United States," 18 U. S. C. § 1025; murder, 18 U. S. C. § 1111; manslaughter, 18

In the Act of 1825, sponsored by Daniel Webster in the House of Representatives, Congress expressly adopted the fundamental policy of conformity to local law.[6] That Act provided the basis from which has grown the Assimilative Crimes Act now before us. Congress thereby made it clear that, with the exception of the enlarged list of offenses specifically proscribed by it, the federal offenses in each enclave were to be identical with those proscribed by the State in which the enclave was situated. That Act made no specific reference to subsequent repeals or amendments by the State of any assimilated laws. It also made no specific reference to new offenses that might be added by the State after the enactment of the Assimilative Crimes Act.

In 1831, there was certified by a Circuit Court to this Court in *United States* v. *Paul,* 6 Pet. 141, the concrete question whether, under the Assimilative Crimes Act of 1825, a statute enacted in 1829 by the State of New York, defining a new offense to be known as burglary in the third degree, was applicable to the federal enclave at West Point. The question was submitted without argument and this Court's answer is reported in full as follows:

> "Mr. Chief Justice MARSHALL stated it to be the opinion of the Court, that the third section of the

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U. S. C. § 1112; attempted murder or manslaughter, 18 U. S. C. § 1113; malicious mischief, 18 U. S. C. § 1363; rape, 18 U. S. C. § 2031; carnal knowledge, 18 U. S. C. § 2032; and robbery, 18 U. S. C. § 2111.

[6] "SEC. 3. . . . if any offence shall be committed in any of the places aforesaid, the punishment of which offence is not specially provided for by any law of the United States, such offence shall, upon a conviction in any court of the United States having cognisance thereof, be liable to, and receive the same punishment as the laws of the state in which such fort, dock-yard, navy-yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated, provide for the like offence when committed within the body of any county of such state." 4 Stat. 115.

> act of Congress, entitled 'an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes,' passed March 3, 1825, is to be limited to the laws of the several states in force at the time of its enactment. This was ordered to be certified to the Circuit Court for the southern district of New York." *Id.*, at 142.

There is nothing in that answer or in the report of the case to show that the issue was decided as anything more than one of statutory construction falling within the doctrine calling for the narrow construction of a penal statute. So interpreted, the decision did not reach the issue that is before us. It did, however, carry a fair implication that the Act of 1825 was constitutional insofar as it made applicable to enclaves the criminal laws in force in the respective States at the time of the enactment of the Assimilative Crimes Act. This Court later so held in *Franklin* v. *United States,* 216 U. S. 559.

Due to the limitation of the Assimilative Crimes Act of 1825 to state laws in force at the time of its own enactment, the Act gradually lost much of its effectiveness in maintaining current conformity with state criminal laws. This result has been well called one of static conformity. To renew such conformity, Congress has enacted comparable Assimilative Crimes Acts in 1866, 14 Stat. 13; in 1874 as R. S. § 5391; in 1898, 30 Stat. 717; in 1909 as § 289 of the Criminal Code, 35 Stat. 1145; in 1933, 48 Stat. 152; in 1935, 49 Stat. 394; in 1940, 54 Stat. 234; and finally in 1948 in the Revised Criminal Code as 18 U. S. C. § 13.

The above series of substantial re-enactments demonstrates a consistent congressional purpose to apply the principle of conformity to state criminal laws in punishing most minor offenses committed within federal enclaves. In the re-enactments of 1866, 1874, 1898 and 1909, the interpretation given the Act of 1825 by the *Paul*

case was made explicit by expressly limiting the assimilation to the state laws "now in force," or as the "laws of the State . . . now provide . . . ." In the Acts of 1933, 1935 and 1940, Congress continued to prescribe assimilation to the state laws "in force" on specified recent dates, and these three re-enactments also made the assimilation conditional upon the state laws "remaining in force at the time of the doing or omitting the doing of such act or thing . . . ." [7] This helped to keep the federal law current with the state law by reflecting future deletions from the state laws as soon as made.

In 1948, coincidentally with its revision of the Criminal Code of the United States, Congress finally adopted the present language. This expressly limits the assimilation to acts or omissions committed within a federal enclave and "not made punishable by any enactment of Congress . . . ." It further specifies that "Whoever . . . is guilty of any act or omission which . . . would be punishable if committed or omitted within the jurisdiction of the State . . . in which such place is situated, *by the laws thereof in force at the time of such act or omission,* shall be guilty of a like [federal] offense and subject to a like punishment." (Emphasis supplied.) This assimilation applies whether the state laws are enacted before or after the Federal Assimilative Crimes Act and at once reflects every addition, repeal or amendment of a state law.[8] Recognizing its underlying policy of 123 years'

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[7] See H. R. Rep. No. 263, 73d Cong., 1st Sess.; 77 Cong. Rec. 5530–5532, 5920; and H. R. Rep. No. 1022, 74th Cong., 1st Sess.

[8] The Reviser's Note to § 13 states the situation simply:

"The revised section omits the specification of any date as unnecessary in a revision, which speaks from the date of its enactment. Such omission will not only make effective within Federal reservations, the local State laws in force on the date of the enactment of the revision, but will authorize the Federal courts to apply the same measuring stick to such offenses as is applied in the adjoining State

standing, Congress has thus at last provided that within each federal enclave, to the extent that offenses are not pre-empted by congressional enactments, there shall be complete current conformity with the criminal laws of the respective States in which the enclaves are situated.

There is no doubt that Congress may validly adopt a criminal code for each federal enclave. It certainly may do so by drafting new laws or by copying laws defining the criminal offenses in force throughout the State in which the enclave is situated. As a practical matter, it has to proceed largely on a wholesale basis. Its reason for adopting local laws is not so much because Congress has examined them individually as it is because the laws are already in force throughout the State in which the enclave is situated.[9] The basic legislative decision made by Congress is its decision to conform the laws in the enclaves to the local laws as to all offenses not punishable by any enactment of Congress. Whether Congress sets forth the assimilated laws in full or assimilates them by reference, the result is as definite and as ascertainable as are the state laws themselves.

Having the power to assimilate the state laws, Congress obviously has like power to renew such assimilation annually or daily in order to keep the laws in the enclaves

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under future changes of the State law and will make unnecessary periodic pro forma amendments of this section to keep abreast of changes of local laws. In other words, the revised section makes applicable to offenses committed on such reservations, the law of the place that would govern if the reservation had not been ceded to the United States." 18 U. S. C.

[9] We do not now pass upon the effect of the Assimilative Crimes Act where an assimilated state law conflicts with a specific federal criminal statute, cf. *Williams* v. *United States,* 327 U. S. 711, or with a federal policy. Cf. *Johnson* v. *Yellow Cab Co.,* 321 U. S. 383; *Stewart & Co.* v. *Sadrakula,* 309 U. S. 94; *Hunt* v. *United States,* 278 U. S. 96; *Air Terminal Services, Inc.* v. *Rentzel,* 81 F. Supp. 611; *Oklahoma City* v. *Sanders,* 94 F. 2d 323.

current with those in the States. That being so, we conclude that Congress is within its constitutional powers and legislative discretion when, after 123 years of experience with the policy of conformity, it enacts that policy in its most complete and accurate form. Rather than being a delegation by Congress of its legislative authority to the States, it is a deliberate continuing adoption by Congress for federal enclaves of such unpre-empted offenses and punishments as shall have been already put in effect by the respective States for their own government. Congress retains power to exclude a particular state law from the assimilative effect of the Act. This procedure is a practical accommodation of the mechanics of the legislative functions of State and Nation in the field of police power where it is especially appropriate to make the federal regulation of local conduct conform to that already established by the State. Cf. *Stewart & Co.* v. *Sadrakula,* 309 U. S. 94, 100–101.

Examples of uses made by Congress of future state legislative action in connection with the exercise of federal legislative power are numerous. The Webb-Kenyon Act of March 1, 1913, 37 Stat. 699, 700, 27 U. S. C. § 122, prohibited the shipment of intoxicating liquors into a State to be used "in violation of any law of such State . . . ." West Virginia subsequently enacted a prohibition law. This Court nevertheless upheld the applicability of the Federal Act as it assimilated that subsequent state statute. *Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311, 326. See also, *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149,[10] 169

[10] In *Knickerbocker Ice Co.* v. *Stewart, supra,* this Court voided a statute which attempted to make state workmen's compensation laws applicable to injuries within the federal admiralty and maritime jurisdiction. The basis of that holding, which we do not now re-examine, was that "the Constitution not only contemplated but actually established" a "harmony and uniformity" of law throughout the

(Justice Holmes' dissent), and *United States* v. *Hill,* 248 U. S. 420.

The Federal Black Bass Act, as amended, 61 Stat. 517, 66 Stat. 736, 16 U. S. C. § 852, prohibited the transportation of fish in interstate commerce contrary to the law of the State from which it is transported. And see 18 U. S. C. § 43.

The Johnson Act, 64 Stat. 1134, 15 U. S. C. § 1172, prohibiting the transportation of gambling devices in interstate commerce, provides that a State may exempt itself from the Act. See *Nilva* v. *United States,* 212 F. 2d 115.[11]

In the less closely related field of civil law, the Federal Tort Claims Act, 28 U. S. C. § 1346 (b), bases the liability of the United States on "the law of the place where the act or omission occurred."

The Social Security Act, as amended, 71 Stat. 519, 42 U. S. C. A. (1957, Cum. Ann. Pocket Pt.) § 416 (h)(1), provides that an applicant shall be considered a husband or wife of an insured individual "if the courts of the State in which such insured individual is domiciled at the time such applicant files an application . . . would find that such applicant and such insured individual were validly

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admiralty jurisdiction. *Id.,* at 164. That statute was voided because it was designed to "destroy" what was considered to be a constitutionally required uniformity. *Ibid.* In contrast, the statute now before us is designed to effectuate a long-standing congressional policy of conformity with local law.

[11] The applicability of criminal provisions under the Connally Hot Oil Act, 49 Stat. 30, 15 U. S. C. § 715, depends upon the adoption of state conservation laws. See *Humble Oil & Refining Co.* v. *United States,* 198 F. 2d 753.

Under the Fugitive from Justice Act, 18 U. S. C. § 1073, it is criminal for a person to travel in interstate commerce to avoid prosecution for specified crimes as defined "under the laws of the place from which he flees . . . ." Cf. *Hemans* v. *United States,* 163 F. 2d 228.

married *at the time such applicant files such application . . . .*" (Emphasis supplied.)

The Bankruptcy Act, 52 Stat. 847, 11 U. S. C. § 24, provides that it shall not affect the allowance of exemptions prescribed "by the State laws in force at the time of the filing of the petition . . . ." See *Hanover National Bank* v. *Moyses,* 186 U. S. 181, 189–190.

Under 63 Stat. 25, 50 U. S. C. App. § 1894 (i)(1) and (2), States were authorized to free certain local areas from federal rent control either by passing local rent control legislation of their own, or by determining that federal rent control was no longer necessary. See *United States* v. *Shoreline Cooperative Apartments, Inc.,* 338 U. S. 897, reversing, *per curiam,* 84 F. Supp. 660.

This Court also has held that Congress may delegate to local legislative bodies broad jurisdiction over Territories and ceded areas provided Congress retains, as it does here, ample power to revise, alter and revoke the local legislation. *District of Columbia* v. *Thompson Co.,* 346 U. S. 100, 106, 109–110; *Christianson* v. *King County,* 239 U. S. 356; *Hornbuckle* v. *Toombs,* 18 Wall. 648, 655.[12]

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[12] *Wayman* v. *Southard,* 10 Wheat. 1, 47–50, is not controlling. In that case, Chief Justice Marshall stated that Congress could not constitutionally delegate to state legislatures the power to adopt future "rules of practice" and "modes of proceeding" which would bind federal courts. In 1872, that decision was met by Congress in the adoption of the Conformity Act, 17 Stat. 197, which prescribed:

"SEC. 5. That the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States *shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes* in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding . . . ." (Emphasis supplied.) While this Act was later restricted by interpretation, the validity of its application to future state practice was generally accepted by the courts. See Hart and Wechsler, The Federal Courts and the Federal

The application of the Assimilative Crimes Act to subsequently adopted state legislation, under the limitations here prescribed, is a reasonable exercise of congressional legislative power and discretion.[13] Accordingly, the judgment of the District Court is reversed and the case is remanded to it for further action consistent with this opinion.

Reversed and remanded.

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

There are two provisions of the Constitution involved in the present controversy. Article I, § 1 provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." A supplementary provision is that contained in Art. IV, § 3, cl. 2: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."

It is, therefore, the Congress, and the Congress alone, that has the power to make rules governing federal enclaves. I suppose there would be no doubt, at least after *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, that this rule-making power could not be exercised by the President, let alone some federal agency such as the Department of the Interior. The power to make laws under which men are punished for crimes calls for as serious a deliberation as the fashioning of rules for the seizure of the industrial plants involved in the *Youngstown* case. Both call for the exercise of legislative judg-

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System (1953), 581–586; Warren, Federal Process and State Legislation, 16 Va. L. Rev. 421, 557–570 (1930); Clark and Moore, A New Federal Civil Procedure, 44 Yale L. J. 387, 401–411 (1935).

[13] See generally, Note, The Federal Assimilative Crimes Act, 70 Harv. L. Rev. 685 (1957).

ment; and I do not see how that requirement can be satisfied by delegating the authority to the President, the Department of the Interior, or, as in this case, to the States. The Court held in *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, that the determination of what constitutes "fair competition" may not be left with the industry affected, subject to approval by the President. For the codes promulgated would have the standing of federal statutes. "But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry." *Id.,* at 537–538. The code-making authority was held to be an unconstitutional delegation of legislative power. *Id.,* at 542. "The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is . . . vested." *Id.,* at 529.

The vice in the *Schechter* case was not that the President was the one who received the delegated authority, but that the Congress had abdicated the lawmaking function. The result should be the same whether the lawmaking authority, constituted by Congress, is the President or a State.

Of course Congress can adopt as federal laws the laws of a State; and it has often done so. Even when it does so without any enumeration of the laws, it "has acted as definitely as if it had repeated the words" used by the State, as Mr. Justice Holmes said in *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, 167. Also Congress could, I think, adopt as federal law, governing an enclave, the state law governing speeding as it may from time to time be enacted. The Congress there determines what the basic policy is. Leaving the details to be filled in by a State is analogous to the scheme of delegated implementa-

tion of congressionally adopted policies with which we are familiar in the field of administrative law. But it is Congress that must determine the policy, for that is the essence of lawmaking. Under the scheme now approved a State makes such federal law, applicable to the enclave, as it likes, and that law becomes federal law, for the violation of which the citizen is sent to prison.

Here it is a sex crime on which Congress has never legislated. Tomorrow it may be a blue law, a law governing usury, or even a law requiring segregation of the races on buses and in restaurants. It may be a law that could never command a majority in the Congress or that in no sense reflected its will. It is no answer to say that the citizen would have a defense under the Fifth and Sixth Amendments to unconstitutional applications of these federal laws or the procedures under them. He is entitled to the considered judgment of Congress whether the law applied to him fits the federal policy. That is what federal lawmaking is. It is that policy which has led the Court heretofore to limit these Assimilative Crimes Acts to those state laws in force at the time of enactment of the Federal Act. *United States* v. *Paul,* 6 Pet. 141. And see *Franklin* v. *United States,* 216 U. S. 559, 568–569.

There is some convenience in doing what the Court allows today. Congress is saved the bother of enacting new Assimilative Crimes Acts from time to time. Federal laws grow like mushrooms without Congress passing a bill. But convenience is not material to the constitutional problem. With all due deference to those who are convinced the other way, I am forced to conclude that under this Assimilative Crimes Act it is a State, not the Congress, that is exercising the legislative power under Art. I, § 1 of the Constitution and that is making the "needful Rules and Regulations" envisioned by Art. IV, § 3, cl. 2. That may not constitutionally be done.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. *v.* ILLINOIS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 12. Argued November 12, 1957.—Decided January 13, 1958.*

After the Illinois Commerce Commission had denied a railroad's request for authority to increase intrastate passenger fares for its Chicago suburban commuter service, claimed as necessary to enable it to operate such service without an out-of-pocket loss, the railroad petitioned the Interstate Commerce Commission for relief under 49 U. S. C. § 13 (4). The latter Commission found that the railroad's revenues from this particular service fell short of meeting the out-of-pocket cost of such service, concluded that this caused undue discrimination against interstate commerce, and prescribed higher intrastate fares to produce enough revenue to eliminate the out-of-pocket loss and to allow $77,000 annually as a contribution to indirect costs and taxes. It also increased interstate fares to two points in Wisconsin to conform to the increased intrastate fares. The District Court set aside the Commission's order, enjoined its enforcement, and remanded the case to the Commission for further proceedings. *Held:* The judgment is modified and affirmed. Pp. 301–312.

1. The Commission's findings were not adequate to support its order under § 13 (4). Pp. 306–309.

(a) The deficit from this single commuter operation cannot fairly be adjudged to work an undue discrimination against the railroad's interstate operations without findings which take into account the carrier's other intrastate revenues from Illinois freight and passenger traffic. Pp. 306–309.

(b) The portion of the prescribed increases designed to produce $77,000 annually as a contribution to indirect costs and taxes is not based on adequate findings. P. 309, n. 8.

2. The Interstate Commerce Commission did not err in considering evidence which was not presented by the railroad to the State Commission. Pp. 310–311.

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*Together with No. 27, *United States* v. *Illinois et al.*, and No. 28, *Interstate Commerce Commission* v. *Illinois et al.*, also on appeals from the same Court.

3. The District Court did not err in setting aside so much of the Commission's order as authorized an increase in the interstate fares to the two Wisconsin points, since those rates are so interwoven with and so closely bound to the intrastate rates that a proper disposition of this case requires that the Commission reconsider them as part of its reconsideration of the entire Chicago suburban commuter service. Pp. 311–312.

146 F. Supp. 195, affirmed with modifications.

R. K. Merrill argued the cause for appellant in No. 12. With him on the brief were *W. J. Quinn* and *Edwin R. Eckersall.*

Solicitor General Rankin submitted on brief for the United States, appellant in No. 27.

Charlie H. Johns, Jr. argued the cause for the Interstate Commerce Commission, appellant in No. 28. With him on the brief was *Robert W. Ginnane.*

Harry R. Begley, Special Assistant Attorney General, argued the cause for the State of Illinois and the Illinois Commerce Commission, appellees. With him on the brief were *Latham Castle,* Attorney General, and *Elmer M. Walsh, Jr.,* Assistant Attorney General.

S. Ashley Guthrie argued the cause for the Milwaukee Road Commuters' Association, appellee. With him on the brief were *Henry F. Tenney* and *Francis D. Fisher.*

Mr. Justice Brennan delivered the opinion of the Court.

The State of Illinois, the Illinois Commerce Commission, and the Milwaukee Road Commuters' Association, aggrieved by an order of the Interstate Commerce Commission fixing intrastate passenger fares for the Milwaukee Road's Chicago suburban commuter service higher than the fares authorized by the State Commission, brought this action in the District Court for the Northern District of Illinois, Eastern Division, seeking

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relief under 28 U. S. C. § 1336. The ICC order, 297 I. C. C. 353, was made under 49 U. S. C. § 13 (4),[1] which authorizes the ICC to prescribe intrastate fares if it finds that ". . . any such . . . [existing intrastate] fare . . . causes . . . any undue, unreasonable, or unjust discrimination against interstate . . . commerce." The three-judge District Court set aside the order, enjoined its enforcement,[2] and remanded the case to the ICC for further proceedings. 146 F. Supp. 195. The District Court held, *inter alia,* that the ICC failed to make findings appropriate to show that the existing fares caused undue, unreasonable or unjust discrimination against interstate commerce. The judgment was appealed under 28 U. S. C. § 1253.[3] We noted probable jurisdiction, 352 U. S. 939.

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[1] 24 Stat. 383, as amended, 41 Stat. 484, 49 U. S. C. § 13 (4):

"Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

[2] The injunction was stayed pending the hearing of the appeal to this Court. The excess fares are being impounded under a provision of the stay order providing for their refund to the persons who paid them in the event the judgment appealed from is affirmed.

[3] The Milwaukee Road is the appellant in No. 12. The United States is the appellant in No. 27. The ICC is the appellant in No. 28. Each appeals from the particular provisions of the judgment by which it is aggrieved.

The ICC found that the Milwaukee Road's 1954 passenger revenues from the Chicago suburban commuter service fell short by $306,038 of meeting the out-of-pocket cost of the service. This was the basis of the conclusion that the existing intrastate fares caused undue discrimination against interstate commerce. To remove this discrimination the ICC prescribed fares to produce $383,000 additional annual revenue, enough to eliminate the determined out-of-pocket loss and to allow $77,000 annually as a contribution to indirect costs and taxes. The question for our decision is whether the District Court properly set aside the ICC order as void for lack of findings necessary to support an order under § 13 (4).

The Chicago suburban commuter service, except for a relatively insignificant exception mentioned below, is entirely an intrastate service. It is provided in two directions from Chicago's Union Station. One direction, wholly within Illinois, is west from Chicago some 37 route miles to Elgin, Illinois. The other direction is north from Chicago to Walworth, Wisconsin; however, 62 of the 74 route miles in that direction, and 24 of the 26 station stops, are located within Illinois.[4] Total 1954 passenger revenues from this service were $1,796,231 from 4,869,064 passengers. Commuters traveling on commutation and

[4] The interstate fares to the two Wisconsin points were also raised in this proceeding by an ICC order entered November 21, 1955, and Order No. 26550, *Passenger Fares and Surcharges,* 214 I. C. C. 174, was modified so as to permit the rates to be made effective. No affirmative order raising the intrastate rates was made, however, until March 2, 1956. The ICC report allowed the Milwaukee Road and the Illinois Commerce Commission 60 days in which to adjust the intrastate rates on the bases prescribed in the report. Failing such adjustment the order of March 2, 1956, prescribing the intrastate rates was entered and Order No. 11703, *Intrastate Rates Within Illinois,* 59 I. C. C. 350, was modified to permit the Milwaukee Road to make the intrastate rates effective.

multiple-ride tickets numbered 3,910,526 of this total and accounted for $1,374,261 of the revenue.

Commuter fares of most of the railroads providing commuter service in the Chicago area have been determined, at least since 1950, in joint hearings conducted by the ICC and the State Commission under 49 U. S. C. § 13 (3).[5] 297 I. C. C. 353, 354. On July 24, 1952, however, the Milwaukee Road, instead of filing petitions or schedules with both Commissions, filed a petition with the State Commission only requesting

> "authority to discontinue all off-peak Chicago suburban passenger trains and consolidate certain peak-hour trains and also to increase one-way, round-trip and commutation fares to such extent as will after taking into consideration the economy effected by

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[5] 24 Stat. 383, as amended, 41 Stat. 484, 49 U. S. C. § 13 (3):

"Whenever in any investigation under the provisions of this chapter, or in any investigation instituted upon petition of the carrier concerned, which petition is authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, the commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this chapter or chapter 12 of this title with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the commission. The commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this chapter or chapter 12 of this title."

such discontinuances and consolidation of trains, give respondent sufficient revenues to permit operation of the Chicago suburban service without an out-of-pocket loss." 297 I. C. C., at 355.

The State Commission did not act on the application until 1954. Meanwhile the Milwaukee Road changed the suburban service from a steam to a diesel operation. The State Commission found that the cost savings effected by this change eliminated the out-of-pocket loss and, on November 10, 1954, denied the application. The Milwaukee Road thereupon, in February 1955, petitioned the ICC for relief under § 13 (4).

This case presents once again the problem of adjusting state and federal interests in the regulation of intrastate rates. These intrastate rates are primarily the State's concern and federal power is dominant "only so far as necessary to alter rates which injuriously affect interstate transportation." *North Carolina* v. *United States,* 325 U. S. 507, 511. Thus, whenever this federal power is exerted within what would otherwise be the domain of state power, the justification for its exercise must "clearly appear." *Florida* v. *United States,* 282 U. S. 194, 212. The statute provides a practical method of minimizing the inevitable irritations inherent in the conflict by requiring the ICC to notify the State whenever there is brought before it any fare imposed by state authority. In addition, the ICC may confer with the state regulatory authority, or may hold joint hearings with the state agency, when the State's rate-making authority may be affected by the action taken by the ICC. 49 U. S. C. § 13 (3).

The occasion for the exercise of the federal power asserted by § 13 (4) is the necessity for effecting the required contribution by intrastate traffic of its proportionate share of the revenues necessary to pay a carrier's

operating cost and to yield a fair return.[6] When intrastate revenues fall short of producing their fair proportionate share of required total revenues, they work an undue discrimination against interstate commerce, and the ICC may remove the discrimination by fixing intrastate rates high enough reasonably to protect interstate commerce. *Illinois Commerce Comm'n* v. *United States,* 292 U. S. 474, 479; *Wisconsin R. Comm'n* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563, 586; *United States* v. *Louisiana,* 290 U. S. 70, 75. In determining whether an undue revenue discrimination against interstate commerce is caused by intrastate rates, the ICC may consider "among other things, the need, in the public interest, of adequate and efficient railway transportation service and the need of revenues sufficient to sustain such service," a standard written into 49 U. S. C. § 15a (2). *King* v. *United States,* 344 U. S. 254, 264. No formal requirements are prescribed for the findings to be made by the ICC under § 13 (4). *United States* v. *Louisiana,* 290 U. S. 70, 80. Reasonable determinations suffice. *Florida* v. *United States,* 292 U. S. 1, 9. But the justification for the exercise of this exceptional federal power to interfere with intrastate rates must be made definitely and clearly apparent. *Florida* v. *United States,* 282 U. S. 194, 212.

In the instant case the ICC interfered with suburban commuter rates—intrastate rates peculiarly localized in impact upon the Chicago suburban community. In substance, the ICC found that because this single segment of the Milwaukee Road's intrastate operations in Illinois did not meet out-of-pocket costs, there was an undue

[6] *Wisconsin R. Comm'n* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563, 586. "The effective operation of the [Interstate Commerce] act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system."

discrimination against the road's interstate operations, without regard to the contribution of other Illinois intrastate revenues, freight or passenger, concerning which both the record and the findings are entirely silent.

We think this is a case where the ICC cannot be sustained in altering intrastate rates merely because the Chicago suburban commuter traffic—of the Milwaukee Road's total intrastate Illinois traffic, freight and passenger—is not remunerative or reasonably compensatory. Cf. *Florida* v. *United States,* 282 U. S. 194; *North Carolina* v. *United States,* 325 U. S. 507. The limited and exceptional federal power asserted by § 13 (4) over intrastate rates must be exercised with "scrupulous regard for maintaining the [primary] power of the state in this field." *North Carolina* v. *United States,* 325 U. S. 507, 511. It is of course desirable that each particular intrastate service should as nearly as may be pay its own way and return a profit—but the State Commission, not the ICC, has the responsibility in the first instance to achieve that desired end. Passenger deficits have become chronic in the railroad industry and it has become necessary to make up these deficits from more remunerative services. The ICC has recognized this practical reality of today's railroading and has changed its rate-fixing policy so that if interstate passenger service inevitably and inescapably cannot bear its direct costs and its share of joint or indirect costs, the ICC feels compelled in a general rate case to take the passenger deficit into account in the adjustment of interstate freight rates and charges. *King* v. *United States,* 344 U. S. 254, 261. An equally broad power must be conceded to a state commission in the exercise of its primary authority to prescribe and adjust intrastate rates.

In view of that policy, we do not think that the deficit from this single commuter operation can fairly be adjudged to work an undue discrimination against the Mil-

waukee Road's interstate operations without findings which take the deficit into account in the light of the carrier's other intrastate revenues from Illinois traffic, freight and passenger. The basic objective of § 13 (4), applied in the light of § 15a (2) to this case, is to prevent a discrimination against the carrier's interstate traffic which would result from saddling that traffic with an undue burden of providing intrastate services. A fair picture of the intrastate operation, and whether the intrastate traffic unduly discriminates against interstate traffic, is not shown, in this case, by limiting consideration to the particular commuter service in disregard of the revenue contributed by the other intrastate services.[7]

A requirement for findings which reflect the commuter service deficit in the totality of intrastate revenues is not a departure from previous holdings of this Court. The precise situation presented by this case has not heretofore been considered by the Court. The previous cases involving Commission orders increasing intrastate rates in the interest of the carrier's revenue (as distinguished from cases of discrimination against particular persons and localities, see *Houston, E. & W. T. R. Co.* v. *United States,* 234 U. S. 342) involved statewide orders raising intrastate rates. In passenger fare cases, ICC orders were sustained on a showing that following general increases in interstate passenger rates, state commissions refused to increase intrastate passenger rates to the same level for what were essentially identical services. *Wiscon-*

[7] This would seem to be particularly required here in light of the Commission's recognition "that the deficit from the [Milwaukee Road's] total passenger operations is relatively greater than from its suburban operations." 297 I. C. C. 353, 359.

The Commission found that the Milwaukee Road earned in 1954 from its freight operations $37,293,050, and suffered a deficit from all passenger operations of $22,824,532, resulting in a net railway operating income of $14,568,518. This represented a return of approximately 2%.

sin R. Comm'n v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563; *New York* v. *United States,* 257 U. S. 591. It was held that the state passenger rates in that circumstance were not producing their fair proportionate share. In *North Carolina* v. *United States,* 325 U. S. 507, also a passenger fare case, the ICC order was not sustained because the findings were held to be insufficient. Nonpassenger fare cases in which ICC orders raising intrastate rates were sustained were *United States* v. *Louisiana,* 290 U. S. 70; *Florida* v. *United States,* 292 U. S. 1; and *King* v. *United States,* 344 U. S. 254. The order was not sustained, however, in an earlier Florida case, *Florida* v. *United States,* 282 U. S. 194. The only case ostensibly based upon a revenue discrimination caused by a local operation was not a passenger fare case. *Illinois Commerce Comm'n* v. *United States,* 292 U. S. 474. Basically the discrimination there complained of, however, was a persons-and-locality discrimination against interstate shippers.

It should also be noted that in *King* v. *United States, supra,* the Court adverted to those very factors among the ICC's findings whose absence in the present case we find to be a fatal defect. The Court there emphasized the ICC finding that the entire intrastate traffic, freight and passenger, constituted a revenue drain upon the carrier's revenues from interstate traffic. Since the Commission has not in this case found whether or not the commuter rates, viewed in the light of the Illinois intrastate operation as a whole, constitute an undue revenue discrimination against the Milwaukee Road's interstate operations, the judgment of the District Court in remanding the case to the Commission for further consideration must be affirmed.[8]

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[8] We agree with the District Court that that portion of the prescribed increases designed to produce $77,000 annually as a contribution to indirect costs and taxes is not based upon adequate findings. There is no finding of the total of indirect costs and taxes to which

The District Court also held that the ICC erred in considering evidence which was not presented by the Milwaukee Road to the State Commission. The evidence in question concerned certain depreciation and maintenance-of-way expenses totaling $258,172, which the ICC took into account in computing out-of-pocket costs. The District Court said:

> "If different evidence is to be offered or a different basis of fares is to be urged before the interstate commission, the state commission should have been given a chance to fix fares on the same evidence and the same basis.
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> . . . . . .
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> "Where a railroad seeks the fixing of higher intrastate rates by the interstate commission after failing in such endeavor before a state commission, § 13 (4) does not contemplate that the state commission is to be considered only a way station in a journey to the interstate commission." 146 F. Supp. 195, 201, 202.

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contribution is to be made, nor any finding from which we may infer how the ICC derived its conclusion that a $77,000 contribution was fair. It is axiomatic that to know whether something is a fair proportionate part of something else, we must be told what the something else is.

On the other hand we cannot agree with the District Court that there was not support in the evidence for the ICC's finding that the prescribed rates would be just and reasonable for the future. The ICC did not rely solely upon the comparison with the similar fares of the Northwestern, for there was ample other evidence in the record to sustain their findings. But the factors which determine the reasonableness of a rate are so different from the factors which determine what is a fair proportionate share of a carrier's total income that a finding of the reasonableness of the rates prescribed does not embrace all the findings necessary to support the exercise of the § 13 (4) power.

This holding in effect restricts the ICC in decisions under § 13 (4) to the identical evidence presented by the railroad to the State Commission. So to restrict the ICC's consideration as to whether intrastate rates work an undue discrimination against interstate commerce might seriously interfere with the Commission's duty to remove the discrimination to protect the exclusive federal domain of interstate commerce. It is contrary to this Court's holding in *Florida* v. *United States,* 282 U. S. 194. There the State Commission had not affirmatively prescribed the existing rates which the ICC increased. It was urged that until the State Commission did so § 13 (4) granted no power to the ICC to prescribe higher rates. This Court rejected this contention, saying "To hold . . . that there can be no adjustment of intrastate rates by the Interstate Commerce Commission so far as may be needed to protect interstate commerce until the State itself has first 'sat in judgment on the issue of the lawfulness of those intrastate rates' would be to impose a limitation not required by the terms of the statute and repugnant to the grant of authority." *Id.,* at 210.

In this case the ICC might more wisely have arranged for joint hearings under § 13 (3) or have deferred action pending an opportunity for the State Commission to consider this evidence. However, nothing in the statute compels either course or denies the ICC the power to determine the question presented by the railroad's petition, whatever may have been the evidence presented before the State Commission. See *North Carolina* v. *United States,* 128 F. Supp. 718, affirmed, 350 U. S. 805; *Illinois* v. *United States,* 101 F. Supp. 36, 47, affirmed, 342 U. S. 930.

Finally, it is argued that the District Court erred in setting aside so much of the ICC order as authorized an increase in the interstate fares to the two Wisconsin points. We believe, however, that these rates are so inter-

woven with and so closely bound to the intrastate rates that a proper disposition of this case reasonably requires that the Commission reconsider them as part of its reconsideration of the entire Chicago suburban commuter service. The only reason why the ICC increased the interstate rates was to make them conform to the increased intrastate rates.

Paragraph 3 of the District Court judgment dated June 14, 1956, is modified to provide that the remand to the ICC shall be for further proceedings not inconsistent with this opinion.

It is so ordered.

STAUB *v.* CITY OF BAXLEY.

APPEAL FROM THE COURT OF APPEALS OF GEORGIA.

No. 48. Argued November 18–19, 1957.—Decided January 13, 1958.

A city ordinance made it an offense to "solicit" citizens of the City to become members of any "organization, union or society" which requires fees or dues from its members without first applying for and receiving from the Mayor and Council a "permit," which they might grant or refuse after considering the character of the applicant, the nature of the organization and its effects upon the general welfare of the citizens. For soliciting applications for membership in a labor union in the private homes of employees without applying for or obtaining such a permit, appellant was convicted of a violation of this ordinance and sentenced to fine or imprisonment, notwithstanding her claim that the ordinance violated her rights under the Federal Constitution. The State Court of Appeals affirmed. It declined to pass on appellant's contention, on the grounds that (1) appellant lacked standing to attack the constitutionality of the ordinance because she had made no attempt to obtain a permit under it, and (2) under state procedure, her attack should have been made against specific sections of the ordinance and not against the ordinance as a whole. *Held:*

1. The decision of the State Court of Appeals does not rest on an adequate nonfederal ground, and this Court has jurisdiction of this appeal. Pp. 318–320.

(a) Failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this Court of a judgment of conviction under such an ordinance. P. 319.

(b) In the circumstances of this case, appellant's failure to attack specific sections of the ordinance, in accordance with state procedure, is not an adequate nonfederal ground of decision. Pp. 319–320.

2. The ordinance is invalid on its face, because it makes enjoyment of the constitutionally guaranteed freedom of speech contingent upon the will of the Mayor and Council and thereby constitutes a prior restraint upon, and abridges, that freedom, contrary to the Fourteenth Amendment. Pp. 321–325.

94 Ga. App. 18, 93 S. E. 2d 375, reversed.

Morris P. Glushien argued the cause for appellant. With him on the brief were *Ed Pearce* and *Bernard Dunau.*

J. H. Highsmith argued the cause and filed a brief for appellee.

Briefs of *amici curiae* urging reversal were filed by *Murray A. Gordon* for the American Civil Liberties Union, and *Carl Rachlin* for the Workers Defense League.

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

Appellant, Rose Staub, was convicted in the Mayor's Court of the City of Baxley, Georgia, of violation of a city ordinance and was sentenced to imprisonment for 30 days or to pay a fine of $300. The Superior Court of the county affirmed the judgment of conviction; the Court of Appeals of the State affirmed the judgment of the Superior Court, 94 Ga. App. 18, 93 S. E. 2d 375; and the Supreme Court of the State denied an application for certiorari. The case comes here on appeal.

The ordinance in question is set forth in the margin.[1] Its violation, which is not denied, arose from the follow-

[1] "Section I. Before any person or persons, firms or organizations shall solicit membership for any organization, union or society of any sort which requires from its members the payments of membership fees, dues or is entitled to make assessment against its members, such person or persons shall make application in writing to Mayor and Council of the City of Baxley for the issuance of a permit to solicit members in such organization from among the citizens of Baxley.

"Section II. Such application shall give the name and nature of the organization for which applicant desires to solicit members, whether such organization is incorporated or unincorporated, the location of its principal office and place of business and the names of its officers, along with date of its organization, and its assets and liabilities. Such application shall further contain the age and residence of applicant including places of residence of applicant for past ten

ing undisputed facts shown at the trial: Appellant was a salaried employee of the International Ladies' Garment Workers Union which was attempting to organize the employees of a manufacturing company located in the nearby town of Hazelhurst. A number of those employees lived in Baxley. On February 19, 1954, appellant and one Mamie Merritt, also a salaried employee of the union, went to Baxley and, without applying for permits required under the ordinance, talked with several of the employees at their homes about joining the union. While in a restaurant in Baxley on that day they were sought out and questioned by the Chief of Police concerning their activities in Baxley, and appellant told him that they were "going around talking to some of the women to organize the factory workers . . . and hold[ing] meetings with them for that purpose." Later

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years; and as well as business or profession in which such applicant has been engaged during said time, and shall furnish at least three persons as references to applicant's character. Said application shall also furnish the information as to whether applicant is a salaried employee of the organization for which he is soliciting members, and what compensation, if any, he receives for obtaining members.

"Section III. This application shall be submitted to a regular meeting of Mayor and Council of City of Baxley, and in event it is desired by Mayor and Council to investigate further the information given in the application, or in the event the applicant desires a formal hearing on such application, such hearing shall be set for a time not later than the next regular meeting of the Mayor and Council of City of Baxley. At such hearing the applicant may submit for consideration any evidence that he may desire bearing on the application, and any interested persons shall have the right of appearing and giving evidence to the contrary.

"Section IV. In passing upon such application the Mayor and Council shall consider the character of the applicant, the nature of the business of the organization for which members are desired to be solicited, and its effects upon the general welfare of citizens of the City of Baxley.

"Section V. The granting or refusing to grant of such application for a permit shall be determined by vote of Mayor and Council, after

that day a meeting was held at the home of one of the employees, attended by three other employees, at which, in the words of the hostess, appellant "just told us they wanted us to join the union, and said it would be a good thing for us to do . . . and went on to tell us how this union would help us." Appellant told those present that the membership dues would be 64 cents per week but would not be payable until the employees were organized. No money was asked or received from the persons at the meeting, but they were invited "to get other girls . . . there to join the union" and blank membership cards were offered for that use. Appellant further explained that the immediate objective was to "have enough cards signed to petition for an election . . . with the Labor Board." [2]

On the same day a summons was issued and served by the Chief of Police commanding appellant to appear

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consideration and hearing if same is requested by applicant or Mayor and Council, in the same manner as other matters are so granted or denied by the vote of the Mayor and Council.

"Section VI. In the event that person making application is salaried employee or officer of the organization for which he desires to seek members among the citizens of Baxley, or persons employed in the City of Baxley, or received a fee of any sort from the obtaining of such members, he shall be issued a permit and license for soliciting such members upon the payment of $2,000.00 per year. Also $500.00 for each member obtained.

"Section VII. Any person, persons, firm, or corporation soliciting members for any organization from among the citizens or persons employed in the City of Baxley without first obtaining a permit and license therefor shall be punished as provided by Section 85 of Criminal Code of City of Baxley.

"Section VIII. All Ordinances of City of Baxley in conflict with [this] ordinance are hereby repealed.

"Section IX. Should any section or portion of this Ordinance be held void, it shall not affect the remaining sections and portions of same."

[2] This reference obviously was to the National Labor Relations Board as Georgia has no comparable agency.

before the Mayor's Court three days later to answer "to the offense of Soliciting Members for an Organization without a Permit & License."

Before the trial, appellant moved to abate the action upon a number of grounds, among which were the contentions that the ordinance "shows on its face that it is repugnant to and violative of the 1st and 14th Amendments to the Constitution of the United States in that it places a condition precedent upon, and otherwise unlawfully restricts, the defendant's freedom of speech as well as freedom of the press and freedom of lawful assembly" by requiring, as conditions precedent to the exercise of those rights, the issuance of a "license" which the Mayor and city council are authorized by the ordinance to grant or refuse in their discretion, and the payment of a "license fee" which is discriminatory and unreasonable in amount and constitutes a prohibitory flat tax upon the privilege of soliciting persons to join a labor union. These contentions were overruled by the Mayor's Court and, after a continuance,[3] the case was tried and appellant was convicted and sentenced as stated.[4] The same contentions were made in the Superior Court where the city answered, denying "that the ordinance is invalid or void for any of the reasons stated" by appellant, and, after a hearing, that court affirmed the judgment of conviction.

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[3] During that continuance, appellant brought an action in the Superior Court of the county asking an injunction against enforcement of the ordinance and a declaration of its invalidity. The Superior Court found against petitioner and on appeal the Supreme Court of the State affirmed, holding that "If the ordinance is invalid, by reason of its unconstitutionality, or for other cause, such invalidity would be a complete defense to any prosecution that might be instituted for its violation." *Staub* v. *Mayor of Baxley*, 211 Ga. 1, 2, 83 S. E. 2d 606, 608.

[4] Mamie Merritt was also charged with the same offense and was tried with appellant and was likewise convicted and given the same sentence, but it has been stipulated that the judgment of conviction against her shall await, and conform with, the result of this appeal.

Those contentions were renewed in the Court of Appeals but that court declined to consider them. It stated that "[t]he attack should have been made against specific sections of the ordinance and not against the ordinance as a whole"; that "[h]aving made no effort to secure a license, the defendant is in no position to claim that any section of the ordinance is invalid or unconstitutional"; and that since it "appears that the attack was not made against any particular section of the ordinance as being void or unconstitutional, and that the defendant has made no effort to comply with any section of the ordinance . . . it is not necessary to pass upon the sufficiency of the evidence, the constitutionality of the ordinance, or any other phase of the case . . . ." The court then held that "[t]he trial court did not err in overruling the writ of certiorari" and affirmed the judgment of conviction. 94 Ga. App., at 24, 93 S. E. 2d, at 378–379.

At the threshold, appellee urges that this appeal be dismissed because, it argues, the decision of the Court of Appeals was based upon state procedural grounds and thus rests upon an *adequate* nonfederal basis, and that we are therefore without jurisdiction to entertain it. Hence, the question is whether that basis was an *adequate* one in the circumstances of this case. "Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law; and where a case coming from a state court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court." *First National Bank* v. *Anderson,* 269 U. S. 341, 346, and cases cited. See also *Schuylkill Trust Co.* v. *Pennsylvania,* 296 U. S. 113, 122–123, and *Lovell* v. *Griffin,* 303 U. S. 444, 450. As Mr. Justice Holmes said in *Davis* v. *Wechsler,* 263 U. S. 22, 24, "Whatever springes the State may set

for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Whether the constitutional rights asserted by the appellant were ". . . given due recognition by the [Court of Appeals] is a question as to which the [appellant is] entitled to invoke our judgment, and this [she has] done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support . . . [for] if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided." *Ward* v. *Love County,* 253 U. S. 17, 22, and cases cited.

The first of the nonfederal grounds relied on by appellee, and upon which the decision of the Court of Appeals rests, is that appellant lacked standing to attack the constitutionality of the ordinance because she made no attempt to secure a permit under it. This is not an adequate nonfederal ground of decision. The decisions of this Court have uniformly held that the failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this Court of a judgment of conviction under such an ordinance. *Smith* v. *Cahoon,* 283 U. S. 553, 562; *Lovell* v. *Griffin,* 303 U. S. 444, 452. "The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands." *Jones* v. *Opelika,* 316 U. S. 584, 602, dissenting opinion, adopted *per curiam* on rehearing, 319 U. S. 103, 104.

Appellee also contends that the holding of the Court of Appeals, that appellant's failure to attack "specific sections" of the ordinance rendered it unnecessary, under

Georgia procedure, "to pass upon . . . the constitutionality of the ordinance, or any other phase of the case . . . ," constitutes an adequate "non-federal ground" to preclude review in this Court. We think this contention is "without any fair or substantial support" (*Ward* v. *Love County, supra*) and therefore does not present an *adequate* nonfederal ground of decision in the circumstances of this case. The several sections of the ordinance are interdependent in their application to one in appellant's position and constitute but one complete act for the licensing and taxing of her described activities. For that reason, no doubt, she challenged the constitutionality of the whole ordinance, and in her objections used language challenging the constitutional effect of all its sections. She did, thus, challenge all sections of the ordinance, though not by number. To require her, in these circumstances, to count off, one by one, the several sections of the ordinance would be to force resort to an arid ritual of meaningless form. Indeed, the Supreme Court of Georgia seems to have recognized the arbitrariness of such exaltation of form. Only four years ago that court recognized that an attack on such a statute was sufficient if "the [statute] so challenged was invalid in every part for some reason alleged." *Flynn* v. *State,* 209 Ga. 519, 522, 74 S. E. 2d 461, 464 (1953). In enunciating that rule the court was following a long line of its own decisions. *Atlantic Loan Co.* v. *Peterson,* 181 Ga. 266, 269, 182 S. E. 15, 16–17 (1935); *Miller* v. *Head,* 186 Ga. 694, 708, 198 S. E. 680, 687–688 (1938); *Stegall* v. *Southwest Georgia Regional Housing Authority,* 197 Ga. 571, 30 S. E. 2d 196 (1944); *Krasner* v. *Rutledge,* 204 Ga. 380, 383, 49 S. E. 2d 864, 866 (1948).

We conclude that the decision of the Court of Appeals does not rest on an adequate nonfederal ground and that we have jurisdiction of this appeal.

The First Amendment of the Constitution provides: "Congress shall make no law . . . abridging the freedom of speech . . . ." This freedom is among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action; and municipal ordinances adopted under state authority constitute state action. *Lovell* v. *Griffin, supra,* at 450, and cases cited.

This ordinance in its broad sweep makes it an offense to "solicit" citizens of the City of Baxley to become members of any "organization, union or society" which requires "fees [or] dues" from its members without first applying for and receiving from the Mayor and Council of the City a "permit" (Sections I and II) which they may grant or refuse to grant (Section V) after considering "the character of the applicant, the nature of the . . . organization for which members are desired to be solicited, and its effects upon the general welfare of [the] citizens of the City of Baxley" (Section IV).

Appellant's first contention in this Court is that the ordinance is invalid on its face because it makes enjoyment of the constitutionally guaranteed freedom of speech contingent upon the will of the Mayor and Council of the City and thereby constitutes a prior restraint upon, and abridges, that freedom. Believing that appellant is right in that contention and that the judgment must be reversed for that reason, we confine our considerations to that particular question and do not reach other questions presented.

It will be noted that appellant was not accused of any act against the peace, good order or dignity of the community, nor for any particular thing she said in soliciting employees of the manufacturing company to join the union. She was simply charged and convicted for "soliciting members for an organization without a Per-

mit." This solicitation, as shown by the evidence, consisted solely of speaking to those employees in their private homes about joining the union.[5]

It will also be noted that the permit is not to be issued as a matter of course, but only upon the affirmative action of the Mayor and Council of the City. They are expressly authorized to refuse to grant the permit if they do not approve of the applicant or of the union or of the union's "effects upon the general welfare of citizens of the City of Baxley." These criteria are without semblance of definitive standards or other controlling guides governing the action of the Mayor and Council in granting or withholding a permit. Cf. *Niemotko* v. *Maryland,* 340 U. S. 268, 271–273. It is thus plain that they act in this respect in their uncontrolled discretion.

It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

In *Cantwell* v. *Connecticut,* 310 U. S. 296, this Court held invalid an Act which proscribed soliciting money or any valuable thing for "any alleged religious, charitable or philanthropic cause" unless the "cause" is approved by the secretary of the public welfare council of the state. Speaking for a unanimous Court, Mr. Justice Roberts said:

> "It will be noted, however, that the Act requires an application to the secretary of the public welfare

[5] For that reason we are not here confronted with any question concerning the right of the city to regulate the pursuit of an occupation. Cf. *Thomas* v. *Collins,* 323 U. S. 516.

> council of the State; that he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion . . . is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth. . . . [T]o condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution." 310 U. S., at 305, 307.

To the same effect are *Lovell* v. *Griffin, supra,* at 451, 452; [6] *Hague* v. *C. I. O.,* 307 U. S. 496, 516; [7] *Schneider* v.

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[6] The ordinance involved in that case proscribed the distribution of literature in the City of Griffin "without first obtaining written permission from the City Manager . . . ," which he might grant or withhold in his discretion. 303 U. S., at 447. This Court, in reversing a conviction under that ordinance, said: "Legislation of the type of the ordinance in question would restore the system of license and censorship in its baldest form." *Id.,* at 452.

[7] There the ordinance proscribed the leasing of a hall for a public speech or the holding of public meetings "without a permit from the Chief of Police." 307 U. S., at 501. Members of a labor union sought permission to hold public meetings in the city for the "organization of unorganized workers into labor unions." *Id.,* at 504. Permission was refused on the ground that such meetings would cause disorder. They then sought and obtained an injunction prohibiting the city from interfering with their rights of free speech and peaceable

State, 308 U. S. 147, 163, 164; [8] *Largent* v. *Texas,* 318 U. S. 418, 422; [9] *Jones* v. *Opelika,* 319 U. S. 103, adopting *per curiam* on rehearing the dissenting opinion in 316 U. S. 584, 600–602; [10] *Niemotko* v. *Maryland,* 340 U. S. 268, 271; [11] *Kunz* v. *New York,* 340 U. S. 290, 293.[12]

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assembly. The case came here on certiorari and this Court affirmed. In the course of his opinion, Mr. Justice Roberts said the ordinance was "void upon its face" and that ". . . uncontrolled official suppression [of free speech and peaceable assembly] cannot be made a substitute for the duty to maintain order in connection with the exercise of the right." *Id.,* at 516.

[8] There an ordinance of Irvington, New Jersey, in effect banned "communication of any views or the advocacy of any cause from door to door" (308 U. S., at 163), without "a written permit from the Chief of Police . . . ." *Id.,* at 157. This Court held the ordinance invalid as a prior restraint upon First Amendment rights and said that such an ordinance "strikes at the very heart of the constitutional guarantees." *Id.,* at 164.

[9] This Court said: "The mayor issues a permit only if after thorough investigation he 'deems it proper or advisable.' Dissemination of ideas depends upon the approval of the distributor by the official. This is administrative censorship in an extreme form. It abridges the freedom of religion, of the press and of speech guaranteed by the Fourteenth Amendment." 318 U. S., at 422.

[10] Chief Justice Stone said: "[H]ere it is the prohibition of publication, save at the uncontrolled will of public officials, which transgresses constitutional limitations and makes the ordinance void on its face." 316 U. S., at 602.

[11] There the city allowed use of its park for public meetings, but by custom a permit was required from its park commissioner. A religious group known as Jehovah's Witnesses scheduled several Bible talks to be held in the city park. They applied for a permit to do so, but it was refused. Later they proceeded to hold such a meeting without a permit and when Niemotko opened the meeting he was arrested and later convicted for disturbing the peace, though the meeting was orderly and the real cause was the failure to have a permit. This Court reversed. After pointing out there were no standards governing the discretion of the park commissioner in granting or refusing such permits and referring to *Hague* v. *C. I. O., supra;*

[*Footnote 12 appears on p. 325.*]

It is undeniable that the ordinance authorized the Mayor and Council of the City of Baxley to grant "or refuse to grant" the required permit in their uncontrolled discretion. It thus makes enjoyment of speech contingent upon the will of the Mayor and Council of the City, although that fundamental right is made free from congressional abridgment by the First Amendment and is protected by the Fourteenth from invasion by state action. For these reasons, the ordinance, on its face, imposes an unconstitutional prior restraint upon the enjoyment of First Amendment freedoms and lays "a forbidden burden upon the exercise of liberty protected by the Constitution." *Cantwell* v. *Connecticut, supra,* at 307. Therefore, the judgment of conviction must fall.

Reversed.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE CLARK joins, dissenting.

This is one of those small cases that carry large issues, for it concerns the essence of our federalism—due regard for the constitutional distribution of power as be-

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Lovell v. *Griffin, supra,* and other cases, it said: "It is clear that all that has been said about the invalidity of such limitless discretion must be equally applicable here. . . . The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body." 340 U. S., at 272.

[12] There it was said: "This interpretation allows the police commissioner, an administrative official, to exercise discretion in denying subsequent permit applications [to hold outdoor religious meetings] on the basis of his interpretation, at that time, of what is deemed to be conduct condemned by the ordinance. We have here, then, an ordinance which gives an administrative official discretionary power to control in advance the right of citizens to speak on religious matters on the streets of New York. As such, the ordinance is clearly invalid as a prior restraint on the exercise of First Amendment rights." 340 U. S., at 293.

tween the Nation and the States, and more particularly the distribution of judicial power as between this Court and the judiciaries of the States.[1]

An ordinance of the City of Baxley, Georgia,[2] provides that anyone who seeks to solicit members for any organization requiring the payment of dues shall first apply to the Mayor and Council of Baxley for a permit to carry on such solicitation. The ordinance further provides a detailed procedure for making the application, standards for granting the permit, the fee to be charged, and sanctions for failure to comply with the ordinance. Appellant was arrested for violation of the ordinance and was ordered to appear before the Mayor's Court of the City. By a plea in abatement she attacked the ordinance as in conflict with provisions of the State and the United States Constitutions and with the National Labor Relations Act.[3] Her plea was overruled, and the cause proceeded to trial. The undisputed evidence established

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[1] The peculiar demands made upon the judiciary by a federal system such as ours were recently indicated by the Chief Justice of Australia, Sir Owen Dixon:

"[F]ederalism is a form of government the nature of which is seldom adequately understood in all its bearings by those whose fortune it is to live under a unitary system. The problems of federalism and the considerations governing their solution assume a different aspect to those whose lives are spent under the operation of a federal Constitution, particularly if by education, practice and study they have been brought to think about the constitutional conceptions and modes of reasoning which belong to federalism as commonplace and familiar ideas. A unitary system presents no analogies and indeed, on the contrary, it forms a background against which many of the conceptions and distinctions inherent in federalism must strike the mind as strange and exotic refinements." *O'Sullivan* v. *Noarlunga Meat Ltd.*, 94 C. L. R. 367, 375 (1956).

[2] The ordinance is set forth in full in the margin of the opinion of the Court in this case, *ante*, p. 314.

[3] The relevant portions of appellant's plea in abatement are set forth in an Appendix to this opinion, p. 335, *infra*.

that appellant was an employee of the International Ladies' Garment Workers Union, an organization that required dues of its members, that she was soliciting members for the union in Baxley, and that she had not applied for a permit as required by the city ordinance. Appellant was convicted and sentenced to pay a fine of $300 or serve 30 days in the city jail.

Appellant applied to the Superior Court of the county for a writ of certiorari, repeating the contentions she had made in her plea in abatement. The cause was tried *de novo* by the court without a jury and the judgment of the Mayor's Court was affirmed.

On writ of error, the Georgia Court of Appeals reviewed the judgment of the Superior Court. It noted that appellant had made no effort to secure a permit and that her constitutional attack should have been made specifically against a particular section or sections of the ordinance and not against the ordinance as a whole. On this doctrine of Georgia appellate procedure it cited *Anthony* v. *City of Atlanta,* 66 Ga. App. 504, 505, 18 S. E. 2d 81–82, which in turn cited *Glover* v. *City of Rome,* 173 Ga. 239, 160 S. E. 249, and concluded that the issue of the constitutionality of the ordinance had not been properly raised. Accordingly, the Court of Appeals sustained the conviction. 94 Ga. App. 18, 93 S. E. 2d 375. The Supreme Court of Georgia denied appellant's application for a writ of certiorari, and the case came here on appeal from the Court of Appeals of Georgia.

The jurisdictional basis for this appeal is 28 U. S. C. § 1257, which had its origin in the famous twenty-fifth section of the Act of September 24, 1789, 1 Stat. 73, 85. That seemingly technical procedural provision of the First Judiciary Act has served as one of the most nationalizing forces in our history. By that section, as construed in *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, strongly reinforced by *Cohens* v. *Virginia,* 6 Wheat. 264, the denial of

a claim of a federal right in the final judgment of the highest available court of a State could be brought for review at the bar of this Court. This amenability of state action to the judicial arbitrament of the Nation's Supreme Court has been recognized by leading historians as one of the shaping influences in the fusion of the States into a Nation. Naturally enough, vigorous efforts were made, both before and after the Civil War, to repeal § 25, but without avail. See Warren, Legislative and Judicial Attacks on the Supreme Court of the United States, A History of the Twenty-Fifth Section of the Judiciary Act, 47 Amer. L. Rev. 1, 161; H. R. Rep. No. 43, 21st Cong., 2d Sess.; Hart and Wechsler, "Note on the Attacks Upon the Jurisdiction," The Federal Courts and the Federal System, 418. The power of this Court to review denials by state courts of federal claims has never been qualified.[4]

While the power to review the denial by a state court of a nonfrivolous claim under the United States Constitution has been centered in this Court, carrying with it the responsibility to see that the opportunity to assert such a claim be not thwarted by any local procedural device, equally important is observance by this Court of

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[4] It was not enlarged until 1914, 38 Stat. 790, now 28 U. S. C. § 1257 (3). It had been assumed that state courts would not unduly invoke a federal right to cut down state authority. But judicial attitudes on the part of state courts toward modern social legislation led Congress to establish a new principle of appellate control over state courts by conferring on this Court jurisdiction to review judgments by the highest court of a State upholding as well as denying federal rights.

More immediately relevant is the fact that, despite the centralizing tendency generated by the outcome of the Civil War, this Court rejected a vigorous drive to extend the scope of our review so as to cover all questions in the record, even those of state concern, where the case is properly here on denial of some federal claim. This attempted extension was rejected as a "radical and hazardous change of a policy vital in its essential nature to the independence of the State courts . . . ." *Murdock* v. *Memphis*, 20 Wall. 590, 630.

the wide discretion in the States to formulate their own procedures for bringing issues appropriately to the attention of their local courts, either in shaping litigation or by appeal. Such methods and procedures may, when judged by the best standards of judicial administration, appear crude, awkward and even finicky or unnecessarily formal when judged in the light of modern emphasis on informality. But so long as the local procedure does not discriminate against the raising of federal claims and, in the particular case, has not been used to stifle a federal claim to prevent its eventual consideration here, this Court is powerless to deny to a State the right to have the kind of judicial system it chooses and to administer that system in its own way. It is of course for this Court to pass on the substantive sufficiency of a claim of federal right, *First National Bank* v. *Anderson,* 269 U. S. 341, 346, but if resort is had in the first instance to the state judiciary for the enforcement of a federal constitutional right, the State is not barred from subjecting the suit to the same procedures, *nisi prius* [5] and appellate, that govern adjudication of all constitutional issues in that State. *Edelman* v. *California,* 344 U. S. 357; *Parker* v. *Illinois,* 333 U. S. 571. In *Nickel* v. *Cole,* 256 U. S. 222, 225, we said, "[W]hen as here there can be no pretence that the [state] Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds

[5] "While it is true that a substantive federal right or defense duly asserted cannot be lessened or destroyed by a state rule of practice, yet the claim of the plaintiff in error to a federal right not having been asserted at a time and in a manner calling for the consideration of it by the state Supreme Court under its established system of practice and pleading, the refusal of the trial court and of the Supreme Court to admit the testimony tendered in support of such claim is not a denial of a federal right which this court can review, *Baldwin* v. *Kansas,* 129 U. S. 52, *Oxley Stave Co.* v. *Butler County,* 166 U. S. 648 . . . ." *Atlantic Coast Line R. Co.* v. *Mims,* 242 U. S. 532, 536–537.

that have no relation to any federal question, this Court accepts the decision whether right or wrong."

The relevance of a state procedure requiring that constitutional issues be presented in their narrowest possible scope is confirmed by the practice of this Court. The Court has long insisted, certainly in precept, on rigorous requirements that must be fulfilled before it will pass on the constitutionality of legislation, on avoidance of such determinations even by strained statutory construction, and on keeping constitutional adjudication, when unavoidable, as narrow as circumstances will permit. See the classic statement of the unanimous Court in *Liverpool, N. Y. & P. S. S. Co.* v. *Commissioners of Emigration,* 113 U. S. 33, 39, and "a series of rules," drawn from a long sequence of prior decisions by Mr. Justice Brandeis, in his well-known concurring opinion, frequently cited and always approvingly, in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 346–348. Even though its action may result in the disadvantages and embarrassments of keeping open doubtful questions of constitutionality, this Court will consider only those very limited aspects of a statute that alone may affect the rights of a particular litigant before the Court. See *Muskrat* v. *United States,* 219 U. S. 346, 361–362; *Massachusetts* v. *Mellon,* 262 U. S. 447. A statute may be found invalid in some of its parts but valid in others, see *Dorchy* v. *Kansas,* 264 U. S. 286, 289–290; it may be valid at one time and not another, see *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543, 547–548; it may be valid under one state of facts but not another, see *Kansas City Southern R. Co.* v. *Anderson,* 233 U. S. 325, 329–330; it may be valid as to one class of persons and invalid as to others, see *New York ex rel. Hatch* v. *Reardon,* 204 U. S. 152, 160–161. It is because the exercise of the right to declare a law unconstitutional is "the most important and delicate duty of this court," and because that right "is not given to [the

Court] . . . as a body with revisory power over the action of Congress," *Muskrat* v. *United States, supra,* at 361, nor, it may be added, over the action of the forty-eight States, that this Court has from the beginning demanded of litigants that they show in precisely what way and to what extent incursions have been made into their federally protected rights and rules have been developed designed to narrow as closely as possible the issues presented by such claims. Surely a state court is not to be denied the like right to protect itself from the necessity—sometimes even the temptation—of adjudicating overly broad claims of unconstitutionality. Surely it can insist that such claims be formulated under precise (even if, in our view, needlessly particularized) requirements and restricted to the limited issues that concrete and immediately pressing circumstances may raise.

An examination of the whole course of Georgia decisions leaves one with the clear conviction that the procedural rule applied by the Court of Appeals of Georgia in this case was intended to be responsive to the same problems that have influenced the important considerations of judicial policy governing the administration of this Court's business. The cases relied upon by the Georgia court in this case are part of a long line of decisions holding a comprehensive, all-inclusive challenge to the constitutionality of a statute inadequate and requiring explicit particularity in pleadings in order to raise constitutional questions. Those cases rest essentially on a recognition of the gravity of judicial invalidation of legislation. See, *e. g., Dade County* v. *State,* 201 Ga. 241, 245, 39 S. E. 2d 473, 476–477. They require the pleader to allege the specific portion of the challenged legislation. Thus, allegations of unconstitutionality directed at a group of 16 sections of the Criminal Code, *Rooks* v. *Tindall,* 138 Ga. 863, 76 S. E. 2d 378; a single named "lengthy section" of a statute, *Crapp* v. *State,* 148

Ga. 150, 95 S. E. 2d 993; a single section of a city charter amendment, *Glover* v. *City of Rome,* 173 Ga. 239, 160 S. E. 249; a named Act of the General Assembly, *Wright* v. *Cannon,* 185 Ga. 363, 195 S. E. 2d 168; and a 5-section chapter of the Code, *Richmond Concrete Products Co.* v. *Ward,* 212 Ga. 773, 95 S. E. 2d 677, were held "too general" or "too indefinite" to raise constitutional questions because of their failure to define with particularity what portions offended claimed constitutional rights. The Georgia rule is designed to apply, within this touchy scope of constitutional litigation, the requirement of the Georgia Code, Ga. Code Ann., 1956, § 81–101, that pleadings shall "plainly, fully, and distinctly" set forth the pleader's cause of action, see *Richmond Concrete Products Co.* v. *Ward, supra,* at 775, 95 S. E. 2d, at 679.

There is nothing frivolous or futile (though it may appear "formal") about a rule insisting that parties specify with arithmetic particularity those provisions in a legislative enactment they would ask a court to strike down. This is so, because such exactitude helps to make concrete the plaintiffs' relation to challenged provisions. First, it calls for closer reflection and greater responsibility on the part of one who challenges legislation, for, in formulating specific attacks against each provision for which an infirmity is claimed, the pleader is more likely to test his claims critically and to reconsider them carefully than he would be if he adopted a "scatter-shot" approach. Secondly, the opposing party, in responding to a particularized attack, is more likely to plead in such a way as to narrow or even eliminate constitutional issues, as where he admits that a specific challenged provision is invalid.[6] Finally, where the parties identify particular

[6] One of the most vulnerable provisions of this ordinance, the drastically high license fee, was taken out of controversy in this suit by the respondent's admission of its invalidity. It is not out of question that more specific pleading might have drawn similar admissions as to other allegedly objectionable portions of the ordinance.

language in a statute as allegedly violating a constitutional provision, the court will often be able to construe the words in such a way as to render them inoffensive. The ordinance involved in this case might, for example, have been held inapplicable to the type of organization to which appellant belongs had her objections been directed at the word "union" in § I; it might have been held to provide for the automatic granting of a permit upon registration had appellant's objections been directed specifically at the standard set forth in § IV.[7] Sophisticated as such a construction might appear, it would have entailed less astute reading than has been resorted to by this Court in its avoidance of constitutional adjudication.

Of course, even if the Georgia rule is intrinsically reasonable and thus entitled to respect by this Court, we must be sure that it has not been applied arbitrarily in the case before us. Appellant attacks a nine-section ordinance with nine charges of invalidity, several of which (although it is difficult to say precisely how many) involve federal claims. It may be—but it certainly is not clearly so—that with little expenditure of time and effort, and with little risk of misreading appellant's charges, a court could determine exactly what it is about the Baxley ordinance that allegedly infringes upon appellant's constitutional rights. But rules are not made solely for the easiest cases they govern. The fact that the reason for a rule does not clearly apply in a given situation does not eliminate the necessity for compliance with the rule. So long as a reasonable rule of state procedure is consistently applied, so long as it is not used as a means for evading vindication of federal rights, see *Davis* v. *Wechsler,* 263 U. S. 22, 24–25, it should not be refused applicability. There is no indication whatever in the case before us that

[7] Thus, it is an allowable assumption that the Georgia court might construe § VI so as to make it provide that a person in appellant's situation need only apply and pay a fee in order to obtain the permit.

the Georgia Court of Appeals applied this well-established rule of pleading arbitrarily or inadvisedly; this case cannot be said to stand out, among the many cases in which the rule has been applied, as a deviation from the norm.

The local procedural rule which controlled this case should not be disregarded by reason of a group of Georgia cases which, while recognizing and reaffirming the rule of pleading relied on by the Court of Appeals below, suggest a limited qualification. It appears that under special circumstances, where a generalized attack is made against a statute without reference to specific provisions, the court will inquire into the validity of the entire body of legislation challenged. The cases on which the Court relies as establishing this as the prevailing rule in Georgia strongly indicate that this approach will be used only where an allegation of unconstitutionality can be disposed of (one way or the other) relatively summarily and not where, as here, difficult issues are raised. In the only case cited by the Court in which the Georgia Supreme Court overturned a statute on the basis of generalized allegations, *Atlantic Loan Co.* v. *Peterson,* 181 Ga. 266, 182 S. E. 15, the result was "plainly apparent." 181 Ga., at 274, 182 S. E., at 19. In the other cases cited, *Miller* v. *Head,* 186 Ga. 694, 198 S. E. 680; *Stegall* v. *Southwest Georgia Regional Housing Authority,* 197 Ga. 571, 30 S. E. 2d 196; *Krasner* v. *Rutledge,* 204 Ga. 380, 49 S. E. 2d 864, and *Flynn* v. *State,* 209 Ga. 519, 74 S. E. 2d 461, the court gave varying degrees of recognition to this approach, refusing altogether to apply it in *Flynn,* where the court declined to accept "the burden of examining the act section by section and sentence by sentence." 209 Ga., at 522, 74 S. E. 2d, at 464. Certainly it cannot be said that the Court of Appeals was out of constitutional bounds in failing to bring the instant case within the purview of whatever exception can be said to have been

spelled out by these cases or that it is for this Court to formulate exceptions to the valid Georgia rule of procedure.

The record before us presents not the remotest basis for attributing to the Georgia court any desire to limit the appellant in the fullest opportunity to raise claims of federal right or to prevent an adverse decision on such claims in the Georgia court from review by this Court. Consequently, this Court is left with no proper choice but to give effect to the rule of procedure on the basis of which this case was disposed of below. "Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. *Callan* v. *Bransford,* 139 U. S. 197; *Brown* v. *Massachusetts,* 144 U. S. 573; *Jacobi* v. *Alabama,* 187 U. S. 133; *Hulbert* v. *Chicago,* 202 U. S. 275, 281; *Newman* v. *Gates,* 204 U. S. 89; *Chesapeake & Ohio Railway Co.* v. *McDonald,* 214 U. S. 191, 195." *John* v. *Paullin,* 231 U. S. 583, 585.

The appeal should be dismissed.

APPENDIX TO OPINION OF MR. JUSTICE FRANKFURTER.

PORTIONS OF APPELLANT'S PLEA IN ABATEMENT.

"2. Defendant alleges that the prosecution of said case should be abated upon the ground that said ordinance is unconstitutional and void for the reasons hereinafter stated.

"(a) Defendant shows that the ordinance with which she is charged to have violated shows on its face that it

is repugnant to and violative of the 1st and 14th Amendments to the Constitution of the United States in that it places a condition precedent upon, and otherwise unlawfully restricts the defendant's freedom of speech as well as freedom of the press and freedom of lawful assembly. Defendant shows that the right to engage in organizing labor unions is an inherent constitutional right consisting of soliciting members by pointing out to workers the advantage of belonging to labor unions, such solicitation being done by word of mouth, by pamphlets or other publications and by holding meetings of those desirous to be informed of the facts about labor unions. Defendant shows that such acts are restricted and limited by said ordinance so as to place a condition precedent, by way of the payment of a license fee, or the privilege of engaging in the constitutional rights of free speech, free press and free assembly.

"(b) Defendant shows that said ordinance is repugnant to and violative of Section 7 of the National Labor Relations Act, as amended, and tends to contravene said Act and the public policy of the United States as contained in said Act by establishing unwarranted conditions upon the right of defendant to participate in the labor activities secured by the National Labor Relations Act, as amended, and the public policy of the United States. Thus the ordinance which interferes with such rights is in direct conflict with superior Federal legislation and is therefore unconstitutional, null and void.

"(c) Defendant shows that said ordinance is not a valid ordinance in that it denies equal protection of the laws to defendant and others like defendant in that said ordinance, which requires the payment of large sums of money, is founded upon an unreasonable and invalid classification of persons which must pay the confiscatory fee which is set out in the ordinance. Said ordinance makes the payment of the fee conditioned upon the mere

fact that a person receives remuneration for his efforts in soliciting membership in an organization. Such classification is not a reasonable classification for imposing the payment of a fee upon defendant and others similarly situated.

"(d) Defendant shows that said ordinance is invalid in that it shows on its face that it is a regulatory measure imposing a flat tax upon a privilege which is excessive in amount. The sums of money charged under said ordinance are of such amount as to be wholly unreasonable, confiscatory and prohibitory. The amounts of money charged in said ordinance are so large that it could not reasonably be paid by anyone desiring to organize any sort of organization and therefore exists solely to prevent and deprive defendant and others like defendant from organizing members in their organization and exercising rights previously herein set out. The ordinance shows on its face that it is patently a device intended to prevent organization within the city limits in behalf of labor unions. It is a well known fact this day and time that labor unions constitute the vast majority of organizations which send paid representatives into communities for the purpose of organizing and soliciting membership. The above purposes are illegal and improper and is a misuse and abuse of the law-making powers of the plaintiff city, but nevertheless will be successful in depriving defendant of her rights unless this court declares said ordinance null and void.

"(e) Defendant shows that said ordinance is an invalid regulating in that it leaves within the discretion of the Mayor and City Council, with no form of appeal or any objective or definitive standards, the refusal or granting of the license required.

"(f) Defendant shows that said ordinance is void in that the same is repugnant to and violative of Article 1, Section 1, paragraph 3 of the Constitution of the State

of Georgia in that the same is not impartial but is unreasonable and arbitrary and contravenes said Section.

"(g) Defendant shows that said ordinance is unconstitutional and void as violative of Article 1, Section 1, Paragraph 3 of the Constitution of Georgia in that defendant is deprived of her liberty and property without due process of law.

"(h) Defendant shows that said ordinance is not a valid ordinance enacted for any legitimate purpose to benefit the citizens of Baxley, Georgia, but that said ordinance on its face shows that it is unreasonable, confiscatory, prohibitory and discriminatory, and that it exists solely for the purpose of depriving and denying defendant and others from engaging in a lawful occupation and that said ordinance is for the purpose of preventing the organization of labor unions within the city limits of Baxley, Georgia.

"(i) Defendant avers that said ordinance is patently void in that the same is a misuse and abuse of the police power of the City of Baxley, Georgia, in an effort to deprive defendant and others like defendant of their rights herein referred to through the subterfuge of a city ordinance.

"3. Defendant alleges that because of the aforesaid reasons said ordinance is unconstitutional and void, and should be so declared by the court, and the action against defendant for violation thereof abated."

LAWN *v.* UNITED STATES.

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

No. 9. Argued October 14, 1957.—Decided January 13, 1958.

Indictments returned by a grand jury in 1952, charging petitioners with evading and conspiring to evade federal income taxes, were dismissed by the District Court on the ground that their constitutional privilege against self-incrimination had been violated by requiring them to testify and produce records before that grand jury while criminal informations charging tax evasions were pending against them, without being warned of their constitutional privilege. In 1953, they were indicted by another grand jury for substantially the same offenses; and they were convicted in a federal court. Both before and at the beginning of their trial, they moved (1) for a hearing to determine whether, in procuring the indictment, the Government had used testimony given or documents produced by them before the 1952 grand jury or leads and clues furnished thereby, and (2) to suppress the use at the trial of all such evidence and all evidence derived therefrom. The court denied these motions, but said that, if during the trial petitioners had reason to believe that illegally obtained material was being or might be used against them, they could object at that time. On appeal, they challenged the validity of their convictions because of denial of these motions and on other grounds. *Held:* The convictions are sustained. Pp. 341–363.

1. In the circumstances of this case, petitioners were not entitled to a preliminary hearing to enable them to satisfy their unsupported suspicions that the 1953 grand jury which returned this indictment had made direct or derivative use of the materials they had produced before the 1952 grand jury. Pp. 348–350.

(a) Petitioners had laid no foundation for the holding of such a preliminary hearing. Pp. 348–349.

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*Together with No. 10, *Giglio et al.* v. *United States,* also on certiorari to the same Court, argued October 15, 1957.

(b) An indictment returned by a legally constituted unbiased grand jury, if valid on its face, is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment. Pp. 349–350.

2. Receipt in evidence at the trial of a photostatic copy of a canceled check and its corresponding check stub, obtained from petitioner Lawn in the 1952 grand jury proceeding, did not deprive him of due process in violation of the Fifth Amendment, because it appears from the record that his counsel consciously and intentionally waived any objection to their receipt in evidence. Pp. 350–355.

(a) In the circumstances of this case, denial of petitioners' pretrial motion to suppress the use in evidence of materials obtained from petitioners in the 1952 grand jury proceeding did not preserve Lawn's objections to these exhibits when his counsel consciously and intentionally waived objection to them. Pp. 353–354.

(b) The Government has filed in this Court what is said to be a transcript of a hearing accorded Lawn at his request in 1952, which it says contains photostatic copies of the check and check stub in question voluntarily produced by him; but his motion to strike the transcript and the portions of the Government's brief relating thereto is sustained, as this Court looks only to the certified record in deciding questions presented. P. 354.

3. On the record in this case, there is no factual basis for petitioners' contention that they were denied an opportunity to examine and cross-examine witnesses at the trial to determine whether evidence derived from leads and clues furnished by materials obtained from them in the 1952 grand jury proceedings was used by the prosecution at the trial, and that this deprived them of due process in violation of the Fifth Amendment. Pp. 355–358.

4. The evidence was sufficient to sustain the convictions of petitioners Lawn and Livorsi. Pp. 358–362.

5. On the record in this case, petitioner Lawn was not deprived of a fair trial by a statement made by government counsel in his closing summation to the jury that, "We vouch for [Roth and Lubben] because we think they are telling the truth." P. 359, n, 15.

6. The contention of petitioners Giglio and Livorsi that the trial court erred in denying their motion for production of Lubben's federal income tax return for 1946, all testimony given by him before the grand jury and all written statements made by him to

any agent of the Government, is not properly before this Court, because that issue was not raised in the Court of Appeals nor mentioned in the petition for certiorari filed in this Court. P. 362, n, 16.

232 F. 2d 589, affirmed.

Milton Pollack argued the cause for petitioner in No. 9. With him on the brief were *Francis E. Koch, Brainerd Currie* and *Philip B. Kurland.*

Joseph Leary Delaney argued the cause for petitioners in No. 10. With him on the brief were *James B. Burke* and *Harold W. Wolfram.*

Roger Fisher argued the cause for the United States. With him on the briefs were *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph F. Goetten.*

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

On July 23, 1953, a 10-count indictment was returned in the United States District Court for the Southern District of New York charging petitioners and others with evading, and conspiring to evade, assessment and payment of a large amount of federal income taxes for the year 1946 in violation of the internal revenue laws (§§ 145 (b) and 3793 (b) of the Internal Revenue Code of 1939) [1] and of the general conspiracy statute (18

[1] 26 U. S. C. (1952 ed.) §§ 145 (b) and 3793 (b).

The first five counts named only petitioner Giglio and Louis J. Roth as defendants. Since Giglio does not here contest the adequacy of the evidence to sustain those or any of the other counts against him, and since Roth pleaded guilty to all counts of the indictment and was a principal witness for the prosecution at the trial, those counts are not here summarized.

The remaining counts in essence charged as follows:

Count 6 charged that Livorsi and Roth, on or about September 15, 1947, willfully attempted to evade assessment of income taxes of Livorsi for the calendar year 1946 by filing a fraudulent return.

Count 7 charged that Giglio, Lawn and Roth, from about Septem-

U. S. C. § 371). After a protracted trial before a jury petitioners were found guilty as charged.[2] On appeal the Court of Appeals found that there was substantial evidence that petitioners, operating through the media of several partnerships and corporations,[3] conspired to evade, and by a variety of means did evade, both the

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ber 1, 1947, to the date of filing of the indictment, willfully attempted to evade payment of Giglio's income taxes for the calendar year 1946 by concealing his assets.

Count 8 charged that Livorsi, from about September 1, 1947, to the date of filing of the indictment, willfully attempted to evade payment of his income taxes for the calendar year 1946 by concealing his assets.

Count 9 charged that Giglio, Livorsi, Lawn and Roth, from about January 1, 1946, to the date of filing of the indictment, willfully attempted to evade payment of income taxes of American Brands Corporation for the calendar year 1946 by converting and diverting its assets.

Count 10 charged that Giglio, Livorsi, Lawn, Roth and American Brands Corporation, from about July 1, 1945, to the date of filing of the indictment, willfully conspired to commit the substantive offenses charged in Counts 1 through 9 of the indictment.

Count 10 of the indictment was dismissed by the court as to American Brands Corporation after the jury failed to report as to it.

[2] Lawn was sentenced to a year and a day on each of Counts 7, 9 and 10, the sentences to run concurrently. Giglio was sentenced to a total of 15 years. Livorsi was sentenced to 5 years on each of Counts 6, 9 and 10 to run consecutively, and was sentenced to 5 years on Count 8 to run concurrently with the sentence on Count 6.

[3] The principal organizations were: Tavern Fruit Juice Company, a partnership owned by Giglio and Livorsi; Eatsum Food Products Co., Ltd., a partnership owned 25% by Giglio, 25% by Livorsi, and 50% by one Lubben until March 8, 1946, when he left the enterprise and sold his "distributive share" in the profits thereof to Giglio and Livorsi; and a series of corporations bearing in some combination the word "American" which were created in early 1946 to drain off the profits of Eatsum through the use of fraudulent invoices and were to be dissolved before their income taxes became due.

assessment [4] and the payment [5] of more than $800,000 of individual and corporate federal income taxes for the year 1946 [6] upon income derived from the World War II black market in sugar and that petitioners Giglio and Livorsi, who owned equal interests in the several enterprises of which Giglio was the chief executive, were the principals in the conspiracy, but Roth, an accountant, and Lawn, a lawyer,[7] provided the accounting and legal services required to carry out the conspiracy. It found that the evidence amply sustained the verdicts and that no prejudicial error was committed at the trial, and it affirmed the judgments of conviction. 232 F. 2d 589. Upon petition by Lawn in No. 9, and by Giglio and Livorsi in No. 10, we granted certiorari. 352 U. S. 865. Because the challenged convictions resulted from a common trial at which petitioners were represented by the same counsel, and because several of the questions presented in each case are similar, the two cases will be decided in one opinion.

Petitioners ask this Court to reverse their convictions upon four main grounds. First, they contend, Lawn only

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[4] The Court of Appeals found that generally three means of evasion of tax assessment were used: (1) the fraudulent allocation of income among the various companies and individuals in the conspiracy; (2) the fraudulent overstatement of expenses; and (3) the failure to disclose income.

[5] The evasion of payment was in general accomplished by delaying disclosure of income tax liabilities through the filing of returns from 5 to 15 months late; by failing to withhold income taxes on salaries; by concealment of the individual assets of Giglio and Livorsi; and by the misappropriation, conversion and diversion of corporate assets.

[6] Of the total, $573,683.73 was admitted to be owing by Giglio, Livorsi and American Brands Corporation in the long-overdue returns they filed, and only $16,735.95 was paid.

[7] They were full-time employees of the several Giglio and Livorsi enterprises.

tangentially, that they were deprived of due process in violation of the Fifth Amendment by the refusal of the District Court to conduct a full-dress hearing to determine whether testimony or documents obtained from them in a prior grand jury investigation, or evidence derived from leads and clues furnished thereby, was considered by the grand jury that returned the present indictment. Second, petitioner Lawn contends that receipt in evidence at the trial of a photostatic copy of a canceled check and its corresponding check stub, obtained from him in a prior grand jury investigation, deprived him of due process in violation of the Fifth Amendment. Third, petitioners contend they were denied an opportunity to examine and cross-examine witnesses at the trial to determine whether evidence derived from leads and clues furnished by testimony and documents obtained from petitioners in a prior grand jury investigation was used by the prosecution at the trial, and that this deprived them of due process in violation of the Fifth Amendment. And fourth, petitioners Lawn and Livorsi contend that the evidence does not support their convictions.

Understanding of petitioners' first and second contentions, and to a lesser extent their third contention, requires a review of the underlying facts upon which they are based. Revenue agents began an investigation in 1948 of petitioners' income tax liabilities, and on September 14, 1950, three criminal informations were filed charging them with violation of the federal income tax laws. Those informations were not brought to trial because the Government had not completed its investigation and later concluded that "much more serious crimes [were] involved." In early July 1952, petitioners and Roth were served with subpoenas *duces tecum* commanding them to appear and testify before a grand jury on July 14, 1952, and to produce certain partnership and corporate records of the Giglio and Livorsi enterprises.

They appeared and testified, but were not warned of their constitutional privilege against self-incrimination. Lawn produced three canceled checks made by Tavern Fruit Juice Co. payable to his order and the checkbook stub corresponding to the second check. Those instruments were there marked "G. J. Ex. [1, 2, 3 and 4, respectively] 7/15/52 L. F. G." and were photostated by the United States Attorney and returned to Lawn. Giglio produced a quantity of records, including some partnership records, but stated that "practically all of these companies and corporations turned over the books and records to the Internal Revenue Department on some date in 1949." On October 20, 1952, the grand jury returned six indictments against petitioners charging them with offenses similar to those charged in the present indictment. Petitioners moved to dismiss those indictments upon the ground that they had been procured, in part at least, upon evidence obtained from petitioners in violation of their Fifth Amendment rights. The District Court held that to require petitioners to testify and produce partnership and personal records before the grand jury, while criminal informations charging tax evasions were pending against them, without warning them of their constitutional privilege against self-incrimination, violated their Fifth Amendment rights. It therefore dismissed the indictments and directed the Government "to return, to the respective defendants, the partnership and personal records produced by them in response to the subpoenas." *United States* v. *Lawn,* 115 F. Supp. 674, 678. The Government appealed from that order but the appeal was dismissed as untimely on October 19, 1953. *United States* v. *Roth,* 208 F. 2d 467.[8] While that appeal was pending

[8] In their brief on that appeal petitioners had argued that the Government's notice of appeal was not timely filed, but they did not move to dismiss the appeal until after the period of limitations had run in late September 1953.

the Government caused a new investigation to be made of petitioners' federal income tax liabilities by another grand jury, before whom petitioners did not appear, and on July 23, 1953, that grand jury returned the present indictment which was sealed. After the Government's appeal from the order dismissing the 1952 indictment had been dismissed (*United States* v. *Roth, supra*) the new sealed indictment was opened, and soon afterward petitioners moved (1) to dismiss the indictment, and in that connection (2) to have a hearing to determine whether the Government had used testimony given or documents produced by petitioners before the 1952 grand jury, or evidence obtained through leads and clues furnished thereby, in procuring the indictment, and (3) to inspect the minutes of the grand jury and, if the motion to dismiss the indictment be denied, (4) to suppress the use at the trial of all testimony and documents procured from petitioners in the 1952 grand jury proceeding and all evidence derived therefrom. These motions were submitted to the court upon affidavits.[9] After considering them and

[9] In support of their motions petitioners filed a number of affidavits reciting in essence that the 1952 indictment was returned after the Government had secured testimony and documents from petitioners in violation of their constitutional rights; that the present indictment is very similar to the prior one, and that a revenue agent had implied that some of his computations were based on documents stored in a room in which the documents obtained from petitioners were also kept.

In opposition to the motions the Government filed affidavits made by all of the revenue agents who had conducted investigations leading to the indictment and by all the United States Attorneys who had been responsible for the prosecution of the case. In essence, they recited that after the District Court dismissed the 1952 indictment a conference was called, by an assistant United States Attorney, of all revenue agents who had conducted the investigations; that they were there told that it would be necessary to obtain a new indictment which was not to be based in any way, however remote, upon testimony or personal or partnership documents obtained from

hearing extensive arguments of counsel, the court found that the affidavits left no room for an inference that the Government had used illegally obtained materials in securing the present indictment, that petitioners' claim did not have the "solidity" required to justify the holding of such a hearing, and that to do so "on the basis of the showing made by the defendants and the Government would indeed be subordinating 'the need for rigorous administration of justice to undue solicitude for potential . . . disobedience of the law by the law's officers.' [*Nardone* v. *United States,* 308 U. S. 338, 342.]" *United States* v. *Giglio,* 16 F. R. D. 268, 270. The court declined to hold the requested hearing and denied the motion to inspect the grand jury minutes and the motion to dismiss the indictment. The court also denied the motion to suppress,[10] but in that connection said: "Of course, if dur-

petitioners in the 1952 grand jury proceedings, and any doubts about the use of any evidence were to be resolved in favor of exclusion; that none of the testimony or personal or partnership records, produced by petitioners before the 1952 grand jury, was in any way used in obtaining the present indictment; and that long before 1952 the Government had in its possession copies and microfilm enlargements of bank checks, bank statements and books and records pertaining to petitioners' transactions, which had been secured from banks, third persons, a New Jersey receiver, government agencies, and abandoned books and records relating to petitioners' businesses. The affidavit of the Assistant United States Attorney in charge of the case unequivocally recited that none of the materials obtained from petitioners in the 1952 grand jury proceeding would be used in the future course of the case.

[10] The court stated as its reasons: "The United States Attorney has sworn that this material will not be used in the future course of this case, and at this stage of the proceedings, that oath is sufficient. The granting of defendants' motion to suppress at this time would necessitate an investigation of all of the Government's evidence. Such an investigation would entail a great deal of useless effort because much of this material, which has been collected since 1948, will not be used at the trial." *United States* v. *Giglio,* 16 F. R. D., at 270, 271.

ing the course of the trial defendants have reason to believe that illegally obtained material is being or may be used against them, they can object at that time and it will be incumbent upon the trial judge to rule on their objections." *United States* v. *Giglio, supra,* at 271.

Pursuant to order of the court the Government produced for inspection by petitioners, before the trial, the corporate records delivered by Giglio to the 1952 grand jury in compliance with its subpoena, the documents which had been abandoned by petitioners and examined by the Government, and the documents relating to petitioners' businesses obtained from the New Jersey receiver. At the beginning of the trial petitioners renewed the above-mentioned motions which were again denied. In the course of the trial the Government furnished petitioners a transcript of their testimony before the 1952 grand jury.

I.

As stated, petitioners first contend that they were deprived of due process by the refusal of the court to conduct the requested full-dress hearing to enable them to attempt to determine whether materials obtained from them in the 1952 grand jury proceeding, or evidence derived therefrom, was considered by the 1953 grand jury. We believe there is no merit in this contention. The District Court's order dismissing the 1952 indictments because of the use of such evidence before that grand jury, though final, could not in any way determine that any direct or derivative use of such evidence was made by the 1953 grand jury that returned the present indictment. The affidavits submitted in support of and in opposition to the motion for the requested hearing disclosed, as found by the trial court and the Court of Appeals, with which findings we agree, that petitioners had no reason, beyond suspicion, to believe that the 1953 grand jury considered

any of the materials produced by petitioners before the 1952 grand jury. These facts make clear that petitioners laid no foundation for the holding of a protracted preliminary hearing (at which they would, in effect, take the depositions of the Government's witnesses) to determine whether there was any substance to their suspicion that some direct or derivative use may have been made by the 1953 grand jury of materials produced by petitioners before the 1952 grand jury.

Moreover, this Court has several times ruled that an indictment returned by a legally constituted nonbiased grand jury, like an information drawn by a prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment. In *Holt* v. *United States,* 218 U. S. 245, this Court was required to decide whether an indictment should be quashed because procured in part by incompetent evidence of an admission by the accused, aside from which "there was very little evidence against the accused." *Id.,* at 247. This Court refused to hold that such an indictment should be quashed, stating: "The abuses of criminal practice would be enhanced if indictments could be upset on such a ground." *Id.,* at 248. In *Costello* v. *United States,* 350 U. S. 359, this Court squarely faced and decided the question, saying:

> "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased

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> grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." *Id.*, at 363.

This Court was urged in that case to "establish a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence," *id.*, at 364, but the Court declined to do so, saying:

> "It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial." *Ibid.*

It should be unnecessary to say that we are not here dealing with the use of incompetent or illegal evidence in a trial on the merits, nor with the right to decline to give incriminating testimony in legal proceedings or to suppress the direct or derivative use at the trial of evidence illegally obtained. We deal here only with the question whether petitioners, in the circumstances of this case, were entitled to a preliminary hearing to enable them to satisfy their unsupported suspicions that the 1953 grand jury that returned this indictment made direct or derivative use of the materials which they produced before the 1952 grand jury. We hold that they were not.

II.

We come now to petitioner Lawn's contention that receipt in evidence at the trial of a photostatic copy of a

canceled check and its corresponding check stub, obtained from him in the 1952 grand jury proceeding, deprived him of due process in violation of the Fifth Amendment. As earlier stated, Lawn, pursuant to subpoena, produced before the 1952 grand jury a canceled check of Tavern Fruit Juice Co. payable to his order in the amount of $15,000, endorsed by him, and the corresponding stub, which were marked on their faces "G. J. Ex. 2 7/15/52 L. F. G." and "G. J. Ex. 4 7/15/52 L. F. G.," respectively, and were photostated by the United States Attorney and returned to Lawn. Those photostats were offered in evidence—it appears inadvertently—by the prosecution at the trial, as Exhibits 61–A and 61–B. However, before those exhibits were offered, Exhibit 58–A, being a statement of assets, liabilities, income, profit and loss and supporting schedules of Tavern Fruit Juice Company prepared some time after Tavern's fiscal year had ended on March 31, 1946, and Exhibit 7, being Tavern's information tax return for 1946 which was filed on September 15, 1947, had been received in evidence without objection. The former contained an item of "legal expenses $16,600," while the latter recited "legal fees $1,600." Roth, in explanation, testified that "sometime during the operation of the partnership a check for $15,000 was drawn to Howard Lawn," and that a question had arisen about how to enter it on the books. After discussing the matter with Giglio, Roth charged it to legal expense. Months later Lawn asked Roth how the item was carried on Tavern's books and Roth told him that it was carried as a legal expense. Lawn advised Roth that this handling was incorrect, as the item was a loan from Giglio and not a legal expense of Tavern. Thereupon, after consulting Giglio, Roth altered Tavern's books by removing the item from legal expense and charging it to Giglio. Roth did not remember just when the alteration of the

books was made, except that it was after the preparation of Exhibit 58–A and prior to the filing of Exhibit 7.

It is important to note that at this stage of the trial there was thus clear evidence before the jury, corroborated by Exhibits 58–A and 7, all admitted without objection, showing that Lawn had received the $15,000 check from Tavern, but an issue existed whether it was an innocent loan from Giglio or an incriminatory payment by Tavern in the guise of a legal fee. The prosecution then offered in evidence Exhibits 61–A and 61–B, being the $15,000 check and corresponding stub. Petitioners' able and experienced counsel (now deceased) then asked, and was granted, permission to examine the witness Roth preparatory to a possible objection to those exhibits. He then questioned the witness at some length about the handwriting on the check and stub,[11] and concluded by asking the witness: "Q. And under that check stub or in that No. 640 [the number of the check stub], which corresponds with the check itself, there is a parenthetical statement, 'Bill G'? A. Yes, sir. Q. Indicating it is for

[11] "Q. In whose handwriting are the entries on Government's Exhibit 61–B for identification? I think you said it is the stub book. A. To the best of my recollection, those are Mr. Cerone's.

"Q. How do you spell Cerone? A. C-e-r-o-n-e.

"Q. He was one of your employees, Mr. Roth? A. No, he was a bookkeeper employed by Tavern Fruit Juice.

"Q. Would the same be true with regard to the check, the face of the check, payee of the check? A. The payee of the check and the amount?

"Q. The handwriting is what I am asking about. A. The handwriting, that looks like William Giglio's handwriting.

"Q. The maker of the check [for] the $15,000? A. Yes, the signature.

"Q. They look like his handwriting, do they? A. Yes, sir.

"Q. And this 61–B for identification, you have told me that that looked like the printing or the writing of Mr. Cerone, did you not? A. Yes, sir."

Mr. Giglio's account? A. Yes, sir." And petitioners' counsel then stated, "No objection," and the exhibits were received. This examination and use of those exhibits (showing on their face that they had been exhibits before the 1952 grand jury) by petitioners' able counsel to show that the check was an innocent loan by Giglio and not an incriminatory payment by Tavern in the guise of a legal fee—his only opportunity to drive that point home to the jury if petitioners were not to take the stand, as they did not—and his affirmative statement that he had "no objection" to receipt of the exhibits show, we believe, a conscious and intentional waiver of all objections to receipt of those documents in evidence.

Lawn argues that the denial, before the trial, of petitioners' motion to suppress, and the unequivocal affidavit of the United States Attorney in charge of the case stating that materials obtained from petitioners pursuant to subpoena in the 1952 grand jury proceeding would not be used in the future course of the case, preserved his objections to these exhibits and made it unnecessary again to object to them at the trial. It is quite true generally that the overruling of a pretrial motion to suppress the use at the trial of particular evidence preserves the point and renders it unnecessary again to object when such evidence is offered at the trial. *Cogen* v. *United States,* 278 U. S. 221, 223; *Gouled* v. *United States,* 255 U. S. 298, 312, 313; *Waldron* v. *United States,* 95 U. S. App. D. C. 66, 69–70, 219 F. 2d 37, 41; and compare *Keen* v. *Overseas Tankship Corp.,* 194 F. 2d 515. But the rule is one of practice and is not without exceptions, nor is it to be applied as a hard-and-fast formula to every case regardless of its special circumstances. *Cogen* v. *United States, supra,* at 223, 224; *Gouled* v. *United States, supra,* at 312, 313. It will be remembered that the court in passing on the motion to suppress said, respect-

ing the affidavit of the United States Attorney, that "at this stage of the proceedings that oath is sufficient" (*United States* v. *Giglio,* 16 F. R. D., at 271), but he expressly left the matter of suppression of evidence to the trial court and admonished petitioners that if during the course of the trial they "have reason to believe that illegally obtained material is being or may be used against them, they can object at that time and it will be incumbent upon the trial judge to rule on their objections." *Id.,* at 271. The record shows that petitioners' counsel was fully aware of all this when Exhibits 61–A and 61–B were offered in evidence, and when, after using them for his purposes, he affirmatively said he had "no objection" to them.

The Government argues that, had its attention been called to the fact that these particular photostatic copies had been exhibits before the 1952 grand jury by an objection to them, it could and would have produced other copies obtained from other sources before the 1952 grand jury proceeding was commenced. In that connection it has filed here what is said to be a transcript of a hearing accorded to Lawn at his request on May 12, 1952, which it says contains photostatic copies of the check and check stub in question voluntarily produced by Lawn. Lawn has moved to strike that transcript and the portions of the Government's brief relating thereto. That motion must be sustained as we must look only to the certified record in deciding questions presented. *McClellan* v. *Carland,* 217 U. S. 268.

We believe that the facts from the certified record, above discussed, show that petitioners' counsel, after using the check and check stub to make his point before the jury that the check was an innocent loan from Giglio and not an incriminatory payment by Tavern in the guise of a legal fee, wisely (as, we believe, every impartial and experienced trial lawyer would agree) said that he had

"no objection" to those exhibits, and thus consciously and intentionally waived any objection to their receipt in evidence.

III.

Petitioners argue that they were denied an opportunity to examine and cross-examine witnesses at the trial to determine whether evidence derived from leads and clues furnished by materials obtained from them in the 1952 grand jury proceedings was used by the prosecution at the trial, and that this deprived them of due process in violation of the Fifth Amendment. It cannot be doubted that petitioners had that right in the circumstances of this case, *Nardone* v. *United States,* 308 U. S. 338, 341, 342, and the Government does not otherwise contend. Moreover, as earlier stated, the District Court, in ruling the pretrial motion to suppress, expressly left this subject open to inquiry at the trial. *United States* v. *Giglio,* 16 F. R. D., at 271. The contention is wholly factual, and a thorough study of the record discloses that petitioners were accorded that right. The court did not sustain objections to petitioners' examination or cross-examination of witnesses attempting to show derivative use at the trial of any evidence produced by petitioners before the 1952 grand jury, but only sustained objections to questions attacking the procedural validity of the indictment.[12] At no time did counsel for petitioners point

[12] Though at times, in colloquies with the court, counsel for petitioners was equivocal, the following is typical of the position taken by him:

Counsel: "I really don't see how I can get adjudicated the question of the illegality of the indictment before you without calling all these people who made affidavits before Judge Palmieri. Now, that obviously would be, well, very disruptive of your trial. I would never think of doing it if . . . it didn't seem to me that was all I had. . . . Have I made it plain?

"The Court: I think you have, but I want to be sure. Now, the

specifically to any evidence offered at the trial which they claimed was derived from materials furnished by petitioners before the 1952 grand jury. Near the close of the Government's case, the court stated that, so far as he could detect, there had been no direct or derivative use of any tainted evidence by the Government at the trial, and he requested counsel for petitioners, on two occasions, to submit a memorandum of any evidence offered by the Government which he believed was obtained through leads or clues from materials produced by petitioners before the 1952 grand jury. No such memorandum was ever furnished.

Petitioners point to three instances where they say the trial court denied them the right to examine witnesses about the source of evidence offered by the Government at the trial. First, they say that in cross-examining the Government's witness Roth they sought to question him concerning an affidavit he had made in support of the motion to dismiss the 1953 indictment, but the court sustained an objection to the question. It is clear that the ruling was made upon the ground, as petitioners' counsel stated at the time, that the purpose of the interrogation was to "go into the question of what evidence was used to obtain this indictment," rather than to show the use by the Government of tainted evidence at the trial. Second, they point to the fact that during the cross-

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whole purpose of this is to go to the procedural validity of the indictment."

Counsel: "That is it, yes, sir. That is it, that is just it exactly.

"The Court: And it is a question, really, of what happened before the grand jury."

Counsel: "That's it, really, just that.

"The Court: Rather than its effect upon what you might call the substantive issues of the case or the guilt or innocence of these defendants, let us say."

Counsel: "My answer is an unequivocal yes, and I don't have to look at a record to answer it."

examination of Treasury Agent Present, their counsel asked him whether, in his audits, he had examined any other books or records about which counsel had failed to ask; and they argue that the purpose of the question was to determine whether tainted evidence had been or was being used by the Government at the trial, and that they were denied an answer to the question. But examination of the record discloses that counsel's announced purpose in asking the question was not to determine whether tainted evidence had been or was being used at the trial, but was, rather, to determine whether tainted evidence was "used by the grand jury that found this indictment." [13] Third, petitioners argue that in examining their own witness, former Assistant United States Attorney Leone, they were denied an opportunity to show

[13] The record shows that, although there was no objection to the question, counsel for the Government stated to the court, out of the hearing of the jury, that prior to the dismissal of the 1952 indictment the witness had examined partnership records produced by petitioners before the 1952 grand jury, and said: "If counsel elicits testimony now about those facts, there is going to be before this court evidence which Judge Goddard held improper. . . . If counsel wishes to examine into this field I think he should do it outside the presence of the jury, because it might be prejudicial error even if he voluntarily does it." Counsel for petitioners then made plain that his purpose was to determine whether tainted evidence was "used by the grand jury that found this indictment," and he further said, "I have no other way . . . than to do it here." Counsel for the Government then said to the court: "Now, the question specifically presented to the witness was broad and includes partnership records illegally produced and partnership records legally obtained. There can't be objection to the second part, but the question is too broad." Counsel for petitioners replied: "Well, I am not going into something half-way. . . ." The court then said: "All right, I think that is the way I should rule." It is obvious that none of this constitutes any support for petitioners' claim that they were denied an opportunity to cross-examine the witness to determine whether tainted evidence had been or was being used by the Government at the trial.

derivative use of tainted evidence by the Government at the trial. The record shows that there is no basis whatever for this contention.[14]

IV.

Petitioners Lawn and Livorsi argue that the evidence is insufficient to sustain their convictions. In support of Count 10, the conspiracy count, the record contains evidence tending to show that Lawn, formerly Chief of the Criminal Division of the United States Attorney's Office for the District of New Jersey, was employed by Giglio and Livorsi because "he had a terrific entry with some of the highest government offices," "was a part of the organization" and was "there to prevent any trouble." He was frequently in Giglio's private office, which adjoined his own. Lawn was present in Giglio's office when it was decided that Eatsum would purchase corn at black-market prices and have it refined into syrup to be sold for over-ceiling prices, and Lubben began the handling of those matters. But Lawn later told him that he "had terrific connections" with a syrup company and with a prominent political figure in the midwest and that he could procure the corn and syrup more advantageously, and Lawn then took over the handling of those matters. Lubben was called into Giglio's office in September 1945, where Giglio, Roth and Lawn were present, and Giglio stated "that the profits from [Tavern's] candy business and primarily [Eatsum's] corn syrup business were becoming terrific, and that he wasn't interested in paying a lot of income tax and something had to be done, and done quick"; that "it had been decided to form a num-

[14] In fact, all petitioners sought to show by this witness was that when he caused petitioners to be subpoenaed to appear before the 1952 grand jury he knew that criminal informations charging tax evasions were then pending against them, and that these prosecutions were instituted in "bad faith."

ber of companies" to siphon off the profits of the partnerships through "phony invoices"; and that the companies would "be dissolved . . . before it came time to pay the income tax." Soon afterward Lawn was instrumental in the creation of a number of corporations bearing in some combination the word "American." Lawn was an officer and nominal stockholder in several of these corporations, and owned 25% of the stock of one of them which had been given to him by Giglio and Livorsi, and Lawn received substantial payments from the Giglio and Livorsi enterprises in addition to his salary. In September 1947, near the time the delinquent income tax returns were filed for the year 1946 by Giglio, Livorsi and their several corporations, a meeting was held in Lawn's private office with Giglio and Roth where it was agreed that Giglio would transfer his home to Roth so that the Government would "not be able to take the house," and Lawn said the arrangement "would save Mr. Giglio's home." Soon afterward the transfer was made. There was other evidence tending to show Lawn's participation in the conspiracy, but we believe the above-recited evidence, with the legitimate inferences that might be drawn therefrom by the jury, was clearly sufficient to support the verdict on the conspiracy count.

Lawn also contests the sufficiency of the evidence to support the verdicts against him on Counts 7 and 9, but since the sentences upon those counts run concurrently with the sentence on Count 10, which we have found sustained by the evidence, it is unnecessary for us to consider those contentions. *Sinclair* v. *United States,* 279 U. S. 263, 299; *Hirabayashi* v. *United States,* 320 U. S. 81; *Pinkerton* v. *United States,* 328 U. S. 640.[15]

[15] Petitioner Lawn also contends that a statement made by the Government's attorney in his closing summation to the jury, saying, in pertinent part, "We vouch for [Roth and Lubben] because we

Petitioner Livorsi argues that the evidence was not sufficient to support the verdicts against him. As to Count 6, which charged him with attempting to evade assessment of his income taxes for the year 1946 by filing a fraudulent return, the record shows that his return disclosed income from Eatsum for that year of $101,123.88. However, the Government introduced evidence showing that his income from that source in that year was $228,288.58, and that his income from Tavern for that year was understated by more than $40,000. During the trial an issue arose concerning the proper "distributive

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think they are telling the truth," deprived him of a fair trial. No objection was made to the statement at the trial. The Government's attorney did not say nor insinuate that the statement was based on personal knowledge or on anything other than the testimony of those witnesses given before the jury, and therefore it was not improper. Cf. *Henderson* v. *United States*, 218 F. 2d 14, 19; *United States* v. *Holt*, 108 F. 2d 365, 370; *Tuckerman* v. *United States*, 291 F. 958, 969. Moreover, petitioners' counsel in his summation to the jury had argued that the Government's case was a persecution of petitioners, had been instituted in bad faith at the instance of a group of revenue agents, and was supported "solely" by the testimony of Roth and Lubben who were admitted perjurers, and counsel in his opening statement had said that the United States Attorney and his assistant in charge of the case "had been instructed, or in my opinion they never would have done this." These comments clearly invited the reply which petitioner Lawn now attacks. Cf. *Gridley* v. *United States*, 44 F. 2d 716, 739; *United States* v. *Battiato*, 204 F. 2d 717. In addition, the court in his charge to the jury, after telling them that they were the sole judges of the credibility of the witnesses, called particular attention to the fact that Roth was an accomplice and said: "You have got to be particularly careful in scrutinizing his testimony to see whether to save his own skin he lied to hurt somebody else or whether he had some other motive for lying to hurt somebody else." As to Lubben, the charge continued: "I am going to tell you to be just as careful with his testimony as you would with an accomplice, and look and scrutinize it carefully." We think the foregoing shows clearly that there is no merit in Lawn's contention.

shares" of Giglio and Livorsi in the profits of Eatsum for the year 1946, by reason of the sale by Lubben of his "distributive share" in the profits of that partnership to Giglio and Livorsi (on March 8, 1946) prior to the close of its accounting year on May 31, 1946. Because of that complication the court, in an effort to simplify the matter, gave a supplemental charge to the jury in which, among other things, he said: "[W]hen you get to counts 5 and 6, *where it was claimed that the income received from Eatsum wasn't fully reported* by the defendant Giglio and by the defendant Livorsi, in connection with their individual returns, I say because of that distributive share difficulty, don't consider Eatsum at all . . . ." (Emphasis supplied.) Livorsi now contends that the effect of that charge was to eliminate the $101,123.88 of income which he had reported in his sworn return as received from that source in that year and to give him a credit in that amount which more than offset his understatement of income from other sources, and, thus, established that there was no deficiency in his reporting of income. This contention need not detain us long. While, of course, a conviction upon a charge of attempting to evade assessment of income taxes by the filing of a fraudulent return cannot stand in the absence of proof of a deficiency, the court's charge did not create the credit claimed by Livorsi. It only withdrew from the jury's consideration the Government's claim that his income from Eatsum in that year was $127,164.70 more than he had reported in his return. That meaning of the charge could not have been misunderstood by the jury.

Count 9 charged Livorsi and others with attempting to evade payment of income taxes of American Brands Corporation for the calendar year 1946 by converting and diverting its assets. Livorsi argues that there is no evidence to support his conviction on that count. We must disagree. The evidence disclosed that Livorsi owned half

of the capital stock of that corporation and frequently conferred with Giglio, who owned the other half of its capital stock, concerning the operations of the corporation and was familiar with its affairs; that no income tax was withheld by the corporation from his salary; and that from January 1, 1946, to June 16, 1947, he withdrew from the corporation more than $122,000, including salary, while the corporation had a federal income tax liability for the year 1946 of more than $100,000, as shown by its own return, of which only $300 had been paid. This evidence, with the legitimate inferences that might be drawn therefrom by the jury, was clearly sufficient to support the verdict on Count 9.

Livorsi's contention that there was not sufficient evidence to support the verdict against him on Count 10, the conspiracy count, when viewed in the light of all the foregoing facts, and those found by the Court of Appeals, which we find are supported by the record, is entirely without merit.

Livorsi also contends that the evidence was not sufficient to support the verdict against him on Count 8, but since the sentence on that count runs concurrently with the sentence on Count 6, which we have affirmed, it is unnecessary to consider his contentions concerning Count 8. *Sinclair* v. *United States, supra; Hirabayashi* v. *United States, supra;* and *Pinkerton* v. *United States, supra.*[16]

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[16] Petitioners Giglio and Livorsi contend that the trial court erred in refusing their motion, made after several days of cross-examination of Lubben at the trial, for production of Lubben's federal income tax return for 1946, all testimony given by Lubben "before the grand jury that found this indictment or found any other indictment against these defendants," and all written statements made by Lubben to any agent of the Government. This issue was not raised in the Court of Appeals. Only in exceptional cases will this Court review a question not raised in the court below. *Duignan* v. *United States,*

Several other points raised by petitioners have been carefully considered and are found to be without merit. The judgment in each case must be

Affirmed.

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

I agree with all of the Court's opinion except Part II relating to Government exhibits 61–A and 61–B, which are the copies of the canceled check and stub evidencing the $15,000 payment to Lawn. This leads me to concur in the affirmance of the convictions of Giglio and Livorsi, but as to Lawn I think a different result is required.

The Court appears to recognize that these exhibits were excludable as "tainted" evidence, since they were government-made copies of documents which, as held in a prior decision, *United States* v. *Lawn,* 115 F. Supp. 674, had been obtained from Lawn in violation of his constitutional rights. Nevertheless the Court sustains their admissibility on the ground that Lawn's counsel "consciously and intentionally" waived at trial any objection to them. This view I cannot share, for it seems to me the Court's action falls short of what we should do in holding the Government to the strictest measure of accountability on its repeated representations to court and defense counsel that it was not using any "tainted" evidence at the trial.

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274 U. S. 195, 200; *Husty* v. *United States,* 282 U. S. 694, 701, 702. There are no exceptional circumstances here. Cf. *United Brotherhood of Carpenters* v. *United States,* 330 U. S. 395, 412. Moreover, the question was not mentioned in the petition for certiorari filed in this Court. Our Rule 23 (1)(c) provides, in pertinent part: "Only the questions set forth in the petition or fairly comprised therein will be considered by the court." The question is not properly here. Cf. *Irvine* v. *California,* 347 U. S. 128, 129.

The Court justifies its finding of waiver by reasoning that the "no objection" remark of Lawn's counsel at the time these exhibits were introduced reflected his deliberate choice between having these documents in, or securing their exclusion from, the case. But to me this reasoning is quite unconvincing. At the outset, it should be noted that the Court here assumes that counsel realized these particular photostats of the original check and stub were "tainted" copies. That, in my opinion, is a hazardous assumption. It is true that each exhibit bore the tell-tale 1952 grand jury markings, but assuming, as I do, that the Government's use of these documents was the result of inadvertence, it is equally true that this red light escaped the notice of the prosecutor as well as that of the trial judge, who the record shows was constantly alert and sensitive throughout the trial to the possibility of "tainted" evidence filtering into the case. I see no reason for attributing to defense counsel greater awareness on this score than that possessed by the prosecutor and the judge.

Further, it is by no means as apparent to me as it is to the Court that counsel wanted these exhibits in the case for the purpose of corroborating Lawn's explanation of the $15,000 payment as being an innocent personal loan from Giglio rather than, as claimed by the Government, an incriminatory payment from the partnership.[1] As I

[1] It is difficult to believe that counsel could have found in these exhibits the important corroborative value which the Court now attributes to them. The original recording of the $15,000 payment as "legal expense" on Tavern's books had been made by the company accountant only after he had consulted Giglio, and there is no dispute that the subsequent alteration in this entry to reflect the payment as a transaction involving Giglio personally rather than the partnership was urged by Lawn. Only because of Lawn's insistence did the $15,000 "payment" take on its subsequent guise as a loan from Giglio.

read the record on this episode, it seems just as reasonable to suppose that counsel's *voir dire* examination of the witness through whom these exhibits were introduced, ending with his "no objection" remark, was but the familiar kind of jury play which a good trial lawyer sometimes uses to affect an appearance of unconcern towards damaging evidence which he knows he cannot keep out of the case. It is of interest that defense counsel did not even mention the loan theory in his summation; this tends to show that, having done what he could with these exhibits at the time of their receipt in evidence, his tactics were to leave well enough alone. On the other hand, it can hardly be denied that from a jury's standpoint the actual canceled check bearing Lawn's endorsement was of great value to the Government. In a jury's eyes the canceled check would be apt to be considered an instrument of crime implicating Lawn in the conspiracy, and so indeed the prosecutor played it up with telling effect in his summation.

In short, I think the Court has viewed this episode in an unreal light. At least there is much room for doubt as to what counsel actually intended. Where, as here, we are dealing with exhibits whose use the Government can justify at all only on a plea of good-faith inadvertence, I think the petitioner is entitled to the benefit of that doubt, particularly in view of the Government's repeated unequivocal representations that it would not use any of the "tainted" evidence at the trial. The Court's contrary view I deem inconsistent with the high standards which past decisions have insisted be maintained in the conduct of federal criminal trials. See *McNabb* v. *United States,* 318 U. S. 332, 340–341. "The dignity of the United States Government will not permit the conviction of any person on tainted testimony." *Mesarosh* v. *United States,* 352 U. S. 1, 9.

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In my opinion the admission of these exhibits was prejudicial error, and if nothing further appeared I think we would be required to reverse for a new trial. However, additional evidence now proffered by the Government indicates that other "innocent" copies of the same check and stub were in the hands of the New Jersey federal authorities at the time of the New York trial.[2] Had the existence of such copies been known to the New York prosecutor, the error arising from the use of the "tainted" copies should be deemed harmless, for if objection to these exhibits had been made the prosecutor could have substituted "innocent" copies. If, on the other hand, the federal authorities in New Jersey had no such copies or if in any event the New York prosecutor was unaware of their possession of the copies, reversal would still be required on grounds of prejudicial error, since the prosecutor would not have been in a position to substitute "innocent" copies had the "tainted" copies been objected to and excluded at the trial.

Although, as the Court properly holds, we cannot pass upon the accuracy of this additional evidence in determining the issues before us, I think the Government's proffer may properly be taken into account in deciding the nature of the judgment we should enter. See 28 U. S. C. § 2106; cf. *United States* v. *Shotwell Manufacturing Co.*, 355 U. S. 233. The petitioner, by making his specific objection to admission of the disputed exhibits for the first time on appeal, gave the Government no occasion to introduce the "innocent" copies at the trial and thereby avoid error. He should not now be permitted to preclude the Government from showing that the error complained of was harmless.

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[2] The Government asserts that such copies were voluntarily produced by Lawn at a hearing with reference to his own income tax returns which was held in New Jersey on May 12, 1952.

In these circumstances I think the proper course for us is to vacate the judgment of the Court of Appeals as to Lawn, and to remand the case to the District Court for the purpose of determining whether "innocent" copies of these exhibits were within reach of the New York prosecutor at the time of trial. If the court so finds, it should be instructed to let Lawn's conviction stand, and if it finds otherwise, to grant him a new trial.

REEVES *v.* ALABAMA.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 66. Argued January 8–9, 1958.—Decided January 13, 1958.

Certiorari dismissed as improvidently granted.
Reported below: 264 Ala. 476, 88 So. 2d 561.

Peter A. Hall and *Orzell Billingsley, Jr.* argued the cause and filed a brief for petitioner.

William F. Thetford and *Robert B. Stewart* argued the cause for respondent. With them on the brief were *John Patterson,* Attorney General of Alabama, and *Bernard F. Sykes,* Assistant Attorney General.

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

MR. JUSTICE DOUGLAS dissents.

GORDON *v.* TEXAS.

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 71. Argued January 9, 1958.—Decided January 13, 1958.

165 Tex. Cr. R. —, 310 S. W. 2d 328, affirmed.

B. R. Stewart argued the cause and filed a brief for appellant.

C. K. Richards, Assistant Attorney General of Texas, argued the cause for respondent. With him on the brief was *Will Wilson,* Attorney General.

PER CURIAM.

The judgment is affirmed. Twenty-first Amendment to the Constitution of the United States. *Carter* v. *Virginia,* 321 U. S. 131.

SOUTHERN RAILWAY CO. ET AL. *v.* UNITED STATES ET AL.

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

No. 579. Decided January 13, 1958.

154 F. Supp. 562, affirmed.

Henry L. Walker, Arthur J. Dixon, James A. Bistline and *R. Granville Curry* for appellants.

John W. Adams, Jr., Charles P. Reynolds, R. B. Claytor, Martin A. Meyer, Jr. and *Walter C. Scott, Jr.* for the Atlanta & St. Andrews Bay Railway Co. et al., and *John S. Burchmore* and *Robert N. Burchmore* for Cramet Inc., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

ONE, INCORPORATED, *v.* OLESEN, POSTMASTER OF LOS ANGELES.

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

No. 290. Decided January 13, 1958.

241 F. 2d 772, reversed.

Eric Julber for petitioner.

Solicitor General Rankin, Acting Assistant Attorney General Leonard and *Samuel D. Slade* for respondent.

PER CURIAM.

The petition for writ of certiorari is granted and the judgment of the United States Court of Appeals for the Ninth Circuit is reversed. *Roth* v. *United States,* 354 U. S. 476.

SUNSHINE BOOK CO. ET AL. *v.* SUMMERFIELD, POSTMASTER GENERAL.

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

No. 587. Decided January 13, 1958.

101 U. S. App. D. C. 358, 249 F. 2d 114, reversed.

O. John Rogge for petitioners.

Solicitor General Rankin, Assistant Attorney General Doub and *Samuel D. Slade* for respondent.

PER CURIAM.

The petition for writ of certiorari is granted and the judgment of the United States Court of Appeals for the District of Columbia Circuit is reversed. *Roth* v. *United States,* 354 U. S. 476.

NASHVILLE MILK CO. *v.* CARNATION COMPANY.

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

No. 67. Argued November 21, 1957.—Decided January 20, 1958.

A private cause of action under §§ 4 and 16 of the Clayton Act, as amended, does not lie for sales at unreasonably low prices for the purpose of destroying competition or eliminating a competitor, which are forbidden only by § 3 of the Robinson-Patman Act. Pp. 374–382.

(a) Sections 4 and 16 of the Clayton Act permit private actions only for injuries resulting from practices forbidden by the "antitrust laws," as defined in § 1 of that Act, and that definition, specifying certain Acts not including the Robinson-Patman Act, is exclusive. Pp. 375–376.

(b) The Robinson-Patman Act shows on its face that § 3 does not amend the Clayton Act, but stands on its own footing and carries its own sanctions, which are penal in nature. Pp. 376–380.

(c) Section 3 of the Robinson-Patman Act contains only penal sanctions for violation of its provisions; and, in the absence of a clear expression of congressional intent to the contrary, these sanctions should be considered exclusive, rather than supplemented by civil sanctions of a distinct statute. P. 377.

(d) A different result is not required by the fact that there is a partial overlap between the price-discrimination clauses of § 3 of the Robinson-Patman Act and those of § 2 of the Clayton Act, as amended by § 1 of the Robinson-Patman Act. Pp. 378–379.

(e) A different result is not required by the fact that the United States Code codifies § 3 of the Robinson-Patman Act as being among the "antitrust laws" embraced in § 1 of the Clayton Act, since there was a palpable error in the codification and the underlying statutes must prevail. Pp. 379–380.

(f) The conclusion here reached is supported by the legislative history of the Robinson-Patman Act. Pp. 380–382.

238 F. 2d 86, affirmed.

Jerome F. Dixon argued the cause for petitioner. With him on the brief were *Karl Edwin Seyfarth, Sherwood Dixon* and *Edward M. Sullivan.*

Melville C. Williams argued the cause for respondent. With him on the brief was *Frank F. Fowle.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioner, alleging that it had been injured by respondent's sales at unreasonably low prices in violation of § 3 of the Robinson-Patman Act,[1] 49 Stat. 1526, 15 U. S. C. § 13a, sued the respondent for treble damages and injunctive relief under §§ 4 and 16 of the Clayton Act, 38 Stat. 730, as amended, 15 U. S. C. §§ 15, 26. The District Court dismissed the complaint on the ground that the private remedies afforded by §§ 4 and 16 of the Clayton Act cannot be based on a violation of § 3 of the Robinson-Patman Act. The Court of Appeals affirmed.

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[1] Section 3 of the Robinson-Patman Act provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

"Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both."

238 F. 2d 86. We brought the case here, 352 U. S. 1023, to resolve a conflict between the ruling below and a decision of the Court of Appeals for the Tenth Circuit holding that such a private action does lie. *Vance* v. *Safeway Stores, Inc.*, 239 F. 2d 144.

Sections 4 and 16 of the Clayton Act permit private actions of this kind [2] only for injuries resulting from practices forbidden by the "antitrust laws" as defined in § 1 of the Clayton Act,[3] namely: (1) the Sherman Act (Act of July 2, 1890); (2) parts of the Wilson Tariff Act (Act of August 27, 1894); (3) the Act amending the Wilson Tariff Act (Act of February 12, 1913); and (4) the Clayton Act ("this Act"). In light of the much other so-called antitrust legislation enacted prior and subsequent

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[2] Section 4 of the Clayton Act provides:

"That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 16 of the Clayton Act grants a private cause of action for injunctive relief against "threatened loss or damage by a violation of the antitrust laws."

[3] 38 Stat. 730. Section 1 of the Clayton Act provides:

"That 'antitrust laws,' as used herein, includes the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled 'An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes,"' approved February twelfth, nineteen hundred and thirteen; and also this Act."

to the Clayton Act,[4] it seems plain that the rule *expressio unius exclusio alterius* is applicable, and that the definition contained in § 1 of the Clayton Act is exclusive. Therefore it is of no moment here that the Robinson-Patman Act may be colloquially described as an "antitrust" statute. And since no one claims that § 3 of the Robinson-Patman Act can be regarded as an amendment to the Sherman Act or the Wilson Tariff Act, the precise issue before us is whether Congress made that section of the Robinson-Patman Act a part of the Clayton Act, thus making it one of the "antitrust laws" whose violation can lead to the private causes of action authorized by §§ 4 and 16. For the reasons stated below we hold that this is not the case.[5]

I.

The Robinson-Patman Act, consisting of four sections, convincingly shows on its face that § 3 does not amend the Clayton Act, but stands on its own footing and carries its own sanctions.

The first section of the Act does expressly amend § 2 of the Clayton Act, which prohibits certain kinds of price discriminations, and allied activities, on the part of those engaged in domestic or territorial commerce. The first paragraph of this section reads:

> "That section 2 of the [Clayton Act] . . . is amended to read as follows:"

. . . . . .

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[4] A total of 71 statutes (including the Clayton Act) are set forth in a compilation prepared by Elmer A. Lewis, Superintendent of the Document Room, House of Representatives, entitled Antitrust Laws with Amendments, 1890–1951 (1951). Of these statutes, 21 were on the books in 1914 when the Clayton Act was enacted, and 49 became law thereafter.

[5] The issue now before us was not decided in *Bruce's Juices, Inc.*, v. *American Can Co.*, 330 U. S. 743, or *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115.

The section then sets forth *in haec verba,* and within quotation marks, all the provisions of § 2, as modified by the amending language. 49 Stat. 1526, 15 U. S. C. § 13 (a).

Two other sections of the Act are not in point here. Section 2 simply applies the amending provisions of § 1 to litigation commenced under the former provisions of § 2 of the Clayton Act, 15 U. S. C. § 21a; and § 4 deals with certain practices of cooperative associations. 15 U. S. C. § 13b.

The only other section of the Act is § 3, with which we are concerned here. It prohibits three kinds of trade practices, (a) general price discriminations, (b) geographical price discriminations, and (c) selling "at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." The important thing to note is that this section, in contrast to § 1 of the Robinson-Patman Act, does not on its face amend the Clayton Act. Further, § 3 contains only penal sanctions for violation of its provisions; in the absence of a clear expression of congressional intent to the contrary, these sanctions should under familiar principles be considered exclusive, rather than supplemented by civil sanctions of a distinct statute. See *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.,* 236 U. S. 165, 174–175.

The conclusion that only § 1 of the Robinson-Patman Act can be regarded as amendatory of the Clayton Act is further borne out by the title of the whole Robinson-Patman Act, which reads (49 Stat. 1526):

> "An Act
>
> "To amend section 2 of [the Clayton Act] . . . and for *other purposes.*" (Italics added.)

The "other purposes" can only refer to the sections of the Act other than the first section.

Because there is a partial overlap between the price-discrimination clauses of § 3 of the Robinson-Patman Act (see note 1, *supra*) and those of § 2 of the Clayton Act, as amended by the first section of the Robinson-Patman Act,[6] it is argued that it would be anomalous to allow a private cause of action for price discrimination in violation of § 2 of the Clayton Act but to deny a private cause of action based on a violation of § 3 of the Robinson-Patman Act. This argument, however, overlooks the fact that § 3 of the Robinson-Patman Act includes a provision which is *not* found in § 2 of the Clayton Act, namely, selling "at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." It is not an idle conjecture that the possibility of abuse inherent in a private cause of action based upon this vague provision[7] was among the factors which led Congress to leave the enforcement of the provisions of § 3 solely in the hands

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[6] 15 U. S. C. § 13 (a). Section 2 of the Clayton Act, as amended, provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . ."

We need not decide whether violations of the price discrimination provisions of § 3 of the Robinson-Patman Act are subject to all of the defenses provided in the case of price discriminations under the Clayton Act.

[7] The District Court indicated that the vagueness of the "unreasonably low prices" provision might give rise to constitutional difficulties, if such questions had to be faced. Cf. *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445. See Comment, 55 Mich. L. Rev. 845, 853–856. Be that as it may, it is worthy of note that the Department of Justice has never, so far as we have been able to determine, brought proceedings under this provision of § 3.

of the public authorities, except to the extent that violation of any of its provisions also constituted a violation of § 2 of the Clayton Act, and as such was subject to private redress under §§ 4 and 16 of that Act. In any event, in the absence of a much clearer indication of congressional intent than is present in these statutory provisions and their legislative history (*infra,* p. 380), we should not read the Robinson-Patman Act as subjecting violations of the "unreasonably low prices" provision of § 3 to the private remedies given by the Clayton Act.

Respondent calls our attention to the fact that the 1940 U. S. Code codifies § 3 of the Robinson-Patman Act as being among the "antitrust laws" embraced in § 1 of the Clayton Act. However, reference to the 1926 and 1934 Codes shows that the 1940 codification was a palpable error.[8] Moreover, this codification seems to us, for the

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[8] In the 1926 U. S. Code, § 1 of the Clayton Act was codified in part as follows (15 U. S. C. § 12):

" 'Antitrust laws,' as used in sections 12 to 27, inclusive, of this chapter [the Clayton Act], includes sections 1 to 27, inclusive, of this chapter."

This codification was correct because §§ 1–27 of Title 15 were the Sherman Act, the Wilson Tariff Act (as amended) and the Clayton Act. The 1934 Code was identical and also correct.

The error occurred in the 1940 codification. The Robinson-Patman Act was enacted in 1936. In the 1940 Code the codification of § 1 of the Clayton Act was changed so that it read:

" 'Antitrust laws,' as used in sections 12, 13, 14–21, 22–27 of this title, includes sections 1–27 inclusive, of this title."

Sections 2, 3, and 4 of the Robinson-Patman Act had been codified as 15 U. S. C. §§ 21a, 13a and 13b, respectively. The codifiers partially recognized that these sections were not part of the Clayton Act by changing the figures "12 to 27" in the earlier codifications of 15 U. S. C. § 12 to read "12, 13, 14–21, 22–27." But the codifiers failed to make a corresponding change in the figures "1 to 27" appearing in the earlier codifications. The result is that the term "antitrust laws" as used in § 1 of the Clayton Act appears in the 1940 Code to include § 3 of the Robinson-Patman Act, codified as § 13a. The 1946 and 1952 codifications perpetuated this error.

reasons set forth in this opinion, to be manifestly inconsistent with the Robinson-Patman Act, and in such circumstances Congress has specifically provided that the underlying statute must prevail. Act of June 30, 1926, § 2 (a), vol. 1 U. S. C. (1952 ed.), p. LXIII; see *Stephan* v. *United States,* 319 U. S. 423, 426.

II.

What appears from the face of the Robinson-Patman Act finds full support in its legislative history. The fair conclusions to be drawn from that history are (a) that § 3 of the Robinson-Patman Act was not intended to become part of the Clayton Act, and (b) that the section was intended to carry only criminal sanctions, except that price discriminations, to the extent that they were common to both that section and § 2 of the Clayton Act, were also understood to carry, *under the independent force of the Clayton Act,* the private remedies provided in §§ 4 and 16 of the Clayton Act. In other words, although price discriminations are both criminally punishable (under § 3 of the Robinson-Patman Act) and subject to civil redress (under § 2 of the Clayton Act), selling "at unreasonably low prices" is subject only to the criminal penalties provided in § 3 of the Robinson-Patman Act.[9] This is evident from the Conference Report on the bill, which states:

"SECTION 2

> "The provisions of section 2 of the House bill[10] were agreed to without amendment by the Senate. . . . [I]t appears in the conference report as

[9] Read in context, the legislative excerpts quoted in the dissenting opinion indicate no more than that.

[10] The House bill was introduced by Representative Patman. H. R. 8442, 79 Cong. Rec. 9081. Shortly thereafter an identical bill was introduced in the Senate by Senator Robinson. S. 3154, 79 Cong. Rec. 10129.

section 2 of the bill itself, rather than as part of *the amendment to section 2 of the Clayton Act which is provided for in section 1 to the present bill.*

"SECTION 3

"Subsection (h) of the Senate amendment . . . appears in the conference report as section 3 of the bill itself. It contains the operative and *penal provisions* of what was originally the Borah-Van Nuys bill (S. 4171).[11] While they overlap in some respects, they are in no way inconsistent with the *provisions of the Clayton Act amendment provided for in section 1.* Section 3 authorizes nothing which *that amendment* prohibits, and takes nothing from it. On the contrary, where only civil remedies and liabilities attach to violations of *the amendment provided in section 1,* section 3 sets up special prohibitions as to the particular offenses therein described *and attaches to them also the criminal penalties therein provided.*" H. R. Rep. No. 2951, 74th Cong., 2d Sess., p. 8. (Italics added.)

Further excerpts from the legislative history, set forth in the margin,[12] also bear out the conclusions stated at the outset of this part of our opinion.

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[11] Independently of the Robinson bill, Senators Borah and Van Nuys introduced separate price-discrimination bills. S. 3670, 80 Cong. Rec. 461; S. 3835, 80 Cong. Rec. 1194. These bills were later consolidated, S. 4171, 80 Cong. Rec. 3204, and ultimately the consolidated bill became § 3 of the Robinson-Patman Act.

[12] Representative Utterback, senior House Manager of the committee of conference, stated on the floor of the House (80 Cong. Rec. 9419):

"Section 3 of the bill sets aside certain practices therein described and attaches to their commission the criminal penalties of fine and imprisonment therein provided. It does not affect the scope or operation of the prohibitions or limitations laid down by *the Clayton Act amendment provided for in section 1.* It authorizes nothing

Finally, it is noteworthy, by way of epitomizing the conclusions to be drawn from the legislative history, that in 1950 Representative Patman (a coauthor of the Robinson-Patman Act) stated in testimony before a Subcommittee of the House Committee on the Judiciary (Hearing on H. R. 7905, 81st Cong., 2d Sess., Serial No. 14, Part 5, p. 48):

> ". . . it happens that section 3, the criminal section of the Robinson-Patman Act, was not, under the terms of that act, made an amendment to the Clayton Act. Moreover, section 3 of the Robinson-Patman Act has never been added to the list of laws designated as 'antitrust laws' in section 1 of the Clayton Act."

For the foregoing reasons, we hold that a private cause of action does not lie for practices forbidden only by § 3 of the Robinson-Patman Act. To the extent that such practices also constitute a violation of § 2 of the Clayton Act, as amended, they are actionable by one injured thereby solely under that Act. Since no such infringement of § 2 is alleged here, the complaint in this case was properly dismissed.

Affirmed.

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therein prohibited. It detracts nothing from them. Most of the acts which it does prohibit lie also within the prohibitions of that amendment. In that sphere this section merely attaches to them its criminal penalties in addition to the civil liabilities and remedies already provided by the Clayton Act." (Italics added.)

Representative Miller, a House Manager of the committee of conference, later said "Section 3 is the Borah-Van Nuys amendment. . . . The first section of the bill as reported back here amends section 2 of the Clayton Act." When asked whether § 3 was "a part of the same act," Mr. Miller replied (80 Cong. Rec. 9421):

"Of course it is, *but it is not a part of the Clayton Act as amended by section 2* [Section 1 of the Robinson-Patman Bill]." (Italics added.)

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

The question in these cases is whether a person injured by a violation of § 3 of the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13a, may sue the wrongdoer for treble damages and an injunction under §§ 4 and 16 of the Clayton Act, 38 Stat. 730, 15 U. S. C. §§ 15, 26. A *dictum* in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 750, indicated that the action would lie; and *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115, sustained a recovery on that theory, though the point now at issue was neither briefed nor considered.

Section 4 of the Clayton Act allows suits for treble damages for acts forbidden by "the antitrust laws." Section 16 allows relief by injunction for violations of "the antitrust laws." The Court holds that § 3 of the Robinson-Patman Act is not a part of "the antitrust laws" as used in the Clayton Act.

We disagree. The legislative history in our opinion shows that Congress intended to permit private actions to be brought for violations of § 3 of the Robinson-Patman Act.

It is true that § 1 of the Clayton Act defines "antitrust laws" as including, *inter alia*, the Sherman Act and the Clayton Act and that the Robinson-Patman Act did not in terms amend § 1. It is also true that § 3 of the Robinson-Patman Act does not in terms amend § 2 of the Clayton Act, while § 1 of the Robinson-Patman Act does. 80 Cong. Rec. 9414. The legislative history is further clouded by the fact that certain types of price discriminations are forbidden by both § 1 [1] and § 3 of the Rob-

*[NOTE: This opinion applies also to No. 69, *Safeway Stores, Inc.*, v. *Vance*, *post*, p. 389.]

[1] Section 1 of the Robinson-Patman Act amended and re-enacted § 2 of the Clayton Act.

inson-Patman Act. Suits for damages on account of these violations plainly are suits for damages under the "antitrust laws" within the meaning of the enforcement provisions of the Clayton Act. It is only when a violation of § 3 alone is involved that the issue we are concerned with here arises. Yet why allow suits for treble damages for price discrimination under § 2 and not allow them when the discrimination practiced is of the kind condemned by § 3? There is no suggestion that any such line was being drawn by the Congress. The emphasis on the restrictive effect of § 3 relates simply to its criminal sanctions, not to the remedial provisions with which we are presently concerned. When the Conference Report was being considered in the House, Representative Miller, a House Conferee supporting the bill, made the following statements (80 Cong. Rec. 9421):

> "The penalty of triple damages is the old law. In other words, we made no change in that particular provision of the Clayton Act. Section 3, which the gentleman from New York talks about, is the Borah-Van Nuys amendment, and that is the criminal section of this bill. The first part of the bill has nothing to do with criminal offenses. It deals primarily, in my opinion, with the authority of the Federal Trade Commission to regulate and enforce the provisions of section 2 of the Clayton Act, as amended. Section 3 in the bill is placed in an effort to make the criminal offense apply only to that particular section, and I believe that is a reasonable construction, if you will look at the bill.
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> "Mr. MASSINGALE. There is no criminal offense involved for anything outside of what is contained in that section?
>
> "Mr. MILLER. In section 3.

> "Mr. HANCOCK of New York. Is it not perfectly clear that any vendor who discriminates in price between purchasers is guilty of a crime and is also subject to triple damages to anyone who claims to be aggrieved?
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> "Mr. MILLER. That is true, but the criminal part is included in section 3 and section 3 only.
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> "Mr. HANCOCK of New York. But it is a part of the same act?
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> "Mr. MILLER. Of course it is, but it is not a part of the Clayton Act as amended by section 2. It ought to be, as far as that is concerned, if a seller willfully discriminates."

Yet § 3 as well as § 2 declares certain price discriminations unlawful; and suits for treble damages are as applicable to § 3 situations as to those under § 2, if words are to have their normal meaning.

During the discussion of the Conference Report in the Senate, Senator Vandenberg stated:

> "Mr. President, I should like to ask the Senator from Indiana one or two questions about the conference report.
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> "The fact has been called to my attention that section 3 of the bill, as agreed upon in conference, makes certain discriminations punishable by fine and also subject to treble damages, while similar discriminations under section 2 (b) would be subject to rebuttal by showing, for instance, that a reduced price was made in good faith to meet an equally low price of a competitor. In other words, it is asserted to me that the defense allowed under section 2 (b) is not permitted under section 3, although the act or the offense would be the same." 80 Cong. Rec. 9903.

In reply, Senator Van Nuys, one of the Senate Conferees, did not contest the statement about civil and criminal penalties, but instead addressed his remarks to the contention concerning the defense:

> "I think the Senator is mistaken there. The proviso to which he refers is simply a rule of evidence rather than a part of the substantive law. If a prima-facie case is made against an alleged unfair practice, the respondent may rebut the prima facie [*sic*] case by showing that his lower prices were made in good faith to meet the prices of a competitor. That is a rule of evidence rather than substantive law." *Ibid.*

While those who favored the bill assumed that § 3 allowed treble damages, those opposed railed against it on that ground. Section 3 derived from an amendment offered by Senators Borah and Van Nuys and it was to it that the fire was directed. 80 Cong. Rec. 9420.

> "Mr. HANCOCK of New York. If a vendor is found guilty of discrimination as provided in this bill, is he subject to the aggrieved party for damages or has he committed a crime and subjected himself to penalty?
>
> "Mr. CELLER. If he violates the Borah-Van Nuys provision or the other provision of the bill he is subject to penalties of a criminal nature and has committed an offense.
>
> "Mr. HANCOCK of New York. Would he also be liable for triple damages?
>
> "Mr. CELLER. And he would also have to respond in triple damages under the provisions of the Clayton Act. Anyone aggrieved can sue."

The treble-damage provision of the Clayton Act was written into the law so as to provide incentives for private as well as governmental patrol of the antitrust field.

Not a word in the legislative history of the Robinson-Patman Act suggests that this special remedy was to be denied to § 3 actions and granted to those under § 2. The fair intendment seems to have been that § 3 was to be added to the body of "antitrust laws." The mechanical device used was an amendment to one section of the Clayton Act.[2]

In resolving all ambiguities against the grant of vitality to § 3, we forget that the treble-damage technique for law enforcement was designed as an effective, if not the most effective, method of deterring violators of the Act.

The House Committee on the Judiciary is entrusted by Congress with the preparation and publication of the Code. 1 U. S. C. § 202. That Committee construed § 3 of the Robinson-Patman Act as part of the antitrust laws, for it gave the section number 13a in the Code and provided in § 12 that the term "antitrust laws" "includes sections 1–27 of this title." That codification establishes "prima facie the laws of the United States," 1 U. S. C. § 204 (a), and the countermanding considerations relied on by the Court do not seem sufficiently persuasive to us to rebut that construction. It indeed accords with what we deem to be the prevailing sentiment in Congress at the time that § 3 became as much a part of the "antitrust laws" as the other provisions of the Robinson-Patman Act.

As the Court notes, it appears that the Department of Justice has never enforced the criminal provisions of § 3

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[2] In determining the legislative intent, reliance can hardly be placed on statements of Representative Patman, made in 1950, *some 14 years after the passage of the Robinson-Patman Act*, that § 3 of the Act did not amend the Clayton Act. Hearings on H. R. 7905, 81st Cong., 2d Sess., Serial No. 14, Part 5, p. 48.

of the Robinson-Patman Act. Because of the Court's holding that § 3 is not available in civil actions to private parties, the statute has in effect been repealed. It is apparent that the opponents of the Robinson-Patman Act have eventually managed to achieve in this Court what they could not do in Congress. We would reverse in No. 67 and affirm in No. 69.

SAFEWAY STORES, INC., *v.* VANCE, TRUSTEE IN BANKRUPTCY.

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

No. 69. Argued November 21, 1957.—Decided January 20, 1958.

A private action for treble damages under § 4 of the Clayton Act, as amended, may be maintained for unlawful price discriminations violative of § 2 of the Clayton Act, as amended, but not for sales at unreasonably low prices which violate only § 3 of the Robinson-Patman Act. *Nashville Milk Co.* v. *Carnation Co., ante,* p. 373. Pp. 389–390.

239 F. 2d 144, judgment vacated and cause remanded.

John B. Tittmann argued the cause for petitioner. With him on the brief was *Douglas Stripp.*

Robert J. Nordhaus argued the cause for respondent. With him on the brief was *Sam Dazzo.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

This is a companion case to No. 67, *Nashville Milk Co.* v. *Carnation Co.,* decided today, *ante,* p. 373. In the present case the Court of Appeals has held that a private action for treble damages* does lie under § 4 of the Clayton Act for violation of § 3 of the Robinson-Patman Act. 239 F. 2d 144. Because of the conflict with the decision of the Court of Appeals for the Seventh Circuit in the *Nashville Milk Co.* case, 238 F. 2d 86, we granted certiorari. 352 U. S. 1023.

The complaint in this case alleges both sales "at unreasonably low prices" and price discriminations in violation of § 3 of the Robinson-Patman Act. For the reasons set

*The complaint does not ask for injunctive relief under § 16 of the Clayton Act.

forth in our *Nashville Milk Co.* opinion, *ante,* p. 373, we hold that the complaint should have been dismissed insofar as it rests on alleged unlawful selling at unreasonably low prices, and that the respondent was entitled to a trial as to the charges of unlawful price discrimination. Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

[For dissenting opinion of MR. JUSTICE DOUGLAS, joined by THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE BRENNAN, see *ante,* p. 383.]

CITIES SERVICE GAS CO. *v.* STATE CORPORATION COMMISSION OF KANSAS ET AL.

APPEAL FROM THE SUPREME COURT OF KANSAS.

No. 85. Argued January 13–14, 1958.—Decided January 20, 1958.

180 Kan. 454, 304 P. 2d 528, reversed.

Joe Rolston argued the cause for appellant. With him on the brief were *Conrad C. Mount, O. R. Stites* and *Mark H. Adams.*

Solicitor General Rankin argued the cause for the Federal Power Commission, as *amicus curiae,* urging reversal. With him on the brief were *Assistant Attorney General Doub, Paul A. Sweeney, Robert S. Green, Willard W. Gatchell* and *Howard E. Wahrenbrock.*

Dale M. Stucky and *Frank G. Theis* argued the cause for appellees. With them on the brief was *Clyde Milligan.*

A joint brief of *amici curiae* urging affirmance was filed for the States of Arkansas, by *Bruce Bennett,* Attorney General; Colorado, by *Duke W. Dunbar,* Attorney General; Kansas, by *John Anderson,* Attorney General; Louisiana, by *Jack P. F. Gremillion,* Attorney General, and *Bailey Walsh,* Special Assistant Attorney General; Mississippi, by *Joe T. Patterson,* Attorney General; Nebraska, by *C. S. Beck,* Attorney General; New Mexico, by *Fred M. Standley,* Attorney General; North Dakota, by *Leslie R. Burgum,* Attorney General; Oklahoma, by *Mac Q. Williamson,* Attorney General; Texas, by *Will Wilson,* Attorney General, and *James N. Ludlum,* First Assistant Attorney General; Utah, by *E. R. Callister,* Attorney General; and Wyoming, by *Thomas O. Miller,* Attorney General. *Latham Castle,* Attorney General of

Illinois, and *William C. Wines,* Assistant Attorney General, filed a statement adopting the brief filed by the various State Attorneys General as *amici curiae.*

PER CURIAM.

The judgment is reversed. *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672; *Natural Gas Pipeline Co.* v. *Panoma Corporation,* 349 U. S. 44.

ZAVADA *v.* UNITED STATES.

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

No. 65, Misc. Decided January 20, 1958.

Certiorari granted; judgment reversed; and case remanded to the District Court for a hearing.

Reported below: 245 F. 2d 956.

Petitioner *pro se.*

Solicitor General Rankin, Warren Olney, III, then Assistant Attorney General, and *Beatrice Rosenberg* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is reversed and the case is remanded to the United States District Court for the Northern District of Ohio for a hearing. *Walker* v. *Johnston,* 312 U. S. 275; *Holiday* v. *Johnston,* 313 U. S. 342.

MR. JUSTICE CLARK, MR. JUSTICE HARLAN, and MR. JUSTICE WHITTAKER dissent.

KARADZOLE, CONSUL GENERAL OF FEDERAL PEOPLE'S REPUBLIC OF YUGOSLAVIA, ET AL. *v.* ARTUKOVIC.

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

No. 462. Decided January 20, 1958.

Certiorari granted; judgment vacated; and case remanded to the District Court for discharge of the writ of habeas corpus and the remand of respondent to the custody of the United States Marshal, in order that a hearing be held under 18 U. S. C. § 3184.

Reported below: 247 F. 2d 198.

Lawrence S. Lesser and *George E. Danielson* for petitioners.

Solicitor General Rankin filed a memorandum for the United States.

Robert T. Reynolds for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States District Court for the Southern District of California for the discharge of the writ of habeas corpus and the remand of respondent to the custody of the United States Marshal in order that a hearing be held under 18 U. S. C. § 3184.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent.

STRAUSS ET AL. *v.* UNIVERSITY OF THE STATE OF NEW YORK ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 610. Decided January 20, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: 2 N. Y. 2d 464, 141 N. E. 2d 595.

Alan Y. Cole for appellants.

Charles A. Brind, Jr. for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

TAYLOR ET AL. *v.* KENTUCKY.

APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

No. 611. Decided January 20, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: 302 S. W. 2d 583.

Alexander H. Sands, Littleton M. Wickham and *H. V. Forsyth* for appellants.

Jo M. Ferguson, Attorney General of Kentucky, and *William F. Simpson,* Assistant Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

EMRAY REALTY CORP. *v.* WEAVER, STATE RENT ADMINISTRATOR.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 631. Decided January 20, 1958.

Appeal dismissed for want of a substantial federal question.

Reported below: 2 N. Y. 2d 973, 3 N. Y. 2d 771, 142 N. E. 2d 647, 143 N. E. 2d 785.

Arnold Schildhaus and *John Harrison Boyles* for appellant.

Nathan Heller for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

FEDERAL TRADE COMMISSION *v.* STANDARD OIL CO.

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

No. 24. Argued November 14, 18, 1957.—Decided January 27, 1958.

Holding that § 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. § 13 (b), affords a seller a complete defense to a charge of price discrimination if its lower price was "made in good faith to meet a lawful and equally low price of a competitor," this Court remanded this case to the Federal Trade Commission for findings as to whether respondent so acted in selling gasoline to four comparatively large "jobber" customers in Detroit at a lower price than it sold like gasoline to many comparatively small service station customers in the same area. Subsequently, without denying that respondent's lower prices were made to meet the equally low prices of its competitors, the Commission found that respondent's lower prices were made pursuant to a price system rather than being "the result of departures from a nondiscriminatory price scale," and, therefore, were not made "in good faith"; and it again ordered respondent to cease and desist from this practice. The Court of Appeals set aside the order on the ground that such a finding was not supported by the record. *Held:* The case turns on a factual issue, decided by the Court of Appeals upon a fair assessment of the record, and its judgment is affirmed. Pp. 397–404.

(a) Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Court of Appeals; and this Court will intervene only when the standard appears to have been misapprehended or grossly misapplied. *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474. Pp. 400–401.

(b) In determining that respondent's prices to these "jobbers" were reduced as a response to individual competitive situations rather than pursuant to a pricing system, which is solely a question of fact, the Court of Appeals made a "fair assessment" of the record in this case. Pp. 401–404.

233 F. 2d 649, affirmed.

Earl E. Pollock argued the cause for petitioner, *pro hac vice,* by special leave of Court. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Hansen, Earl W. Kintner* and *James E. Corkey.*

Hammond E. Chaffetz argued the cause for respondent. With him on the brief were *Weymouth Kirkland, Howard Ellis, W. H. Van Oosterhout, Frederick M. Rowe* and *Thomas E. Sunderland.*

Cyrus Austin filed a brief for the National Congress of Petroleum Retailers, Inc., et al., as *amici curiae,* urging reversal.

William Simon, Robert L. Wald and *John Bodner, Jr.* for the Empire State Petroleum Association et al. and *Otis H. Ellis* for the National Oil Jobbers Association, Inc., et al. filed a brief, as *amici curiae,* urging affirmance.

MR. JUSTICE CLARK delivered the opinion of the Court.

This case is a sequel to *Standard Oil Co.* v. *Federal Trade Comm'n,* 340 U. S. 231 (1951), wherein the Court held that § 2 (b) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13 (b), afforded a seller a complete defense to a charge of price discrimination if its lower price was "made in good faith to meet a lawful and equally low price of a competitor." 340 U. S., at 246. We remanded the case with instructions that the Federal Trade Commission make findings on Standard's contention that its discriminatory prices were so made. The subsequent findings are not altogether clear. The Commission, acting on the same record, seemingly does not contest the fact that Standard's deductions were made to meet the equally low prices of its competitors. However, Standard was held not to have acted in good faith, and the § 2 (b) defense precluded, because of the Commission's determination

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that Standard's reduced prices were made pursuant to a price system rather than being "the result of departures from a nondiscriminatory price scale." 49 F. T. C. 923, 954. The Court of Appeals found no basis in the record for such a finding and vacated the order of the Commission, holding that Standard's " 'good faith' defense was firmly established." 233 F. 2d 649, 655. In view of our former opinion and the importance of bringing an end to this protracted litigation, we granted certiorari. 352 U. S. 950 (1956). Having concluded that the case turns on a factual issue, decided by the Court of Appeals upon a fair assessment of the record, we affirm the decision below.

The long history of this 17-year-old case may be found both in the original opinion of the Court of Appeals, 173 F. 2d 210, and in the original opinion of this Court, *supra*. The case arose as a companion to similar complaints filed by the Commission against Gulf Oil Company, the Texas Company, and Shell Oil Company. In its petition for certiorari, the Commission stresses the existence of an industry-wide "dual price system," asserting that the decision below would "insulate from attack a price pattern deeply entrenched in the industry—not only in the Detroit area, but also elsewhere in the country." The pendency of the Gulf, Texas, and Shell complaints is mentioned twice, and the Commission states in a footnote that "[p]roceedings thereon have been deferred until the disposition of this case." However, on April 3, 1957, the Commission decided that "it will not now be practicable to try the issues raised" in the companion complaints "irrespective of the final outcome of . . . the matter of *Standard Oil Company*," and dismissed all three of the companion cases. The claim that the asserted dual pricing system was of industry-wide scope is not vital to the Commission's position here, was not alleged in its complaint, and is not

included among its findings; [1] therefore, we limit our consideration of the pricing system contention to Standard alone.

The Commission urges us to examine its 8-volume record of over 5,500 pages and determine if its finding that Standard reduced prices to four "jobbers" [2] pursuant to a pricing system was erroneous, as held by the Court of Appeals.[3] The Commission contends that a § 2 (b) defense is precluded if the reductions were so made. If wrong in this, it maintains that the "good faith" element of a § 2 (b) defense is not made out by showing that competitors employ such a pricing system,[4] and in any

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[1] The Commission admits that not all of the major suppliers were using the asserted dual price system, stating in its brief that Standard's two largest competitors in the Detroit area, Socony-Vacuum and Sun Oil Company, sold only at the higher tank-wagon price. The Commission findings reveal that those suppliers who did offer a tank-car price to the Standard customers in question were not offering a uniform price: both Shell and the Texas Company, for example, made offers of two cents per gallon off the tank-wagon price, as contrasted with Standard's one-and-one-half-cent reduction.

[2] The particular tag "jobbers" is of no significance here in the light of our affirmance of the Court of Appeals' conclusion that the reductions in price complained of were not made pursuant to a pricing system. Standard's use of the word, while not an accurate description of the economic function performed by the four purchasers, is as consistent with a desire to placate customers to whom Standard was not forced by lower offers to give a reduced price as it would be with any asserted reduction of prices pursuant to a pricing system.

[3] ". . . [W]e are unable to discern any basis for the conclusion that petitioner's prices 'were not the result of departures from a non-discriminatory price scale.' *The record affirmatively demonstrates to the contrary.* Petitioner sold invariably at its uniform tank-wagon price, except when at different times it reduced its price to meet competitive offers in order to retain a customer." *Standard Oil Co.* v. *Federal Trade Comm'n,* 233 F. 2d 649, 654. (Emphasis added.)

[4] This contention falls of its own weight, for the conclusion that the reductions here were not made pursuant to a pricing system

event is negatived by Standard's failure to make a bona fide effort to review its pricing system upon passage of the Robinson-Patman Act.[5]

On the present posture of the case we believe that further review of the evidence is unwarranted. As stated in *Federal Trade Comm'n* v. *American Tobacco Co.*, 274 U. S. 543, 544 (1927), although "[t]he statement of the petition for certiorari that the judgment and opinion below might seriously hinder future administration of the law was grave and sufficiently probable to justify issuance of the writ," it now appears that "[p]roper decision of the controversy depends upon a question of fact," and therefore "we adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." Moreover, in *Universal Camera Corp.*

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negates the fact assumption underlying the Commission's argument that there is no good faith when one price system is being matched against another. There is no showing or serious contention by the Commission that the offers of Standard's competitors were unlawful. Indeed, the Court of Appeals stated, "[I]n the instant situation there is no finding, no contention and not even a suspicion but that the competing prices which petitioner met were lawful." 233 F. 2d, at 654. The Commission admits that it "did not actually adjudicate the legality of the competing prices which Standard allegedly met . . . ." In the manner of a casual aside, the Commission belatedly suggests now that the competitors' prices were unlawful since they were similar to Standard's reductions and the latter were unlawful because made pursuant to a pricing system. If this be thought sufficient to raise the question, the foundation of the Commission's logic is destroyed by our affirmance of the finding that Standard's reductions were not made pursuant to any price system.

[5] Our disposition eliminates the necessity of considering this last point. Nor need we consider the Commission's claim that the Court of Appeals held the question involved here to be one of law. An examination of the court's statement, 233 F. 2d, at 651, indicates it had reference to the broader issue of Standard's "good faith" under § 2 (b).

v. *Labor Board,* 340 U. S. 474, 491 (1951), we decided that substantiality of evidence on the record as a whole to support agency findings "is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." We do no more on the issue of insubstantiality than decide that the Court of Appeals has made a "fair assessment" of the record.[6] That conclusion is strengthened by the fact that the finding made by the Court of Appeals accords with that of the trial examiner, two dissenting members of the Commission, and another panel of the Court of Appeals when the case was first before that court in 1949, all of them being agreed that the prices were reduced in good faith to meet offers of competitors.

Both parties acknowledge that discrimination pursuant to a price system would preclude a finding of "good faith." *Federal Trade Comm'n* v. *A. E. Staley Mfg. Co.,* 324 U. S. 746 (1945); *Federal Trade Comm'n* v. *Cement Institute,* 333 U. S. 683 (1948); *Federal Trade Comm'n* v. *National Lead Co.,* 352 U. S. 419 (1957). The sole question then is one of fact: were Standard's reduced prices to four "jobber" buyers—Citrin-Kolb, Stikeman, Wayne, and Ned's—made pursuant to a pricing system rather than to meet individual competitive situations?

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[6] *Labor Board* v. *Pittsburgh S. S. Co.,* 340 U. S. 498, 502–503 (1951); see also *Labor Board* v. *American National Ins. Co.,* 343 U. S. 395, 409–410 (1952). Those cases cannot be distinguished from the present one on the basis of the statutes involved. Compare National Labor Relations Act, § 10 (e), 61 Stat. 147, 29 U. S. C. § 160 (e), with Federal Trade Commission Act, § 5 (c) and (d), 52 Stat. 112–113, 15 U. S. C. § 45 (c), (d). In *Universal Camera, supra,* the Court indicated that the review standard established in that case would apply to all instances of court review of agency decisions. 340 U. S., at 488–490.

We have examined the findings of the Commission, which relies most heavily on the fact that no competitors' offers were shown to have been made to Citrin-Kolb, Stikeman, or Wayne prior to the time Standard initially granted them the reduced tank-car price.[7] All three of these "jobbers," however, were granted the tank-car price before the passage of the Robinson-Patman Act in 1936, and the trial examiner excluded proof of pre-1936 offers on the ground of irrelevancy. The Commission approved this ruling, and on remand failed to reopen the record to take any further proof. In our former opinion in this case, we said, "There is no doubt that under the Clayton Act, before its amendment by the Robinson-Patman Act, [such] evidence would have been material and, if accepted, would have established a complete defense to the charge of unlawful discrimination." 340 U. S., at 239–240. The proof should have been admitted; its absence can hardly be relied on by the Commission now as a ground for reversal. In any event, the findings that were made are sufficient for our disposition of the case.

It appears to us that the crucial inquiry is not why reduced prices were first granted to Citrin-Kolb, Stikeman, and Wayne, but rather why the reduced price was continued subsequent to passage of the Act in 1936. The findings show that both major and local suppliers made numerous attempts in the 1936–1941 period to lure these "jobbers" away from Standard with cut-rate prices, often-

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[7] The Commission brief also claims that reduction pursuant to a pricing system was admitted in the 1940 answer filed by Standard. That portion of the answer referred to, however, was concerned with establishing an alternative and altogether different defense, namely, cost justification on the basis of functional customer classification. Such defense could be argued even if the reductions were held made pursuant to a pricing method, and therefore is consistent with the claim of good faith meeting of competition.

times much lower than the one-and-one-half-cent reduction Standard was giving them.[8] It is uncontradicted, as pointed out in one of the Commission dissents, that Standard lost three of its seven "jobbers" by not meeting competitors' pirating offers in 1933–1934. All of this occurred in the context of a major gasoline price war in the Detroit area, created by an extreme overabundance of supply—a setting most unlikely to lend itself to general pricing policies. The Commission itself stated:

> "It may well be that [Standard] was convinced that if it ceased granting tank-car prices to Citrin-Kolb, Wayne, and Stikeman and continued to refuse the tank-car price to Ned's Auto Supply Company it would lose these accounts. It had substantial reasons for believing this to be the case, for all of these concerns, except Ned's Auto Supply Company, had already been recognized as entitled to the tank-car price under the commonly accepted standards of the industry, and Ned's had achieved a volume of distribution which brought it within the range where it was likely to be so recognized by a major oil company at any time." 49 F. T. C., at 952–953.

The findings as to Ned's, the only one of the "jobbers" initially to receive the tank-car price *post* Robinson-Patman, are highly significant. After a prolonged period of haggling, during which Ned's pressured Standard with information as to numerous more attractive price offers made by other suppliers, Standard responded to an ultimatum from Ned's in 1936 with a half-cent-per-gallon reduction from the tank-wagon price. The

[8] The Commission places great importance on the fact that only one of these offers was a standing offer. This is not a situation involving only one or two competitive raids, however; continuation of reductions once granted is warranted by § 2 (b) when competitors' reduced price offers are recurring again and again in a cutthroat market.

Commission concedes that this first reduction occurred at a time when Ned's did not meet the criteria normally insisted upon by Standard before giving any reduction. Two years later, after a still further period of haggling [9] and another Ned's ultimatum, Standard gave a second reduction of still another cent.

In determining that Standard's prices to these four "jobbers" were reduced as a response to individual competitive situations rather than pursuant to a pricing system, the Court of Appeals considered the factors just mentioned, all of which weigh heavily against the Commission's position. The Commission's own findings thus afford ample witness that a "fair assessment" of the record has been made. Standard's use here of two prices, the lower of which could be obtained under the spur of threats to switch to pirating competitors, is a competitive deterrent far short of the discriminatory pricing of *Staley, Cement,* and *National Lead, supra,* and one which we believe within the sanction of § 2 (b) of the Robinson-Patman Act.

Affirmed.

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

The Court today cripples the enforcement of the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13, in an

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[9] The findings indicate that similar haggling over an extended period of time occurred before each of the other "jobbers" obtained a reduced price. The great time consumed in the haggling process tends to negate any idea that the participants were only deciding whether a given purchaser met Standard's four well-defined "jobber" criteria—annual volume of one to two million gallons, own delivery facilities, bulk storage capable of taking tank-car delivery, and responsible credit rating.

important area. Section 2 of the Act makes it unlawful for any person engaged in commerce "to discriminate in price between different purchasers of commodities of like grade and quality" where the purchases are in commerce. Section 2 further provides that as proof of a discrimination "the burden of rebutting the *prima-facie* case" shall be on the person charged with the discrimination, provided, however, "That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made *in good faith* to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." (Italics added.)

First. Standard admitted that it gave reduced prices to some retailers and refused those reduced prices to other retailers. Before granting these retailers the reduced prices Standard classified them as "jobbers." Standard's definition of a "jobber" took into account the volume of sales of the "jobber," his bulk storage facilities, his delivery equipment, and his credit rating. If Standard's tests were met, the "retailer" became a "jobber" even though he continued to sell at retail. Moreover, Standard's test of who was a "jobber" did not take into account the cost to Standard of making these sales. So Standard's definition of "jobber" was arbitrary, both as respects the matter of *costs* and the matter of *function.* It comes down to this: a big retailer gets one price; a small retailer gets another price. And this occurs at the *ipse dixit* of Standard, not because the cost of serving the big retailer is less nor because the big retailer, as respects the sales in question, performs a function different from any other retailer.

The construction now given the Act flies in the face of the policy expressed by the provisions already quoted and

the words in explanation used by Representative Patman himself:

> "What are the objectives of this bill? Mr. Chairman, there has grown up in this country a policy in business that a few rich, powerful organizations by reason of their size and their ability to coerce and intimidate manufacturers have forced those manufacturers to give them their goods at a lower price than they give to the independent merchants under the same and similar circumstance and for the same quantities of goods. Is that right or wrong? It is wrong. We are attempting to stop it, recognizing the right of the manufacturer to have a different price for a different quantity where there is a difference in the cost of manufacture." 80 Cong. Rec. 8111.

Second. It is argued, however, that the discrimination in favor of the big retailers and against the small ones is justified on the ground that Standard did no more than meet competition.

To repeat, Standard has given lower prices to some retailers than to others by labeling the favored retailers as "jobbers," when in fact they are not "jobbers." It seems impossible to justify the statutory burden of showing "good faith" by reliance upon such a plainly deceptive contrivance as that.

The Court concedes that Standard did not meet the burden of proving its good faith if its discriminatory prices were made pursuant to a pricing "system" within the meaning given that term by *Federal Trade Comm'n* v. *Staley Co.*, 324 U. S. 746; *Federal Trade Comm'n* v. *Cement Institute*, 333 U. S. 683; *Federal Trade Comm'n* v. *National Lead Co.*, 352 U. S. 419. The Commission found "the discriminations in price involved in this proceeding were made pursuant to respondent's established

method of pricing." The record amply supports this finding.[1]

If a seller offers a reduced price for no other reason than to meet the lawful low price of a competitor, then the

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[1] Standard's answer to the complaint admits as much if the conclusory allegations as to Standard's good faith are ignored. Paragraph 17 of the answer alleged:

"Respondent alleges that its general policy and practice of bona fidely selecting and classifying gasoline customers as wholesale or jobber customers, as distinguished from retail resellers, is as follows:

"That such wholesale or jobber customer so classified shall have adequate bulk storage of his own; that he be equipped to receive bulk deliveries by tank car or truck train into such storage; that he have adequate distribution and delivery facilities; that he make tank car purchases in substantial volume and do a continuing substantial volume of business as a bona fide gasoline dealer maintaining and operating an established gasoline business; that he have satisfactory credit rating; that he maintain a sufficient personnel and all requisite facilities and equipment to adequately operate his business, service his customers, and perform his functions as a wholesaler or jobber, and assume the hazard and expense of fully operating his own business.

"Respondent alleges that each of the four customers named in Paragraph Three of the Complaint fully, fairly, and reasonably falls within not only the requirements set forth in Paragraph 17 above but within all fair, reasonable, usual and proper requirements for classification as a wholesaler or jobber, and that each maintains its own adequate bulk storage, delivery tank trucks, salesmen and operating personnel; buys in substantial tank car or truck train lots . . . ."

Moreover, the manager of Standard's Detroit Division, when asked what characteristics a jobber must have to be entitled to the tank car price replied:

"He must have equipment; he must have equipped himself with bulk storage, and, by bulk storage, I mean sufficient storage so that he can take care of tank car quantities of gasoline; he should have a volume of business amounting to about 1,000,000 to 2,000,000 gallons per year; his credit responsibility and so forth must be satisfactory; he should have an established business."

Also, with one exception for a short period, the favored "jobbers" always received the same price.

seller's otherwise unlawful price falls within the protection of § 2 (b). But where, as here, a seller establishes a discriminatory pricing *system,* this system does not acquire the protection of § 2 (b) simply because in fact use of the system holds a customer against a competitive offer. In other words, a discriminatory pricing system which in fact meets competition is not a good-faith meeting of competition within the meaning of the Act. The effectiveness of the system does not demonstrate the good faith of its initiator.

Third. The mere fact that a competitor offered the lower price does not mean that Standard can lawfully meet it. Standard's system of price discrimination, shown not to be in "good faith," cannot be justified by showing that competitors were using the same system. "This startling conclusion is admissible only upon the assumption that the statute permits a seller to maintain an otherwise unlawful system of discriminatory prices, merely because he had adopted it in its entirety, as a means of securing the benefits of a like unlawful system maintained by his competitors." *Federal Trade Comm'n* v. *Staley Co., supra,* at 753. See also *Federal Trade Comm'n* v. *Cement Institute, supra,* at 725.

We said in *Standard Oil Co.* v. *Federal Trade Comm'n,* 340 U. S. 231, 250, "Congress meant to permit the natural consequences to follow the seller's action in meeting in good faith a *lawful* and *equally low price* of its competitor." (Italics added.) It is only a *lawful* lower price that may be met. Were it otherwise then the law to govern is not the Robinson-Patman Act but the law of the jungle. The point we have now reached was seen by Congressman Utterback, one of the managers of the bill in conference. What he said should dispose of this case:

> "This procedural provision cannot be construed as a *carte blanche* exemption to violate the bill so long

as a competitor can be shown to have violated it first, nor so long as that competition cannot be met without the use of oppressive discriminations in violation of the obvious intent of the bill.

"To illustrate: The House committee hearings showed a discrimination of 15 cents a box granted by Colgate-Palmolive-Peet Co. on sales of soap to the A. & P. chain. Upon a complaint and hearing before the Federal Trade Commission, this proviso would permit the Colgate Co. to show in rebuttal evidence, if such were the fact, an equally low price made by a local soap manufacturer in Des Moines, Iowa, to A. & P.'s retail outlets in that city; but this would not exonerate it from a discrimination granted to A. & P. everywhere, if otherwise in violation of the bill.

"But the committee hearings show a similar discount of 15 cents a case granted by Procter & Gamble to the same chain. If this proviso were construed to permit the showing of a competing offer as an absolute bar to liability for discrimination, then it would nullify the act entirely at the very inception of its enforcement, for in nearly every case mass buyers receive similar discriminations from competing sellers of the same product. One violation of law cannot be permitted to justify another. As in any case of self-defense, while the attack against which the defense is claimed may be shown in evidence, its competency as a bar depends also upon whether it was a legal or illegal attack. A discrimination in violation of this bill is in practical effect a commercial bribe to lure the business of the favored customer away from the competitor, and if one bribe were permitted to justify another the bill would be futile to achieve its plainly intended purposes." 80 Cong. Rec. 9418. (Italics added.)

When we let Standard classify a "retailer" as a "jobber" and grant a discriminatory price pursuant to arbitrary requirements merely because a competitor employs the same system,[2] we make this provision of the Robinson-Patman Act ineffective. We should read the Act in a more hospitable way and allow Standard to maintain its discriminatory price schedule for retailers if and only if it can show

(a) that that price was justified on the basis of costs or function, or

(b) that it was in good faith meeting the *lawful* offer of a competitor, rather than merely matching a predatory price system, or meeting a competitor's "pirating" offers, to use the Court's word, with a "pirating" system of its own.

I would reverse this judgment and direct enforcement of the Commission's order.

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[2] The Commission's findings stated:

"In selecting the customers or prospective customers to whom [Standard] will grant the tank-car price on gasoline, the respondent's criterion is now, and for many years has been, that the customer or prospective customer make annual purchases of not less than from one to two million gallons of gasoline, have storage facilities sufficient to accept delivery in tank-car quantities, and have a credit standing assuring payment for large volume purchases. This is the same criterion which for many years has also been applied by the respondent's major competitors, and under it any question of the distributive function performed by the purchaser, that is, whether the purchaser is a retail dealer selling to the public or a wholesaler selling to retail dealers, is wholly immaterial." 49 F. T. C. 923, 953.

MOOG INDUSTRIES, INC., *v.* FEDERAL TRADE COMMISSION.

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

No. 77. Argued January 14, 1958.—Decided January 27, 1958.*

The question whether a valid order of the Federal Trade Commission, directing one firm to cease and desist from engaging in illegal price discrimination in violation of § 2 of the Clayton Act, should go into effect before competing firms are similarly restrained is for determination by the Commission; it should be considered by a reviewing court only if raised before the Commission; and a determination of it by the Commission should not be overturned in the absence of a patent abuse of discretion. Pp. 411–414.

238 F. 2d 43, affirmed.

241 F. 2d 37, judgment vacated and cause remanded.

Malcolm I. Frank argued the cause for petitioner in No. 77. With him on the brief were *Bernard Mellitz* and *James W. Cassedy.*

Earl W. Kintner argued the causes for the Federal Trade Commission. With him on the briefs were *Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston* and *James E. Corkey.*

Charles R. Sprowl argued the cause and filed a brief for respondent in No. 110.

PER CURIAM.

The general question presented by these two cases is whether it is within the scope of the reviewing authority of a Court of Appeals to postpone the operation of a valid

*Together with No. 110, *Federal Trade Commission* v. *C. E. Niehoff & Co.*, on certiorari to the United States Court of Appeals for the Seventh Circuit.

cease and desist order of the Federal Trade Commission against a single firm until similar orders have been entered against that firm's competitors. In proceedings arising out of alleged violations of the price discrimination provisions of the Clayton Act, § 2, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13, two Courts of Appeals reached opposed results on this underlying issue. In order to resolve the conflict we granted certiorari, 353 U. S. 908, 982.

In No. 77, petitioner (Moog Industries, Inc.) was found by the Commission to have violated the Act and was ordered to cease and desist from further violation. 51 F. T. C. 931. Petitioner sought review in the United States Court of Appeals for the Eighth Circuit. Upon affirmance of the order, 238 F. 2d 43, petitioner moved the court to hold the entry of judgment in abeyance on the ground that petitioner would suffer serious financial loss if prohibited from engaging in pricing practices open to its competitors. The court denied the requested relief.

In No. 110, respondent (C. E. Niehoff & Co.) requested the Commission to hold in abeyance the cease and desist order that had been recommended by the hearing examiner, on the ground that respondent would have to go out of business if compelled to sell at a uniform price while its competitors were not under similar restraint. The Commission found that respondent had violated the Act and, in issuing its order, denied respondent's request. 51 F. T. C. 1114, 1153. On review in the United States Court of Appeals for the Seventh Circuit, the Commission's determination of statutory violation was affirmed; however, the court (one judge dissenting) directed that the cease and desist order should take effect "at such time in the future as the United States Court of Appeals for the Seventh Circuit may direct, *sua sponte* or upon motion of the Federal Trade Commission." 241 F. 2d 37, 43.

In view of the scope of administrative discretion that Congress has given the Federal Trade Commission, it is ordinarily not for courts to modify ancillary features of a valid Commission order. This is but recognition of the fact that in the shaping of its remedies within the framework of regulatory legislation, an agency is called upon to exercise its specialized, experienced judgment. Thus, the decision as to whether or not an order against one firm to cease and desist from engaging in illegal price discrimination should go into effect before others are similarly prohibited depends on a variety of factors peculiarly within the expert understanding of the Commission. Only the Commission, for example, is competent to make an initial determination as to whether and to what extent there is a relevant "industry" within which the particular respondent competes and whether or not the nature of that competition is such as to indicate identical treatment of the entire industry by an enforcement agency. Moreover, although an allegedly illegal practice may appear to be operative throughout an industry, whether such appearances reflect fact and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency. It is clearly within the special competence of the Commission to appraise the adverse effect on competition that might result from postponing a particular order prohibiting continued violations of the law. Furthermore, the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically.

The question, then, of whether orders such as those before us should be held in abeyance until the respondents' competitors are proceeded against is for the Com-

438765 O—58——32

mission to decide. If the question has not been raised before the Commission, as was the situation in No. 77, a reviewing court should not in any event entertain it. If the Commission has decided the question, its discretionary determination should not be overturned in the absence of a patent abuse of discretion. Accordingly, the judgment in No. 77 is affirmed, and the judgment in No. 110 is vacated and the cause remanded to the Court of Appeals with directions to affirm the order of the Commission in its entirety.

It is so ordered.

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

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

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 616. Decided January 27, 1958.*

The District Court set aside an order of the Interstate Commerce Commission granting appellant (an investment company) the status of a noncarrier to be "considered as a carrier" under §§ 5 (2) and 5 (3) of the Interstate Commerce Act and approving an issue of preferred stock. This Court reversed and remanded the case to the District Court for consideration of appellees' claim that "the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act." The District Court then sustained the stock issue against attacks on its basic fairness but enjoined the order approving the issue on the ground that the Commission had not approved appellant's acquisition of control of a subsidiary as a necessary preliminary to approval of the stock issue. *Held:* The judgment is reversed and the case is remanded to the District Court for consideration of the only claim left open by this Court's prior decision, *i. e.*, whether "the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act." P. 416.

156 F. Supp. 227, reversed and remanded.

Whitney North Seymour, David Hartfield, Jr. and *Edward K. Wheeler* for appellant in No. 616.

Harold H. Levin, Joseph M. Proskauer, Marvin E. Frankel and *Allen L. Feinstein* for appellants in No. 617.

Robert W. Ginnane for appellant in No. 618.

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*Together with No. 617, *Gruss et al.* v. *Breswick & Co. et al.*, and No. 618, *Interstate Commerce Commission* v. *Breswick & Co. et al.*, also on appeals from the same Court.

Edward M. Garlock filed a motion for Baker, Weeks & Co. et al. for leave to join in the Jurisdictional Statements and Applications for Summary Reversal filed by appellants in Nos. 616 and 617.

George Brussel, Jr. for Breswick & Co. et al., appellees.

PER CURIAM.

The judgment of the District Court is reversed and the case is remanded for consideration by that court of the only claim that was left open at this Court's prior disposition of this litigation, to wit, whether "the preferred stock issue as approved by the [Interstate Commerce] Commission was in violation of the Interstate Commerce Act." *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151, 175.

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

These cases are a sequel to *Alleghany Corporation* v. *Breswick & Co.*, 353 U. S. 151. There, the decision of the District Court was reversed and the case was remanded for further proceedings. Now, the decision of the District Court on remand is being summarily reversed on the ground that the basis of the decision below was precluded by the mandate and opinion of this Court. For the reasons which follow, it is my opinion that probable jurisdiction should be noted in these cases.

First. I do not agree that the decision below went beyond the scope of the opinion and mandate of this Court.

Alleghany Corporation acquired control of the New York Central Railroad Co., the parent of an integrated system of carriers. Subsequent to the acquisition of control by Alleghany, two of the corporate subsidiaries of the Central system were merged. Alleghany is basically sub-

ject to the control of the Securities and Exchange Commission under the Investment Company Act of 1940, 54 Stat. 789, 15 U. S. C. § 80a–1 *et seq.* Section 3 (c)(9) of that Act exempts companies which are subject to regulation by the Interstate Commerce Commission. The question thus arose as to whether Alleghany, although not a carrier as that term is used in the Interstate Commerce Act, was subject to regulation by the Interstate Commerce Commission because of the merger of the subsidiaries of Central of which Alleghany acquired control and therefore exempt from supervision by the Securities and Exchange Commission. The determination of the Interstate Commerce Commission that Alleghany was under its jurisdiction was reversed by the District Court but this Court then reversed the District Court. 353 U. S. 151. The scope of that holding is the present issue.

In order to attain the status of a carrier the noncarrier must satisfy the requirements of § 5 (2)(a) of the Interstate Commerce Act. The pertinent portions of that section provide:

> "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).

The operation of this section is more easily understood if the two clauses pertaining to a person not a carrier are numbered as follows:

> Clause I. "A person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise."

> Clause II. "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."

It is clear that a person not a carrier must acquire at least two carriers before being subject to regulation by the Interstate Commerce Commission. There may be one transaction acquiring control of two carriers under Clause I or control may be acquired consecutively under Clause II. Whichever Clause is applicable to the particular facts, § 5 (2)(b) requires the Commission to find that the proposed acquisition is in the public interest.

The District Court held in its first decision that the Interstate Commerce Commission did not have jurisdiction under Clause II because, even if Alleghany had control of a carrier, Central, it did not "acquire control of another carrier" by the device of merging two of the subsidiaries. That court also held that there was no jurisdiction in the Interstate Commerce Commission under Clause I because the Commission had not approved of the acquisition of control of Central. 138 F. Supp. 123.

On appeal, this Court reversed. In deciding "the substantive issues in the litigation," *viz.*, ". . . the jurisdiction of the Commission under §§ 5 (2) and 5 (3) of the Act . . . ," the Court held that the order granting Alleghany the status of a carrier was valid. *Alleghany Corp.* v. *Breswick & Co., supra,* at 160–161. The Court based its decision on Clause II and reasoned that Alleghany controlled Central and had "acquired" another carrier because of the merger. All of the requirements of Clause II of § 5 (2)(a) were satisfied because the Commission had found the merger to be in the public interest within the meaning of § 5 (2)(b). *Louisville & J. B. & R. Co. Merger,* 295 I. C. C. 11, 17.

Because the jurisdiction of the Interstate Commerce Commission could be sustained on this ground, the Court

found it unnecessary to decide if acquisition of a system required approval because it was the acquisition of "two or more carriers" under Clause I. The Court stated:

> "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 . . . ." *Alleghany Corp.* v. *Breswick & Co., supra,* at 161.

The Court then held that approval under Clause I was not necessary to sustain *the jurisdiction* of the Commission.

Alleghany had not only obtained a status order declaring it to be a carrier but the Commission had also approved a request by Alleghany to issue preferred stock. Accordingly, the Court "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.*" *Id.,* at 175. (Italics added.)

On remand, the District Court sustained the stock issue against various attacks on its basic fairness but enjoined the order approving the issue on the theory that the Commission was required by Clause I of § 5 (2)(a) of the Act to approve Alleghany's acquisition of control of Central before the stock issue could be approved. 156 F. Supp. 227.

That holding was based on the premise that § 5 (4) of the Act,* which was not construed in our earlier opinion,

*Section 5 (4) provides: "It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or

made it necessary for the Commission to consider the legality of the acquisition of control under Clause I, as well as Clause II, of § 5 (2)(a). For § 5 (4) makes it "unlawful" without Commission approval for any person "to enter into any transaction within the scope" of § 5 (2)(a)—whether Clause I or Clause II. And § 5 (7) authorizes the Commission to investigate and determine whether § 5 (4) has been violated.

The holding of the District Court on remand did not question the basis of our earlier holding that the Interstate Commerce Commission, not the Securities and Exchange Commission, had jurisdiction of these transactions. It only determined the issue which we held to be open on remand—whether the transactions were "in violation of the Interstate Commerce Act." 353 U. S., at 175. That issue included not only the legality of the preferred stock issue but also the legality of the acquisition of Central by Alleghany. In other words the force of § 5 (4) and § 5 (7) makes Clause I of § 5 (2)(a) applicable as well as Clause II. That at least is the force of the argument under § 5 (4) and § 5 (7), and I for one cannot say it is frivolous or unsubstantial.

This Court decided the conflicting jurisdictional claims of two governmental agencies and remanded the case without precluding the District Court, as I see it, from deciding that approval of the acquisition of a system is required under § 5 before the preferred stock can be issued. No one, at least no lawyer or judge, should be confused by the fact that this Court held approval of the acquisition was not necessary under the facts of this case for one

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investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words 'control or management' shall be construed to include the power to exercise control or management."

reason (jurisdiction) and the District Court held approval was necessary for another reason (compliance with the Act before the stock could be issued). Respect for the considered and well-reasoned decision of this three-judge District Court alone should convince us there has been no defiance of our mandate.

Second. Even if there be doubts as to the force of this reasoning, we should hear this case on the merits. The only basis on which it can be argued that the mandate precluded the decision is that this Court not only decided that the Interstate Commerce Commission had jurisdiction over Alleghany but also that the Commission properly exercised that jurisdiction in authorizing the issuance of the stock without approving the acquisition of control of Central. No such issue was presented to us earlier. The only way it is even possible to read such a holding from the opinion and mandate is by implication, since nowhere in the opinion is this particular problem mentioned. The issue is now forcefully presented by the decision of a lower court. By reversing summarily on this appeal a substantial question is resolved *sub silentio.*

The question whether or not the acquisition of a carrier system is the acquisition of "two or more carriers" within the meaning of § 5 (2)(a)(i) of the Act (Clause I) seems plainly to be a substantial one. To repeat, the prior opinion of the Court in this case did not decide this problem. Yet it is arguable that the acquisition of a system is the acquisition of two or more carriers. Until this case, it apparently has been the consistent view of the Commission that such an acquisition was the acquisition of two or more carriers. As Division 4 of the Commission stated:

> "We long have recognized under section 5, that railroad systems are comprised of 2 or more carriers,

> and that control of a single system may not lawfully be effectuated without our approval and authorization. [Citations omitted.] That principle is considered basic, almost as a definition. So much so, that the question of acquisition of a carrier system has never been contested before the Commission, and as far as we know, there have been no court decisions touching on that issue." *Louisville & J. B. & R. Co. Merger,* 290 I. C. C. 725, 733.

The full Commission held, however, without citation of any authority, that approval of the acquisition of the control of Central was not required by § 5 (2) of the Act. 295 I. C. C. 11, 16–17. And the courts have not resolved that important question.

Moreover, assuming Commission approval is necessary at some time, must it come before the refinancing can be approved? As shown, if the transaction is within Clause I, then § 5 (4) makes the acquisition illegal until Commission approval is obtained. Under those circumstances the District Court said:

> "The approval of acquisition and continued control is an obvious first question in any application by Alleghany because unless the Commission intends to approve this control . . . it would be granting a wrongdoer sanctuary from the Investment Company Act; and it would be authorizing and ordering acts in aid of a known violation of the Interstate Commerce Act. The ultimate crucial result of such temporizing would be that by granting seemingly innocuous piecemeal applications, it would unobtrusively foreclose itself from any realistic determination of the fundamental question, because after the passage of time the disruption of the carriers in the system and of the public service, caused by divestiture, would

be so great that it would necessarily be discarded as a practical alternative." 156 F. Supp. 227, 236–237.

Did Congress permit such broken-field running between two statutes, designed to protect the public interest, without a full inquiry by the Commission into the primary acquisition of control of Central by Alleghany? At the very least, there should be a reasoned decision by this Court approving the rule that makes this possible.

I would note probable jurisdiction in these cases.

HONEYCUTT *v.* WABASH RAILWAY CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE ST. LOUIS COURT OF APPEALS OF MISSOURI.

No. 639. Decided January 27, 1958.

In this case arising under the Federal Employers' Liability Act, *held:* The proofs justified the conclusion that employer negligence played a part in producing petitioner's injury. Therefore, certiorari is granted, the judgment reversing a judgment for petitioner is reversed and the case is remanded.

303 S. W. 2d 153, reversed and remanded.

Charles E. Gray for petitioner.

PER CURIAM.

The petition for certiorari is granted, and the judgment of the St. Louis Court of Appeals of the State of Missouri is reversed and the case is remanded for proceedings in conformity with this opinion. We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury. *Ferguson* v. *Moore-McCormack Lines, Inc.,* 352 U. S. 521; *Rogers* v. *Missouri Pacific R. Co.,* 352 U. S. 500.

MR. JUSTICE HARLAN, whom MR. JUSTICE WHITTAKER joins, concurs in the result for the reasons given in his memorandum in *Gibson* v. *Thompson,* 355 U. S. 18.

For the reasons set forth in his opinion in *Rogers* v. *Missouri Pacific R. Co.,* 352 U. S. 500, 524, MR. JUSTICE FRANKFURTER is of the view that the writ of certiorari is improvidently granted.

MICHIGAN WISCONSIN PIPE LINE CO. *v.* CORPORATION COMMISSION OF OKLAHOMA ET AL.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA.

No. 86. Decided January 27, 1958.*

Judgments reversed on authority of case cited.

Coleman Hayes and *Arthur R. Seder, Jr.* for appellant in No. 86.

Rayburn L. Foster, Harry D. Turner, R. M. Williams and *Cecil C. Hamilton* for appellant in Nos. 111, 112 and 113.

Ferrill H. Rogers for the Corporation Commission of Oklahoma, appellee.

PER CURIAM.

The judgments are reversed. *Cities Service Gas Co.* v. *State Corporation Commission of Kansas,* 355 U. S. 391.

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*Together with Nos. 111, 112 and 113, *Phillips Petroleum Co.* v. *Corporation Commission of Oklahoma et al.,* also on appeals from the same Court.

KERNAN, ADMINISTRATOR, *v.* AMERICAN DREDGING CO.

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

No. 34. Argued November 21, 1957.—Decided February 3, 1958.

A seaman lost his life on a tug which caught fire when an open-flame kerosene lamp on the deck of a scow it was towing on a river at night ignited highly inflammable vapors lying above an accumulation of petroleum products spread over the surface of the river. The lamp was not more than three feet above the water, and the vapor would not have been ignited had the lamp been carried at the height of eight feet required by Coast Guard regulations. There was no collision or fault of navigation. *Held:* Under the Jones Act, which incorporates the provisions of the Federal Employers' Liability Act, the seaman's employer was liable, without a showing of negligence, for his death resulting from a violation of the Coast Guard regulations pertaining to navigation. Pp. 427–439.

(a) The decisions of this Court in actions under the Federal Employers' Liability Act based upon violations of the Safety Appliance Acts and the Boiler Inspection Act establish that a violation of either Act creates liability without regard to negligence, if the violation in fact contributes to the death or injury, without regard to whether the injury flowing from the breach was the injury the statute sought to prevent. Pp. 430–436.

(b) The basis of liability established in those decisions is not confined to cases involving the Safety Appliance Acts or the Boiler Inspection Act but extends also to deaths resulting from a violation of the Coast Guard regulations here involved. Pp. 436–439.

(c) Under § 1 of the Federal Employers' Liability Act, when a statutory violation results in a defect or insufficiency in appliances or other equipment, liability ensues, without regard to whether the injury flowing from the violation was the injury the statute sought to guard against. Pp. 437–439.

(d) The Jones Act expressly provides for seamen the cause of action—and consequently the entire judicially developed doctrine of liability—granted to railroad workers by the Federal Employers' Liability Act. P. 439.

35 F. 2d 618, 619, reversed and remanded.

Abraham E. Freedman argued the cause and filed a brief for petitioner.

T. E. Byrne, Jr. argued the cause for respondent. With him on the brief was *Mark D. Alspach.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

In this limitation proceeding brought by the respondent under §§ 183–186 of the Limited Liability Act, R. S. §§ 4281–4289, as amended, 46 U. S. C. §§ 181–196, the District Court for the Eastern District of Pennsylvania denied the petitioner's claim for damages filed on behalf of the widow and other dependents of a seaman who lost his life on respondent's tug in a fire caused by the violation of a navigation rule. 141 F. Supp. 582. The Court of Appeals for the Third Circuit affirmed. 235 F. 2d 618, rehearing denied, 235 F. 2d 619. We granted certiorari. 352 U. S. 965.

The seaman lost his life on the tug *Arthur N. Herron,* which, on the night of November 18, 1952, while towing a scow on the Schuylkill River in Philadelphia, caught fire when an open-flame kerosene lamp on the deck of the scow ignited highly inflammable vapors lying above an extensive accumulation of petroleum products spread over the surface of the river. Several oil refineries and facilities for oil storage, and for loading and unloading petroleum products, are located along the banks of the Schuylkill River. The trial court found that the lamp was not more than three feet above the water. Maintaining the lamp at a height of less than eight feet violated a navigation rule promulgated by the Commandant of the United States Coast Guard.[1] The trial court found that

[1] 33 CFR § 80.16 (h). "Scows not otherwise provided for in this section on waters described in paragraph (a) of this section shall

the vapor would not have been ignited if the lamp had been carried at the required height.

The District Court held that the violation of the rule, "whether . . . [it] be called negligence or be said to make the flotilla unseaworthy," did not impose liability because "the Coast Guard regulation had to do solely with navigation and was intended for the prevention of collisions, and for no other purpose. In the present case there was no collision and no fault of navigation. True, the origin of the fire can be traced to the violation of the regulation, but the question is not causation but whether the violation of the regulation, of itself, imposes liability." 141 F. Supp., at 585.

The petitioner urges first that the statutory violation made the flotilla unseaworthy, creating liability without regard to fault. But the remedy for unseaworthiness derives from the general maritime law, and that law recognizes no cause of action for wrongful death whether

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carry a white light at each end of each scow, except that when such scows are massed in tiers, two or more abreast, each of the outside scows shall carry a white light on its outer bow, and the outside scows in the last tier shall each carry, in addition, a white light on the outer part of the stern. The white light shall be carried not less than 8 feet above the surface of the water, and shall be so placed as to show an unbroken light all around the horizon, and shall be of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least 5 miles."

The Commandant is empowered by 30 Stat. 102, as amended, 33 U. S. C. § 157, to establish rules "as to the lights to be carried . . . as he . . . may deem necessary for safety . . . ." This section was contained in the Act of June 7, 1897, the purpose of which was to codify the rules governing navigation on inland waters and to conform them as nearly as practicable to the revised international rules for preventing collisions at sea adopted at the International Marine Conference in October 1889. 30 Cong. Rec. 1394; H. R. Doc. No. 42, 55th Cong., 1st Sess., p. 1.

occasioned by unseaworthiness or by negligence. *The Harrisburg,* 119 U. S. 199;[2] see *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 240. Before the Jones Act,[3] federal courts of admiralty resorted to the various state death acts to give a remedy for wrongful death. *The Hamilton,* 207 U. S. 398; *The Transfer No. 4,* 61 F. 364; see *Western Fuel Co.* v. *Garcia, supra,* at 242; *Great Lakes Dredge & Dock Co.* v. *Kierejewski,* 261 U. S. 479. The Jones Act created a federal right of action for the wrongful death of a seaman based on the statutory action under the Federal Employers' Liability Act. In *Lindgren* v. *United States,* 281 U. S. 38, the Court held that the Jones Act remedy for wrongful death was exclusive and precluded any remedy for wrongful death within territorial

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[2] *The Harrisburg* disapproved lower federal court cases, among them a decision of Chief Justice Chase at Circuit, *The Sea Gull,* 21 Fed. Cas. 910, No. 12578a, which had given a right of action for wrongful death. Reliance was placed on the fact that English admiralty law did not recognize the cause of action although continental maritime law did. By statute, English admiralty courts now entertain a cause of action for wrongful death. 23 Halsbury's Laws of England (2d ed. 1936) § 979.

[3] "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. [*I. e.,* Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. §§ 51–60.] Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." 41 Stat. 1007, 46 U. S. C. § 688.

438765 O—58——33

waters,[4] based on unseaworthiness, whether derived from federal or state law. The petitioner assumes that under today's general maritime law the personal representative of a deceased seaman may elect, as the seaman himself may elect, between an action based on the FELA and an action, recognized in *The Osceola,* 189 U. S. 158, 175, based upon unseaworthiness. In view of the disposition we are making of this case, we need not consider the soundness of this assumption.

The petitioner also urges that, since the violation of the rule requiring the lights to be eight feet above the water resulted in a defect or insufficiency in the flotilla's lighting equipment which in fact caused the seaman's death, liability was created without regard to negligence under the line of decisions of this Court in actions under the FELA based upon violations of either the Safety Appliance Acts[5] or the Boiler Inspection Act.[6] That line of decisions interpreted the clause of § 1 of the FELA, 45 U. S. C. § 51, which imposes liability on the employer "by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." The cases

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[4] Where death occurs beyond a marine league from state shores, the Death on the High Seas Act, 41 Stat. 537, 46 U. S. C. §§ 761–768, provides a remedy for wrongful death. Presumably any claims, based on unseaworthiness, for damages accrued prior to the decedent's death would survive, at least if a pertinent state statute is effective to bring about a survival of the seaman's right. See *Holland* v. *Steag, Inc.,* 143 F. Supp. 203; cf. *Cox* v. *Roth,* 348 U. S. 207; *Just* v. *Chambers,* 312 U. S. 383. Claims for maintenance and cure survive the death of the seaman. *Sperbeck* v. *A. L. Burbank & Co.,* 190 F. 2d 449. For a discussion of the applicability of a state wrongful-death statute to an action for death of a nonseaman based upon a breach of the warranty of seaworthiness, see *Skovgaard* v. *The Tungus,* 252 F. 2d 14.

[5] 27 Stat. 531, as amended, 45 U. S. C. §§ 1–16.

[6] 36 Stat. 913, as amended, 45 U. S. C. §§ 22–34.

hold that under this clause, a defect resulting from a violation of either statute which causes the injury or death of an employee creates liability without regard to negligence. *San Antonio & A. P. R. Co.* v. *Wagner,* 241 U. S. 476, 484. Here the defect or insufficiency in the flotilla's lighting equipment due to a violation of the statute resulted in the death of the seaman. The question for our decision is whether, in the absence of any showing of negligence, the Jones Act—which in terms incorporates the provisions of the FELA—permits recovery for the death of a seaman resulting from a violation of a statutory duty. We hold that it does.

In denying the claim the lower courts relied upon their views of general tort doctrine. It is true that at common law the liability of the master to his servant was founded wholly on tort rules of general applicability and the master was granted the effective defenses of assumption of risk and contributory negligence. This limited liability derived from a public policy, designed to give maximum freedom to infant industrial enterprises, "to insulate the employer as much as possible from bearing the 'human overhead' which is an inevitable part of the cost—to someone—of the doing of industrialized business." *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U. S. 54, 59. But it came to be recognized that, whatever the rights and duties among persons generally, the industrial employer had a special responsibility toward his workers, who were daily exposed to the risks of the business and who were largely helpless to provide adequately for their own safety. Therefore, as industry and commerce became sufficiently strong to bear the burden, the law, the reflection of an evolving public policy, came to favor compensation of employees and their dependents for the losses occasioned by the inevitable deaths and injuries of industrial employment, thus shifting to industry the "human overhead" of doing business. For most indus-

tries this change has been embodied in Workmen's Compensation Acts. In the railroad and shipping industries, however, the FELA and Jones Act provide the framework for determining liability for industrial accidents. But instead of a detailed statute codifying common-law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. But it is clear that the general congressional intent was to provide liberal recovery for injured workers, *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 508–510, and it is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers.

The FELA and the Jones Act impose upon the employer the duty of paying damages when injury to the worker is caused, in whole or in part, by the employer's fault. This fault may consist of a breach of the duty of care, analogous but by no means identical to the general common-law duty, or of a breach of some statutory duty. The tort doctrine which the lower courts applied imposes liability for violation of a statutory duty only where the injury is one which the statute was designed to prevent.[7] However, this Court has repeatedly refused to apply such a limiting doctrine in FELA cases. In FELA cases based upon violations of the Safety Appli-

[7] The trial court relied upon Restatement, Torts, § 286, Comment on Clause (c), h: "A statute or ordinance may be construed as intended to give protection against a particular form of harm to a particular interest. If so, the actor cannot be liable to another for a violation of the enactment unless the harm which the violation causes is that from which it was the purpose of the enactment to protect the other."

ance Acts or the Boiler Inspection Act, the Court has held that a violation of either statute creates liability under FELA if the resulting defect or insufficiency in equipment contributes in fact to the death or injury in suit, without regard to whether the injury flowing from the breach was the injury the statute sought to prevent. Since it appears in this case that the defect or insufficiency of the flotilla's lighting equipment resulting from the violation of 33 U. S. C. § 157 actually caused the seaman's death, this principle governs and compels a result in favor of the petitioner's claim.

In *Louisville & N. R. Co.* v. *Layton,* 243 U. S. 617, a railroad employee on one of five freight cars loaded with coal was thrown to the track and injured when an engine pushed a stock car into the last of the loaded cars and drove the five cars against a standing train. Neither the stock car nor the car which it struck was equipped with automatic couplers, as required by the Federal Safety Appliance Act. Had the cars been so equipped they would have coupled when they came together and the five cars would not have run against the standing train. The stated purpose of the automatic coupler requirement was to avoid "the necessity of men going between the ends of cars," and the railroad contended that this showed that the Congress intended the requirement only for the benefit of employees injured when between cars for the purpose of coupling or uncoupling them. The Court rejected the argument and affirmed a judgment for the plaintiff.

In *Minneapolis & St. L. R. Co.* v. *Gotschall,* 244 U. S. 66, a brakeman walking along the tops of the cars of a moving train was thrown off and killed when the train separated because of the opening of a coupler which resulted in an automatic setting of the emergency brakes and a sudden jerk of the train. This Court sustained a

judgment against the railroad although the injury was not one which the Safety Appliance Act aims to prevent.

In *Davis* v. *Wolfe,* 263 U. S. 239, the conductor of a moving train holding on to the grab iron directly over the sill-step on which he stood fell because the grab iron was loose and defective. It was contended that the grab iron was required to aid employees engaged in coupling or uncoupling cars or a service connected therewith, not to aid in the transportation of employees. The Court rejected this contention and held that the *Layton* and *Gotschall* cases had settled that the employee ". . . can recover if the failure to comply with the requirements of the [Safety Appliance] act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection." *Id.,* at 243.

In *Swinson* v. *Chicago, St. P., M. & O. R. Co.,* 294 U. S. 529, a freight brakeman was releasing a tightly set hand brake at the end of a tank car. Release of the hand brake required the application of considerable force to the brake wheel. The brakeman put his left foot on the running board and his right foot on the grab iron to set himself better to put pressure on the brake wheel. The foot pressure exerted on the grab iron caused the plank to which it was attached to split and one of the bolts securing the grab iron to be pulled through. As a result the brakeman lost his balance and was seriously injured in a fall in front of the moving car. The railroad contended, unsuccessfully, that it was not liable because the grab iron had been used by the brakeman for a purpose for which it was not intended, arguing that the duty to supply grab irons was intended by Congress in order to provide employees with an appliance to grasp with the hands, not to provide a foot brace or support to secure leverage in releasing a hand brake.

In *Coray* v. *Southern Pacific Co.*, 335 U. S. 520, an employee of the railroad, riding a motor-driven track car behind a moving freight train, was killed in a crash of the track car into the freight train which stopped suddenly when its brakes locked because of a defect in its braking system. The Supreme Court of Utah affirmed the state trial court's direction of verdict for the railroad upon the ground that, in so far as brakes were concerned, the object of the Safety Appliance Act was not to protect employees from standing trains, but from moving trains. The Utah Supreme Court also reasoned that the stopping of the train in consequence of the leak in the valve was precisely what, as a safety device, it was designed to do. This Court reversed and said, *id.*, at 524:

> "The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose. The statute declares that railroads shall be responsible for their employees' deaths 'resulting in whole or in part' from defective appliances such as were here maintained. 45 U. S. C. § 51. And to make its purpose crystal clear, Congress has also provided that 'no such employee . . . shall be held to have been guilty of contributory negligence in any case' where a violation of the Safety Appliance Act, such as the one here, 'contributed to the . . . death of such employee.' 45 U. S. C. § 53. Congress has thus for its own reasons imposed extraordinary safety obligations upon railroads and has commanded that if a breach of these obligations contributes in part to an employee's death, the railroad must pay damages. These air-brakes were defective; for this reason alone the train suddenly and unexpectedly stopped; a motor track car following at about the same rate of speed and operated by an employee looking in

another direction crashed into the train; all of these circumstances were inseparably related to one another in time and space. The jury could have found that decedent's death resulted from any or all of the foregoing circumstances."

Finally, in *Urie* v. *Thompson,* 337 U. S. 163, the Court considered a claim based upon an alleged violation of an Interstate Commerce Commission regulation promulgated under the Boiler Inspection Act. The regulation provided: "Locomotives shall be equipped with proper sanding apparatus, which shall be maintained in safe and suitable condition for service, and tested before each trip. Sand pipes must be securely fastened in line with the rails." *Id.,* at 195. The purpose of the requirement was to provide sand for traction. A fireman employed by the railroad for almost thirty years sued to recover damages for silicosis allegedly contracted from the inhalation of silicate dust emitted by allegedly broken or faultily adjusted sanders into the decks and cabs of the many locomotives on which he had worked. The railroad contended that the ICC rule was designed to ensure an adequate auxiliary braking system, not to protect employees against silicosis, and therefore the employee could not recover for an injury not of the kind the ICC rule sought to guard against. The Court rejected the argument as resting on general tort doctrine inapplicable to this case.

The decisive question in this case, then, is whether the principles developed in this line of FELA cases permit recovery for violation of this navigation statute or are limited, as the dissenting opinion would have it, to cases involving the Safety Appliance and Boiler Inspection Acts. Our attention is directed to the provisions of § 4 of the FELA, which makes reference to "any statute enacted for the safety of employees . . . ," and it is urged that this phrase, in some unexplained manner,

creates a special relationship between the FELA and the Safety Appliance and Boiler Inspection Acts. Several answers may be given to this contention.

First, § 4 relates entirely to the defense of assumption of risk, abolishing this defense where the injury was caused by the employer's negligence or by "violation . . . of any statute enacted for the safety of employees . . . ." It is § 1 of the FELA which creates the cause of action and this section, on its face, is barren of any suggestion that injuries caused by violation of *any* statute are to be treated specially. In formulating the rule that violation of the Safety Appliance and Boiler Inspection Acts creates liability for resulting injuries without proof of negligence, the Court relied on judicially evolved principles designed to carry out the general congressional purpose of providing appropriate remedies for injuries incurred by railroad employees. For Congress, in 1908, did not crystallize the application of the Act by enacting specific rules to guide the courts. Rather, by using generalized language, it created only a framework within which the courts were left to evolve, much in the manner of the common law, a system of principles providing compensation for injuries to employees consistent with the changing realities of employment in the railroad industry.

Second, it is argued that the Safety Appliance and Boiler Inspection Acts are special safety statutes and thus may easily be assimilated to the FELA under general common-law principles. But there is no magic in the word "safety." In the cases we have discussed it was regarded as irrelevant that the defects in the appliances did not disable them from performing their intended safety function. For instance, in *Gotschall* the coupling defect parting the cars resulted in the automatic setting of the emergency brakes as a safety measure. In *Coray* the train stopped due to the operation of the very safety mechanism required by the

statute. In *Urie* the defect in the sanders which caused sand to come into the locomotive cabs in no wise impaired the designed safety function of the sanders—to provide sand for traction. We think that the irrelevance of the safety aspect in these cases demonstrates that the basis of liability is a violation of statutory duty without regard to whether the injury flowing from the violation was the injury the statute sought to guard against. It must therefore be concluded that the nature of the Acts violated is not a controlling consideration; the basis of liability is the FELA.[8]

The courts, in developing the FELA with a view to adjusting equitably between the worker and his corporate employer the risks inherent in the railroad industry, have plainly rejected many of the refined distinctions necessary in common-law tort doctrine for the purpose of allocating risks between persons who are more nearly on an equal footing as to financial capacity and ability to avoid the hazards involved. Among the refinements developed by the common law for the purpose of limiting the risk of liability arising from wrongful conduct is the rule that violation of a statutory duty creates liability only when the statute was intended to protect those in the position of the plaintiff from the type of injury in fact incurred. This limiting approach has long been discarded from the FELA. Instead, the theory of the FELA is that where the employer's conduct falls short of the high standard

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[8] The dissenters argue that the Safety Appliance and Boiler Inspection Acts were each prefaced by the statement: "An Act to promote the safety of employees and travelers . . . ." But we are not persuaded that liability under the FELA should depend on the title of the Acts whose violation is alleged. Were we to rely on such indicia we could point out that the statute here involved empowered the Commandant of the Coast Guard to establish rules "as to the lights to be carried . . . as he . . . *may deem necessary for safety* . . . ." 30 Stat. 102, 33 U. S. C. § 157. (Emphasis added.)

required of him by this Act, and his fault, in whole or in part, causes injury, liability ensues. And this result follows whether the fault is a violation of a statutory duty or the more general duty of acting with care, for the employer owes the employee, as much as the duty of acting with care, the duty of complying with his statutory obligations.

We find no difficulty in applying these principles, developed under the FELA, to the present action under the Jones Act, for the latter Act expressly provides for seamen the cause of action—and consequently the entire judicially developed doctrine of liability—granted to railroad workers by the FELA. The deceased seaman here was in a position perfectly analogous to that of the railroad workers allowed recovery in the line of cases we have discussed, and the principles governing those cases clearly should apply here.

The judgment of the Court of Appeals is reversed with direction to remand to the District Court for further proceedings not inconsistent with this opinion.

Reversed.

Memorandum of MR. JUSTICE FRANKFURTER.

Since it has been my general practice for on to a decade to refrain from participating in the substantive disposition of cases arising under the Federal Employers' Liability Act and the Jones Act that have been brought here on writ of certiorari, a word explaining my participation today is in order.

After persistent protest against granting petitions for certiorari to review judgments in the state courts and the United States Courts of Appeals involving application of the Federal Employers' Liability Act, I deemed it necessary to register my conviction on the unjustifiability of granting such petitions by noting that the petitions were

improvidently granted. See my opinion in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 524. All these cases involved evaluation of evidence: evidence on what constitutes "negligence," *i. e.*, the common-law conception of negligence which Congress adopted, subject to qualifications regarding "causation" and withdrawal of common-law defenses, and which remains the statutory requisite for liability. It has become the practice for this Court to review evidence where trial courts have considered it their duty to take cases from juries or to set aside jury verdicts, or where appellate courts have reversed trial court decisions as to what are allowable verdicts by juries. This manifestly ceased to be the function of this Court after Congress, by the Act of September 6, 1916, 39 Stat. 726, abolished appeals to the Court in Federal Employers' Liability Act cases and restricted review of lower court decisions in such cases to the confined scope of our general certiorari jurisdiction.

I am aware of the suggestion that these cases, at least those coming from the Courts of Appeals, involve a constitutional issue—namely, the application of the Seventh Amendment. That, I should suppose, would be equally true of every case in the federal courts in which the claim is made that a case should have been left to the jury, and equally, of course, such claims (in non-FELA cases, at any rate) are here denied, except in the most flagrant instances. This Court has said again and again, in other than FELA cases, that questions of fact—and that is essentially what these negligence cases involve—afford an inadmissible basis for review by this Court. And this for the conclusive reason that deliberate consideration and wise adjudication of the cases that concededly ought to be reviewed here make a demand greater than the resources of time and thought possessed by this Court, no matter how ably constituted, reasonably afford. See

Ex parte Peru, 318 U. S. 578, 602–603 (dissenting opinion).

This case is different in kind from those in which I have felt it my duty to abstain from consideration on the merits. This is a case which involves a serious question of construction of a statute of nationwide importance. Such questions of construction are among the most important issues for final determination by this Court. I therefore reach the merits, and on the merits I join the opinion of MR. JUSTICE HARLAN.

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

I share the view of the Court that under existing law a cause of action for wrongful death does not lie on principles of unseaworthiness, and that therefore respondent's liability for the death caused by this unfortunate accident depends entirely on the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, which incorporates the provisions of the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. §§ 51–60, and thereby reflects the principles of negligence upon which the FELA is explicitly based.

The District Court granted exoneration to respondent upon findings that the accident was not attributable to negligence of any kind on its part, and in particular that respondent was not negligent in carrying the kerosene signal lantern, which ignited the fumes from the petroleum products on the surface of the river, at a height of three feet in a part of the river which had never been considered a danger area. Although the District Court found that the accident was traceable in fact to respondent's violation of a Coast Guard regulation, 33 CFR § 80.16 (h), which required a white light to be carried

at a minimum height of eight feet above the water,[1] the court held that this violation did not of itself give rise to liability in negligence because the sole purpose of the statute authorizing the regulation, 30 Stat. 102, as amended, 33 U. S. C. § 157, was to guard against collisions and not to prevent the type of accident which here resulted.

This holding, as the Court seems to recognize, was in accord with the familiar principle in the common law of negligence that injuries resulting from violations of a statutory duty do not give rise to liability unless of the kind the statute was designed to prevent. Indeed that principle, which is but an aspect of the general rule of negligence law that injuries in order to be actionable must be within the risk of harm which a defendant's conduct has created, see Seavey, Principles of Torts, 56 Harv. L. Rev. 72, 90–92 (1942), was established as long ago as 1874 by a leading English case, *Gorris* v. *Scott*, L. R. 9 Ex. 125, and has been followed in this country almost without exception. Restatement, Torts, § 286; Prosser, Torts (2d ed. 1955), § 34; Lowndes, Civil Liability Created by Criminal Legislation, 16 Minn. L. Rev. 361, 372–377 (1932); cf. *The Eugene F. Moran*, 212 U. S. 466, 476 (under admiralty law).

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[1] This finding must rest on the assumption of the District Court that the regulation forbade respondent to carry any signal light at a height of less than eight feet above the water. However, it is questionable whether the regulation had the effect of proscribing a light at three feet, as well as requiring a light at a minimum height of eight feet. That is, the violation of the regulation may have consisted solely in the *absence* of a light eight feet above the water, not in the *presence* of a light three feet above the water, in which case the accident could not be attributed to violation of the regulation. For the purpose of this opinion, I shall assume, as the District Court necessarily concluded, that the violation of respondent consisted in carrying the light at three feet and was thus the factual cause of the accident.

The Court neither casts doubt on the District Court's finding that respondent was not negligent in carrying the tug's lantern at three feet above the water surface nor disputes that the sole purpose of the Coast Guard regulation was to guard against the risk of collision, but it nevertheless decides that violation of the regulation in and of itself rendered the respondent liable for *all* injuries flowing from it. This holding is said to follow from the decisions of this Court in a series of FELA cases based on violations of the Safety Appliance Act, 27 Stat. 531, as amended, 45 U. S. C. §§ 1–16, and the Boiler Inspection Act, 36 Stat. 913, as amended, 45 U. S. C. §§ 22–34. These decisions, as the Court here properly states, have created under the FELA an absolute liability—that is, a liability "without regard to negligence"—for injuries resulting from violations of the other Acts. From this, the Court concludes that there is no reason not to extend this absolute liability to cases based on the violation of a statutory duty which are brought under the Jones Act.

This conclusion I cannot share. A reading of the cases relied upon by the Court demonstrates beyond dispute that the reasons underlying those decisions have no application in the context of this Coast Guard regulation and the Jones Act. It follows that liability can be impressed on respondent only because of negligence, the theory upon which the Jones Act is founded.

In the course of its development of an absolute liability under the FELA for injuries traceable to violations of the Safety Appliance Act or the Boiler Inspection Act, the Court has faced two distinct problems. First, was it necessary for the plaintiff to show that the violation of either of these safety statutes was due to negligence? The answer has uniformly been "no." *St. Louis, Iron Mountain & So. R. Co.* v. *Taylor,* 210 U. S. 281; *San Antonio &*

A. P. R. Co. v. *Wagner,* 241 U. S. 476; *Minneapolis & St. L. R. Co.* v. *Gotschall,* 244 U. S. 66; *Southern R. Co.* v. *Lunsford,* 297 U. S. 398; *Lilly* v. *Grand Trunk R. Co.,* 317 U. S. 481. Second, was the defendant's liability for the injuries suffered limited to those within the character of the risks which these statutes were designed to eliminate? Except for *St. Louis & S. F. R. Co.* v. *Conarty,* 238 U. S. 243, which stands alone and has never since been followed, the answer here has also been "no." *Louisville & N. R. Co.* v. *Layton,* 243 U. S. 617; *Davis* v. *Wolfe,* 263 U. S. 239; *Swinson* v. *Chicago, St. P., M. & O. R. Co.,* 294 U. S. 529; *Brady* v. *Terminal Railroad Assn.,* 303 U. S. 10.

The rationale for these earlier cases is not entirely clear, but after a good deal of uncertainty it finally became established in 1948 and 1949 that railway employees suffering injuries in consequence of a violation of safety regulations found in or promulgated under either the Safety Appliance Act or the Boiler Inspection Act could maintain an action under the FELA *without reference* to the law of negligence. *Urie* v. *Thompson,* 337 U. S. 163; *O'Donnell* v. *Elgin, J. & E. R. Co.,* 338 U. S. 384; *Carter* v. *Atlanta & St. A. B. R. Co.,* 338 U. S. 430. As a result of these cases, the scope of § 1 of the FELA, 35 Stat. 65, as amended, 45 U. S. C. § 51, has been enlarged by making compensable not only injuries "resulting in whole or in part from the negligence" of the carrier, but also those resulting from violation of the two regulatory Acts, so that in effect these Acts give rise, through the medium of the FELA, to a "non-negligence" (*O'Donnell, supra,* at 391) cause of action. Referring to the nature of that kind of action this Court said in *Carter, supra* (at p. 434):

> "Sometimes that violation [of the Safety Appliance Act] is described as 'negligence per se' . . . ; but we

> have made clear in the *O'Donnell* case that that term is a confusing label for what is simply a violation of an absolute duty.
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> "Once the violation is established, only causal relation is in issue. And Congress has directed liability if the injury resulted 'in whole or in part' from defendant's negligence *or its violation of the Safety Appliance Act.*" (Italics added.)

These cases then certainly do not establish any broad rule under the FELA that the term *"negligence"* as used in that Act is not subject to the limiting doctrine of *Gorris* v. *Scott, supra,* which the District Court applied. Rather, they are based on a theory of liability wholly divorced from negligence. And in fact, the Court today invokes these decisions to support its conclusion that a *"non-negligence"* action based on violation of this Coast Guard regulation lies under the Jones Act. Its reasons for this conclusion are that the Jones Act "incorporates the provisions of the FELA" and "expressly provides for seamen the cause of action—and consequently the entire judicially developed doctrine of liability—granted to railroad workers by the FELA." The Court thus reads these decisions to establish a doctrine under the FELA that injuries following *any* violation of *any* statute, not simply the Safety Appliance and Boiler Inspection Acts, are actionable without any showing of negligence, and it is this doctrine which, the Court argues, the Jones Act absorbs.

So unjustifiably broad a view of the doctrine this Court is said to have established disregards the basis upon which these earlier decisions proceed. In brief, they concentrate and explicitly rest upon the peculiar relationship between the Safety Appliance and the Boiler Inspection Acts, on the one hand, and the FELA, on the other. In view of this relationship, the Court, recognizing that

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neither of these safety Acts gives rise to a private cause of action of its own force, see, *e. g., Urie* v. *Thompson, supra,* at p. 188, has read the FELA to provide the private remedy to enforce the absolute liability which the Court considered the other Acts to establish. The Court's opinion here makes no effort to show either that the statute authorizing the Coast Guard regulation was intended to give rise to an absolute liability for injuries resulting from its violation or that the Jones Act, a statute founded on negligence, was intended to be the medium of enforcement of such a liability.

In the cases involving the Safety Appliance and the Boiler Inspection Acts, the Court has repeatedly emphasized that the manifest purpose of Congress was to foster through these particular Acts the safety of employees and to make employees secure in their jobs, a purpose partially evidenced by statements prefacing each of these Acts as they were originally enacted: "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to . . ." follow the rules of each Act. 27 Stat. 531; 36 Stat. 913; *Illinois Central R. Co.* v. *Williams,* 242 U. S. 462, 466–467; *Urie* v. *Thompson, supra,* at 190–191. In keeping with this statement of purpose, two sections of the Safety Appliance Act expressly refer to the civil liability of employers to injured employees by abrogating the common-law defense of assumption of risk and by preserving such civil liability over a particular exception to the general liability for fines payable to the United States which is imposed on carriers for violation of the provisions of the Act. 27 Stat. 532, 45 U. S. C. § 7; 36 Stat. 299, 45 U. S. C. § 13.

Paralleling the provision of the Safety Appliance Act referring to assumption of risk is § 4 of the FELA, 35 Stat. 66, as amended, 45 U. S. C. § 54, which abolishes

the defense of assumption of risk not only with respect to actions grounded on negligence but also "in any case where the violation . . . of any statute enacted for the safety of employees contributed to the injury or death of" an employee. This quoted clause is included also in § 3 of the Act, 35 Stat. 66, 45 U. S. C. § 53, which substitutes for the absolute common-law defense of contributory negligence what is in effect a rule of comparative negligence, but bars this defense completely in actions based on the violation of such a statute. The phrase "any statute enacted for the safety of employees" of course refers to the Safety Appliance Act, *Moore* v. *Chesapeake & Ohio R. Co.*, 291 U. S. 205, 210, and to the Boiler Inspection Act, *Urie* v. *Thompson, supra,* at 188–189. The use of this phrase in juxtaposition with the term "negligence" in these sections confirms the congressional purpose to accord special treatment to employees injured by violations of these Acts.

These express indications of congressional intent to impose strict liability for injuries traceable to violations of these statutes underlay the holdings on which the Court relies. The intimate relationship between the Safety Appliance Act and the FELA was summed up by the Court in *San Antonio & A. P. R. Co.* v. *Wagner, supra,* in the following language (p. 484):

> "If [the Safety Appliance Act] is violated, the question of negligence in the general sense of want of care is immaterial. . . . [T]he two statutes [Safety Appliance Act and the FELA] are *in pari materia,* and where the [FELA] refers to 'any defect or insufficiency, *due to its negligence,* in its cars, engines, appliances,' etc., it clearly is the legislative intent to treat a violation of the Safety Appliance Act as 'negligence' . . . ." (Italics in original.)

And in *Urie* v. *Thompson, supra,* the Court concluded (p. 189):

> "In this view the Safety Appliance Acts, together with the Boiler Inspection Act, are substantively if not in form amendments to the [FELA]. . . . [They] cannot be regarded as statutes wholly separate from and independent of the [FELA]. They are rather supplemental to it, having the purpose and effect of facilitating employee recovery . . . ."

Finally, as noted above, the Court in *Carter* v. *Atlanta & St. A. B. R. Co., supra,* at 434, observed that "Congress has directed liability" under the FELA for injuries resulting from negligence *or* from violation of these Acts.

In short, I think it is evident that this Court's past interpretation of the FELA to provide a cause of action based on absolute liability for injuries traceable to violations of these two *particular* safety statutes has rested entirely on its view of congressional intent, and that no general rule of absolute liability without regard to negligence for injuries resulting from violation of *any* statute can fairly be said to emerge from these decisions.

Despite the explanations in the past cases for creation of this absolute liability, the Court now asserts that "the nature of the Acts violated is not a controlling consideration." Indeed, it does not even appear to be a pertinent consideration, for the opinion makes no effort to show that a similar congressional intent to create absolute liability in favor of seamen, or even to afford additional rights to seamen, can be discerned either in the terms of the statute authorizing this Coast Guard regulation or in its relationship with the Jones Act. It is abundantly clear from the face of the regulation, and its setting, that its purpose was simply to prevent collisions, rather than to guard against such unforeseeable occurrences as the

explosion in this case.[2] This is confirmed by the tenor of the section of the statute under which the regulation issued:

> "The Commandant of the United States Coast Guard shall establish such rules to be observed on the waters mentioned in the preceding section by steam vessels in passing each other and as to the lights to be carried on such waters by ferryboats and by vessels and craft of all types when in tow of steam vessels . . . as he from time to time may deem necessary for safety . . . ." [3]

Moreover, although another section of the same statute indicates that violation of this regulation does give rise to an absolute liability on the part of the *master* or *mate*

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[2] The particular regulation violated by respondent, 33 CFR § 80.16 (h), appears under Subchapter D of 33 CFR, which is entitled: "Navigation Requirements For Certain Inland Waters." Section 80.16 itself bears the caption: "Lights for barges, canal boats, scows and other nondescript vessels on certain inland waters on the Atlantic and Pacific Coasts." Other sections under Subchapter D regulate fog signals (§ 80.12), speed in fog (§ 80.13), and navigation near bends and curves (§ 80.5). Section 80.16 (h) itself states that a light shall be carried at a minimum height of eight feet above the surface of the water ". . . and shall be so placed as to show an unbroken light all around the horizon, and shall be of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least 5 miles."

[3] This section, 30 Stat. 102, as amended, 33 U. S. C. § 157, appears under Chapter 3 of Title 33, which bears the title: "Navigation Rules for Harbors, Rivers, And Inland Waters Generally." Other sections under Chapter 3 refer to sound signals (33 U. S. C. § 191), speed in fog (33 U. S. C. § 192), and ascertainment of risk of collision (33 U. S. C. § 201). Section 157 was originally enacted as part of the Act of June 7, 1897, and the clear purpose of that Act was simply to effect a codification of all rules governing navigation on inland waters so that they would conform in the highest possible degree to prevailing international rules for the prevention of collisions at sea. H. R. Doc. No. 42, 55th Cong., 1st Sess., p. 1.

of the tug for damages suffered by *passengers,* that section makes no reference to *seamen's* remedies and provides generally that liability of the *vessel* or *owner* is not to be affected by the statute.[4] Finally, there are no cross provisions between this statute and the sections of the FELA incorporated into the Jones Act comparable to those found between the FELA, on the one hand, and the Safety Appliance and Boiler Inspection Acts, on the other. In short, unlike the situation as to those statutes, one can look in vain for evidence of a congressional purpose to supplement the remedies for injuries due to negli-

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[4] 30 Stat. 102, as amended, 33 U. S. C. § 158, was also enacted as part of the Act of June 7, 1897, note 3, *supra.* It provides in part that: "Every pilot, engineer, mate, or master of any steam vessel . . . and every master or mate of any barge or canal boat, who neglects or refuses to observe the provisions of . . . the regulations established in pursuance of [§ 157, text at note 3, *supra*] . . . shall be liable to a penalty of one hundred dollars, and for all damages sustained by any passenger in his person or baggage by such neglect or refusal: *Provided,* That nothing herein shall relieve any vessel, owner, or corporation from any liability incurred by reason of such neglect or refusal." As originally drafted, preceding its enactment in 1897, present § 158 read substantially as it does now, except that it did not contain the last *"Provided"* clause. H. R. Doc. No. 42, 55th Cong., 1st Sess., p. 9. In the House debates concerning the Act of 1897, discussion was directed in part to this section and the question was raised whether its effect might be to impose liability for injury to passengers exclusively upon *officers* of the vessels, who might be financially irresponsible. 30 Cong. Rec. 1395. To end these doubts, the section was amended prior to its enactment by addition of the *"Provided"* clause. Representative Payne stated that the amendment's purpose was to make clear that liability of the *vessel* or *owner of the vessel* for damages would remain entirely unaffected by the section. 30 Cong. Rec. 1465. In other words, the Act of 1897 was not intended either to define to any extent liability of a vessel or its owner or to advance the remedies or broaden the rights of seamen, but simply afforded *passengers* remedies against officers *personally* liable because of breach of regulations.

gence available to seamen under the Jones Act by a cause of action based on absolute liability for damages suffered in consequence of a violation of this Coast Guard regulation. In these circumstances, the argument that such a cause of action arises because the Jones Act "expressly provides for seamen the cause of action . . . granted to railroad workers by the FELA" seems to me an empty one.

The premise of the Court that the FELA was intended to leave to federal courts the duty of fashioning remedies "to meet . . . changing concepts of industry's duty toward its workers" underlies today's holding. In carrying out this duty, the courts, as shown by this decision, are not to consider themselves confined by doctrines deeply ingrained in the common law of negligence upon which the FELA was predicated but instead are to be free to develop other theories of liability. Indeed, not content with its particular conclusion that violation of a statutory duty leads to absolute liability under the FELA and the Jones Act, the Court goes on to say that "the theory of the FELA is that where the employer's conduct falls short of the high standard required of him by this Act, and his fault, in whole or in part, causes injury, liability ensues . . . whether the fault is a violation of a statutory duty or the more general duty of acting with care . . . ." Thus the Court in effect reads out of the FELA and the Jones Act the common-law concepts of foreseeability and risk of harm which lie at the very core of negligence liability, and treats these statutes as making employers in this area virtual insurers of the safety of their employees.

Whatever may be one's views of the adequacy of "negligence" liability as the means of dealing with occupational hazards in these fields, Congress has not legis-

lated in terms of absolute liability. "The basis of liability under the Act is and remains negligence." *Wilkerson* v. *McCarthy,* 336 U. S. 53, 69 (concurring opinion of DOUGLAS, J.). And, except as expressly modified by Congress, the term "negligence" as it appears in § 1 of the FELA has always been taken to embody common-law concepts. Thus in *Urie* v. *Thompson, supra,* one of the principal cases on which the Court here relies, it was said (at 174, 182):

> "The section [§ 1 of the FELA] does not define negligence, leaving that question to be determined . . . 'by the common law principles as established and applied in the federal courts.' . . .
>
> "We recognize . . . that the Federal Employers' Liability Act is founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms." [5]

I cannot agree that Congress intended the federal courts to roam at large in devising new bases of liability to replace the liability for negligence which these Acts imposed on employers.

I would affirm.

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[5] The qualifications of course refer to those provisions of the FELA not applicable to the facts of this case which modify or abrogate the common-law defenses of contributory negligence, § 3, 35 Stat. 66, 45 U. S. C. § 53, and assumption of risk, § 4, 35 Stat. 66, as amended, 45 U. S. C. § 54.

Syllabus.

NATIONAL LABOR RELATIONS BOARD *v.* DISTRICT 50, UNITED MINE WORKERS OF AMERICA, ET AL.

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

No. 64. Argued January 6, 1958.—Decided February 3, 1958.

The National Labor Relations Board found that an employer had committed an unfair labor practice by assisting a union to defeat the efforts of a rival union to organize the employer's workers, but that the assisted union was not dominated by the employer. It ordered the employer to post certain notices and to withdraw and withhold recognition from the assisted union until it received the Board's certification as the exclusive bargaining representative of the employees. The assisted union was not eligible for such certification, because it was not in compliance with § 9 (f), (g) and (h) of the National Labor Relations Act, as amended. The Court of Appeals modified the Board's order so that the employer would be free to recognize the assisted union not only when certified by the Board but, alternatively, when it "shall have been freely chosen as [their representative] by a majority of the employees after all effects of unfair labor practices have been eliminated." It also struck from the Board's notice requirement certain references to the rival union. *Held:*

1. In the circumstances of this case, the Board's order is not appropriate or adapted to the situation calling for redress, and it constitutes an abuse of the Board's discretionary power under § 10 (c). Pp. 458–463.

(a) The certification requirement, in these circumstances, has the effect of disestablishment and thus defeats the statutory rights of the employees, because this assisted but undominated union can never obtain certification so long as it remains out of compliance with § 9 (f), (g) and (h). Pp. 460–461.

(b) The Board is not powerless to effect a remedy in this case which would properly reconcile the objectives of eliminating improper employer interference and preserving the employees' full choice of a bargaining representative, since § 9 (f), (g) and (h)

are not a barrier to conduct by the Board of an election not followed by certification, or to the making of an arrangement with another appropriate agency, state or federal, for the conduct of an election under conditions prescribed by the Board. Pp. 461–462.

(c) To dispense with a certification in the case of a noncomplying assisted union, while requiring a certification in the case of a complying union, would not negative the policy and intent of § 9 (f), (g) and (h), since Congress did not make the filing required by those subsections compulsory or a condition precedent to the right of a noncomplying union to be recognized as the exclusive representative of the employees. Pp. 462–463.

2. The modifications of the Board's cease-and-desist order made by the Court of Appeals go beyond permissible limits of judicial review under § 10 (f) and cannot be sustained. Pp. 463–464.

(a) The Court's alternative to Board certification dispenses with the necessity of an election and can be interpreted to leave to the offending employer and the assisted union the decision when the effect of the unfair labor practice has been eliminated and the employees have regained their freedom of action. P. 463.

(b) The Court's rewriting of the notice to be posted was improper insofar as it deleted references to the rival union, because no objection to the notice in this respect was ever raised by the parties before the Board. Pp. 463–464.

3. The orderly administration of the Act and due regard for the respective functions of the Board and the reviewing courts require that the judgment of the Court of Appeals be vacated with instructions to remand the case to the Board for further proceedings consistent with this opinion. P. 464.

99 U. S. App. D. C. 104, 237 F. 2d 585, judgment vacated with instructions to remand the case to the Board.

Dominick L. Manoli argued the cause for petitioner. With him on the brief were *Solicitor General Rankin, Jerome D. Fenton, Stephen Leonard* and *Alice Andrews.*

Crampton Harris argued the cause for District 50, United Mine Workers of America, respondent. With him on the brief were *Yelverton Cowherd* and *Alfred D. Treherne.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The National Labor Relations Board found that Bowman Transportation, Inc., committed unfair labor practices by assisting District 50, United Mine Workers, as a means of defeating the efforts of a Teamsters Local to organize its workers.[1] The cease-and-desist order which issued was in the standard form directing the company to withdraw and withhold recognition from District 50 unless and until it received the Board's certification as the exclusive representative of the employees. 112 N. L. R. B. 387.[2] But the United Mine Workers is not in compliance with § 9 (f), (g), and (h), added by the Taft-Hartley amendments to the National Labor Relations Act, 61 Stat. 143, 29 U. S. C. § 159 (f), (g), (h).[3]

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[1] The Teamsters Local was International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local No. 612. The Board concurred in the Trial Examiner's findings that when the Teamsters Local was picketing the premises the company rendered illegal support and assistance to District 50 by negotiating the details of a contract with officials of that union before a single employee had actually authorized it as a representative, by showing the draft contract to the drivers at a meeting convened by and presided over by the company president, who assured them that if necessary he would advance the money for dues, after which, and within less than three hours, the drivers signed District 50 authorization cards, established a local which held its first meeting, at the president's suggestion, on company premises, and concluded a contract with the company.

[2] This remedy was apparently first adopted in *Lenox Shoe Co.*, 4 N. L. R. B. 372, 388, decided December 3, 1937.

[3] Subsection (f) provides that no investigation shall be made by the Board concerning the representation of employees raised by a labor organization, and no complaint of unfair labor practices shall be issued pursuant to a charge made by a labor organization, unless the organization and any national or international labor organization of which it is an affiliate or constituent shall have filed with the

It is therefore not eligible for a Board certification and in consequence the Bowman employees may never have an opportunity to select District 50 as their representative. The Board denied the United Mine Workers' application to delete the requirement for a Board certification. 113 N. L. R. B. 786. The question arises whether the requirement for a Board certification in these circumstances exceeds the Board's discretionary power under § 10 (c), 29 U. S. C. § 160 (c), to fashion remedies to dissipate the effects of an employer's unfair labor practices in assisting a union.

The union petitioned the Court of Appeals for the District of Columbia under § 10 (f), 29 U. S. C. § 160 (f), which authorizes a Court of Appeals to "enter a decree enforcing, modifying, and enforcing as so modified,

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Secretary of Labor copies of the union's constitution and by-laws and a report showing, among other things, the names of officers and agents whose aggregate compensation and allowance for the preceding year exceeded $5,000, the amounts paid to each, the manner in which such officers and agents were selected, the amount of initiation fees and dues charged to union members, the union's procedures followed with respect to qualification for membership, election as officers and stewards, etc. The subsection also requires the filing with the Secretary of a report showing union receipts, disbursements, and assets and liabilities. Subsection (g) requires, among other things, the filing annually with the Secretary of reports bringing up to date the information required to be supplied under subsection (f). Subsection (h) provides that no investigation of a question of representation raised by a labor organization shall be made and no complaint of unfair labor practices pursuant to a charge made by a labor organization shall issue unless there is on file with the Board an affidavit executed within the preceding year by each officer of the organization and the officers of any national or international labor organization of which it is an affiliate or constituent 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 or supporter of, any organization that believes in or teaches the overthrow of the United States Government by force or by illegal or unconstitutional methods.

or setting aside in whole or in part the order of the Board . . . ." The Court of Appeals, 99 U. S. App. D. C. 104, 237 F. 2d 585, did not delete the provisions for Board certification but modified the order so that the company would be free to recognize District 50 not only when certified by the Board but, alternatively, when District 50 "shall have been freely chosen as such [representative] by a majority of the employees after all effects of unfair labor practices have been eliminated." 99 U. S. App. D. C., at 107, 237 F. 2d, at 588.

The Board's order also required the company to post for at least 60 days a notice prepared by the Board. In the notice the company would state to its employees that it would not discourage membership in, or interrogate the employees concerning their activities on behalf of, ". . . Teamsters . . . Local No. 612, or any other labor organization . . . ," and, further, that the company would ". . . withhold all recognition from District 50 . . . unless and until said organization shall have been certified as such representative by the . . . Board." 112 N. L. R. B. 387, 391. The parties raised no objection to the notice either before the Board or in the Court of Appeals. However, the Court of Appeals on its own motion struck from the notice the references to the Teamsters Local, stating its view that "references to that union in the Board's form of notice are susceptible of being construed as" indicating that the Board "prefers Teamsters." 99 U. S. App. D. C., at 108, 237 F. 2d, at 589. The court also added, to the paragraph in the notice stating that the company would withhold recognition from District 50 until the union received a Board certification, the alternative "or [until District 50] shall have been selected as such [representative] by a majority of our employees at a time at least 60 days later than the date of this notice." 99 U. S. App. D. C., at 109, 237 F. 2d, at 590.

Because important questions of the administration of the Act were raised, we granted certiorari on the Board's petition. 352 U. S. 999.

The Board's order was fashioned under § 10 (c), 29 U. S. C. § 160 (c), which vests remedial power in the Board to redress unfair labor practices by "an order requiring such person [committing the unfair labor practice] to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this Act . . . ." The Board's discretionary authority to fashion remedies to purge unfair labor practices necessarily has a broad reach. *Labor Board* v. *Link-Belt Co.*, 311 U. S. 584, 600. But the power is not limitless; it is contained by the requirement that the remedy shall be "appropriate," *Labor Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, and shall "be adapted to the situation which calls for redress," *Labor Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 348. The Board may not apply "a remedy it has worked out on the basis of its experience, without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act." *Labor Board* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 349. The Board's provision for a Board certification must therefore be examined in the light of its appropriateness in the circumstances of this case.

In formulating remedies for unfair labor practices involving interference by employers with their employees' freedom of choice of a representative, the Board has always distinguished the remedy appropriate in the case of a union *dominated* by an employer from the remedy appropriate in the case of a union *assisted but undominated* by an employer. In the case of a *dominated* union the Board usually orders the complete disestablishment of the union so that it can never be certified by the Board: This Court has sustained such orders. *Labor Board* v.

Pennsylvania Greyhound Lines, Inc., 303 U. S. 261; *Labor Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241. On the other hand, in the case of the *assisted but undominated* union, the Board has consistently directed the employer to withhold recognition from the assisted union until the union receives a Board certification. The basis for the distinction is that, in the Board's judgment, the free choice by employees of an agent capable of acting as their true representative, in the case of a *dominated* union, is improbable under any circumstances, while the free choice of an *assisted but undominated* union, capable of acting as their true representative, is a reasonable possibility after the effects of the employer's unfair labor practices have been dissipated. See *Labor Board* v. *Wemyss*, 212 F. 2d 465, 471, 472.

The reason for the Board's certification requirement is to invoke the normal electoral processes by which a free choice of representatives is assured. The Board's opinion in this case states that

> ". . . the Board has, since its earliest days, recognized that the policies of the Act could best be effectuated in cases involving violations of Section 8 (a)(2) by directing the offending employers to withhold the preferred treatment afforded to the labor organizations involved until the effect of the unfair labor practices had been dissipated and the majority status of such unions had been established in an atmosphere free of restraint and coercion." 113 N. L. R. B. 786, 787.

Again,

> ". . . in the case of an assisted but undominated labor organization, the Board has required the offending employer to withdraw and withhold recognition from the assisted union until it was certified, thus enabling the Board to assure the affected

> employees that their statutory right to freely choose a bargaining representative shall be preserved by conducting an election under conditions which will render such a choice possible." 113 N. L. R. B. 786, 788.

It is thus clear that the most significant element of the remedy is not the formality of certification but an election, after a lapse of time and under proper safeguards, by which employees in "the privacy and independence of the voting booth," *Brooks* v. *Labor Board,* 348 U. S. 96, 99–100, may freely register their choice whether or not they desire to be represented by the assisted union.

In this case of a noncomplying union, however, requiring the formality of Board certification in addition to an election has the same effect as disestablishment. This is because District 50 can never be certified by the Board so long as the United Mine Workers remain out of compliance with § 9 (f), (g), and (h). But disestablishment has been applied by the Board and upheld by the courts only in the case of a dominated union, where a free choice of a truly representative union is improbable under any circumstances, and therefore where an abridgment of the statutory right of employees does not result. District 50 was found by the Board to be an assisted but not a dominated union, so that a free choice of District 50 by Bowman's employees is a reasonable possibility. Therefore the certification requirement here misapplies the Board's own policy by actually defeating the statutory rights of Bowman's employees.

The Board reasoned that since this Court has sustained its power under § 10 (c) "to dissipate the effect of an unfair labor practice by *completely removing* a dominated union . . . , the Board manifestly has the statutory power to impose the lesser sanction of certification in the case of an assisted union . . . ." 113 N. L. R. B. 786, 788. Even if we grant the premise that the Board may

remove a dominated union, it does not follow that the Board may remove this merely assisted union. Certification under the circumstances of this case is not the "lesser sanction" but is substantially the same as removal. Unlike an assisted union, a dominated union is deemed inherently incapable of ever fairly representing its members. *Labor Board* v. *Pennsylvania Greyhound Lines, Inc., supra,* at 270, 271; *Labor Board* v. *Newport News Shipbuilding & Dry Dock Co., supra,* at 250.

We do not think, however, that the Board lacks authority to effect a remedy in this case which would properly reconcile the objectives of eliminating improper employer interference and preserving the employees' full choice of a bargaining representative. The prohibitions of § 9 (f) and (h) against investigation of representatives, the requirement of § 9 (c) of Board-conducted elections connected with such investigations, and the prohibition of § 9 (g) against certification of a noncomplying union, are concerned not with remedial orders under § 10 (c) but with questions of representation and unfair labor practices "raised by a labor organization." The single objective of § 9 (f), (g), and (h) was "to stop the use of the Labor Board" by noncomplying unions. *Labor Board* v. *Dant,* 344 U. S. 375, 385. These subsections contain nothing compelling the Board to insist upon a Board certification and thus to deny the employees the right at an election held under proper safeguards to select the noncomplying assisted union for their representative. Nothing in the subsections, for example, is a barrier to the conduct by the Board of an election not followed by a certification, or to the making of an arrangement with another appropriate agency, state or federal, for the conduct of the election under conditions prescribed by the Board. Clearly an election under such circumstances will also achieve the Board's prime objective in these cases, *viz.,* to "demonstrate that . . . [the assisted union's] right to

be the exclusive representative of the employees involved has been established in an atmosphere free of restraint and coercion." 113 N. L. R. B. 786, 788. Indeed, in its brief, the Board impliedly admits the irrelevance of the formality of certification to the effectiveness of the fashioned remedy, stating that ". . . if that view [of certification] is rejected, the Board may perhaps devise other measures which will enable it to make certain that the employees' choice of bargaining representative is in fact made in an atmosphere free of restraint and coercion . . . ." In a footnote the Board suggests such an alternative: ". . . [T]he Board might conduct an election among the employees and certify the union if it wins the election provided it is in compliance but otherwise certify only the arithmetical results. . . ."

The Board's opinion also states that to dispense with a certification in the case of a noncomplying assisted union, while requiring a certification in the case of a complying union, "would negative the policy and intent of Section 9 (f), (g), and (h) of the Act." 113 N. L. R. B. 786, 790. But this misinterprets the scope of those provisions. "Subsections (f), (g) and (h) of § 9 merely describe advantages that may be gained by compliance with their conditions. The very specificity of the advantages to be gained and the express provision for the loss of these advantages imply that no consequences other than those so listed shall result from noncompliance." *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 73. Congress did not in § 9 (f), (g), and (h) make the filing required by those subsections compulsory or a condition precedent to the right of a noncomplying union to be recognized as the exclusive representative of the employees. *United Mine Workers* v. *Arkansas Oak Flooring Co., supra.* Similarly, the Board cannot, through the requirement of a Board certification, make noncompliance a reason for denying the employees the right to choose the

assisted union at an election which can readily serve its designed purpose without such certification. Finally, we do not believe that the issuance of an order in the case of a noncomplying assisted union different from the form of order consistently used in cases of complying assisted unions extends "preferred treatment" to the noncomplying union. What it does in fact is to give the noncomplying union substantially the same treatment as a complying union instead of subjecting it to disabilities not intended by Congress as a result of noncompliance. The Board's order is therefore not appropriate or adapted to the situation calling for redress and constitutes an abuse of the Board's discretionary power.

However, the modifications of the cease-and-desist order made by the Court of Appeals go beyond permissible limits of judicial review under § 10 (f) and cannot be sustained. The Court's alternative to Board certification dispenses with the necessity of an election and can be interpreted, as the Board argues, to leave to the offending employer and the assisted union the decision when the effect of the unfair labor practice has been eliminated and the employees have regained their freedom of action. Nothing said in the *Arkansas Flooring* case, upon which the Court of Appeals relied, justifies the Court of Appeals in going so far as to dispense with an election under proper safeguards. This Court has long recognized the propriety of an agency's choice of an election as the proper means to assure dissipation of the unwholesome effects of the employer's unlawful assistance to a union. See *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548. The Board's discretion here was exceeded only in the inflexibility of the requirement for a Board certification notwithstanding its inappropriateness in the circumstances of this case.

The rewriting of the notice to be posted was improper insofar as it deleted reference to the Teamsters Union,

because no objection to the notice in this respect was ever raised by the parties before the Board. *Labor Board* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 350; *Labor Board* v. *Cheney California Lumber Co.*, 327 U. S. 385, 388–389; cf. *Federal Power Comm'n* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 497. Section 10 (e) of the Act provides: "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the . . . [Court of Appeals], unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." No extraordinary circumstances were shown here.

The orderly administration of the Act and due regard for the respective functions of the Board and reviewing courts require that we vacate the judgment of the Court of Appeals with instructions to remand the case to the Board for further proceedings consistent with this opinion.

It is so ordered.

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

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

No. 55. Argued January 30, 1958.—Decided February 3, 1958.

98 U. S. App. D. C. 366, 235 F. 2d 863, reversed insofar as it set aside the Board's order.

Howard C. Westwood argued the cause and filed a brief for petitioner.

O. D. Ozment argued the cause for the Civil Aeronautics Board, respondent. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman, Franklin M. Stone* and *Robert L. Toomey.*

No appearance for North American Airlines, Inc., respondent.

PER CURIAM.

The judgment is reversed insofar as it set aside the Board's order. *American Airlines, Inc.,* v. *North American Airlines, Inc.,* 351 U. S. 79.

MR. JUSTICE DOUGLAS dissents.

UNITED STATES ET AL. *v.* CITY OF DETROIT.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 26. Argued November 14, 1957.—Decided March 3, 1958.

Under Michigan Public Act 189 of 1953, the City of Detroit assessed against a private corporation engaged in business for profit taxes based upon the value of real property owned by the United States and leased to the corporation under a lease permitting the corporation to deduct from the agreed rental any such taxes paid by it but reserving to the Government the right to contest the validity of such taxes. In effect, the Act provides that, when tax-exempt real property is used by a private party in a business conducted for profit, such private party is subject to taxation in the same amount and to the same extent as though he owned the property; that such taxes shall be assessed and collected in the same manner as taxes assessed to the owners of real property, except that they shall not become a lien against the property but shall be a debt due from the user and collectible by direct action; and that the Act shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which otherwise might lawfully be assessed. *Held:* The Act, on its face and as here applied, does not invade the constitutional immunity of federal property from taxation by the States or discriminate against the Government or those with whom it deals. Pp. 467–475.

(a) The Government's constitutional immunity does not shield private parties from state taxes imposed on them merely because part or all of the financial burden of the taxes eventually falls on the Government. Pp. 469, 472–473.

(b) The tax here involved is not levied on the Government or its property but on the private lessee who uses the property in a business conducted for profit. P. 469.

(c) The fact that the tax is measured by the value of the property used does not justify treating it as a mere contrivance to tax the property itself. Pp. 470–471.

(d) *United States* v. *Allegheny County*, 322 U. S. 174, distinguished. Pp. 471–472.

(e) Neither on its face nor as here applied, does this tax operate so as to discriminate against the Federal Government or those with whom it deals. Pp. 473–474.

(f) A different result is not required by the fact that the Act creates an exception to the tax on users where payments in lieu of taxes are made by the United States "in amounts equivalent to taxes which might otherwise be lawfully assessed." P. 474, n. 6.

(g) To hold that the tax imposed here on private business violates the Government's constitutional tax immunity would improperly impair the taxing power of the State. P. 475.

345 Mich. 601, 77 N. W. 2d 79, affirmed.

Roger Fisher argued the cause and was on a reply brief for the United States. Also on a brief were *Solicitor General Rankin, Acting Assistant Attorney General Stull, Ralph S. Spritzer, J. Dwight Evans, Jr., A. F. Prescott* and *H. Eugene Heine, Jr.* for the United States, and *Glenn M. Coulter* who submitted on the brief for the Borg-Warner Corporation (Detroit Gear Division), appellant.

Roger P. O'Connor argued the cause for appellee. With him on the brief were *Andrew DiMaggio* and *Julius C. Pliskow.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The United States asks this Court to strike down as unconstitutional a tax statute of the State of Michigan as applied to a lessee of government property. In general terms this statute, Public Act 189 of 1953, provides that when tax-exempt real property is used by a private party in a business conducted for profit the private party is subject to taxation to the same extent as though he owned the property.[1]

[1] Now compiled in 6 Mich. Stat. Ann., 1950 (1957 Cum. Supp.), §§ 7.7 (5) and (6). In full the Act reads:

"AN ACT to provide for the taxation of lessees and users of tax-exempt property.

. . . . . .

"Sec. 1. When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and

Here the United States was the owner of an industrial plant in Detroit, Michigan. It leased a portion of that plant to the Borg-Warner Corporation at a stipulated annual rental for use in the latter's private manufacturing business. The lease provided that Borg-Warner could deduct from the agreed rental any taxes paid by it under Public Act 189 or similar state statutes enacted during the term of the lease, but the Government reserved the right to contest the validity of such taxes.

On January 1, 1954, a tax was assessed against Borg-Warner under Public Act 189. The tax was based on the value of the property leased and computed at the rate used for calculating real property taxes. Under protest Borg-Warner paid part of the assessment. Subsequently the United States and Borg-Warner filed this suit in a state court for refund of the amount paid. They charged that the tax was repugnant to the Constitution of the United States because it imposed a levy upon government prop-

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used by a private individual, association or corporation in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public airport, park, market, fair ground or similar property which is available to the use of the general public [*sic*], shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property: Provided, however, That the foregoing shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or property of any state-supported educational institution.

. . . . . .

"Sec. 2. Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not become a lien against the property. When due, such taxes shall constitute a debt due from the lessee or user to the township, city, village, county and school district for which the taxes were assessed and shall be recoverable by direct action of assumpsit."

erty and discriminated against those using such property. The lower court however upheld the tax and the Michigan Supreme Court affirmed. 345 Mich. 601, 77 N. W. 2d 79. It ruled that the tax was neither discriminatory nor on the property of the United States but instead was a tax on the lessee's privilege of using the property in a private business conducted for profit. We noted probable jurisdiction of an appeal by the United States and Borg-Warner from this decision. 352 U. S. 962.

This Court has held that a State cannot constitutionally levy a tax directly against the Government of the United States or its property without the consent of Congress. *M'Culloch* v. *Maryland,* 4 Wheat. 316; *Van Brocklin* v. *Tennessee,* 117 U. S. 151. At the same time it is well settled that the Government's constitutional immunity does not shield private parties with whom it does business from state taxes imposed on them merely because part or all of the financial burden of the tax eventually falls on the Government. See, *e. g., James* v. *Dravo Contracting Co.,* 302 U. S. 134; *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466; *Alabama* v. *King & Boozer,* 314 U. S. 1. Of course in determining whether a tax is actually laid on the United States or its property this Court goes beyond the bare face of the taxing statute to consider all relevant circumstances.

The Michigan statute challenged here imposes a tax on private lessees and users of tax-exempt property who use such property in a business conducted for profit. Any taxes due under the statute are the personal obligation of the private lessee or user. The owner is not liable for their payment nor is the property itself subject to any lien if they remain unpaid. So far as the United States is concerned as the owner of the exempt property used in this case it seems clear that there was no attempt to levy against its property or treasury.

Nevertheless the Government argues that since the tax is measured by the value of the property used it should be treated as nothing but a contrivance to lay a tax on that property. We do not find this argument persuasive. A tax for the beneficial use of property, as distinguished from a tax on the property itself, has long been a commonplace in this country. See *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 582–583. In measuring such a use tax it seems neither irregular nor extravagant to resort to the value of the property used; indeed no more so than measuring a sales tax by the value of the property sold. Public Act 189 was apparently designed to equalize the annual tax burden carried by private businesses using exempt property with that of similar businesses using nonexempt property. Other things being the same, it seems obvious enough that use of exempt property is worth as much as use of comparable taxed property during the same interval. In our judgment it was not an impermissible subterfuge but a permissible exercise of its taxing power for Michigan to compute its tax by the value of the property used.

A number of decisions by this Court support this conclusion. For example in *Curry* v. *United States,* 314 U. S. 14, we upheld unanimously a state use tax on a contractor who was using government-owned materials although the tax was based on the full value of those materials. Similarly in *Esso Standard Oil Co.* v. *Evans,* 345 U. S. 495, the Court held valid a state tax on the privilege of storing gasoline even though that part of the tax which was challenged was measured by the number of gallons of government-owned gasoline stored with the taxpayer. While it is true that the tax here is measured by the value of government property instead of by its quantity as in *Esso* such technical difference has no meaningful significance in determining whether the Con-

stitution prohibits this tax. Still other cases further confirm the proposition that it may be permissible for a State to measure a tax imposed on a valid subject of state taxation by taking into account government property which is itself tax-exempt. See, *e. g., Home Insurance Co.* v. *New York,* 134 U. S. 594; *Plummer* v. *Coler,* 178 U. S. 115; *Educational Films Corp.* v. *Ward,* 282 U. S. 379; *Pacific Co.* v. *Johnson,* 285 U. S. 480, 489–490.

In urging that the tax assessed here be struck down the appellants rely primarily on *United States* v. *Allegheny County,* 322 U. S. 174, but we do not think that case is at all controlling. In *Allegheny* the Court ruled invalid a tax which the State did not contend was "anything other than the old and widely used ad valorem general property tax" to the extent it was laid on government property in the hands of a private bailee. Reviewing all the circumstances the Court concluded that the tax was simply and forthrightly imposed on the property itself, not on the privilege of using or possessing it. In carefully reserving the question whether the bailee could be taxed for exercising such privileges, the Court stated:

> "Whether such a right of possession and use in view of all the circumstances could be taxed by appropriate proceedings we do not decide.
>
> . . . . . .
>
> "Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor. His personal advantages from the relationship by way of salary, profit, or beneficial personal use of the property may be taxed as we have held." 322 U. S., at 184, 186, 187.

Here we have a tax which is imposed on a party using tax-exempt property for its own "beneficial personal use" and "advantage." [2]

It is undoubtedly true, as the Government points out, that it will not be able to secure as high rentals if lessees are taxed for using its property. But as this Court has ruled in *James* v. *Dravo Contracting Co.*, 302 U. S. 134, *Alabama* v. *King & Boozer*, 314 U. S. 1, and numerous other cases,[3] the imposition of an increased financial burden on the Government does not, by itself, vitiate a state tax. *King & Boozer* offers a striking example. There a private party, acting under contract with the United States, purchased materials which the contract required him to transfer to the Government. At the same time the Government agreed to pay his costs plus a fixed fee so a state excise levied on his purchase was passed directly and completely to the Government. Yet despite the immediate financial burden imposed on the United States, this Court, without dissent, upheld the tax.

We are aware of course that the general principles laid down in *Dravo*, *King & Boozer* and subsequent cases do not resolve all the difficulties in the area of intergovernmental tax immunity, but they were adopted by this

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[2] The Government also places reliance on *Macallen Co.* v. *Massachusetts*, 279 U. S. 620. The weight of that case as a precedent was substantially impaired by its narrow distinction in *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 392, and the reasoning of the Court in *Pacific Co.* v. *Johnson*, 285 U. S. 480, 495. Later in *New York ex rel. Northern Finance Corp.* v. *Lynch*, 290 U. S. 601, a case which seems indistinguishable from *Macallen* on its facts, the Court in a per curiam opinion upheld the same kind of state tax which it had struck down in *Macallen*.

[3] See, *e. g.*, *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 485–486; *Helvering* v. *Gerhardt*, 304 U. S. 405, 420–422; *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514.

Court, with the full support of the Government, as the least complicated, the most workable and the proper standards for decision in this much litigated and often confused field and we adhere to them.[4]

It still remains true, as it has from the beginning, that a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals. Cf. *M'Culloch* v. *Maryland,* 4 Wheat. 316. But here the tax applies to every private party who uses exempt property in Michigan in connection with a business conducted for private gain. Under Michigan law this means persons who use property owned by the Federal Government, the State, its political subdivisions, churches, charitable organizations and a great host of other entities.[5] The class defined is not an arbitrary or invidiously discriminatory one. As suggested before the legislature apparently was trying to equate the tax burden imposed on private enterprise using exempt property with that carried by similar businesses using taxed property. Those using exempt property are required to pay no greater tax than

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[4] In its brief in *King & Boozer* the Government strongly urged the Court to abandon whatever remained of the "economic burden" test, which at one time was used to range far afield in striking down state taxes, because that test was "illusory and incapable of consistent application."

[5] In somewhat greater detail, Michigan statutes exempt from real property taxes all property belonging to the Federal Government, the State, political subdivisions of the State, charitable organizations, educational or scientific institutions, fraternal or secret societies (if used for charitable purposes), churches, libraries, religious societies, cemeteries, state or county agricultural societies, certain corporations making payments to the State in lieu of taxes, nonprofit trusts (if used for hospital or public health purposes), boy or girl scout organizations (up to 160 acres), certain veterans' homes and land dedicated to public use. See 6 Mich. Stat. Ann., 1950, § 7.7.

that placed on private owners or passed on by them to their business lessees. In the absence of such equalization the lessees of tax-exempt property might well be given a distinct economic preference over their neighboring competitors, as well as escaping their fair share of local tax responsibility. Cf. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 583–585. Nor is there any showing that the tax is in fact administered to discriminate against those using federal property. To the contrary undisputed evidence introduced by appellees demonstrates that lessees of other exempt property have also been taxed.[6]

Today the United States does business with a vast number of private parties. In this Court the trend has been to reject immunizing these private parties from nondiscriminatory state taxes as a matter of constitutional law. Cf. *Penn Dairies* v. *Milk Control Comm'n*, 318 U. S. 261, 270. Of course this is not to say that Congress, acting within the proper scope of its power, cannot confer immunity by statute where it does not exist constitutionally. Wise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy. Such complex problems are ones which Congress is best qualified to resolve. As the Government points out Congress has already extensively legislated in this area by per-

[6] The Government points to the fact that Public Act 189 creates an exception to the tax on users where payments are made by the United States "in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed" as manifesting a purpose to tax government property. But this exemption, which if anything operates in the Government's favor, avoids the possibility of a double contribution to the revenues of the State where private parties use federal property for their own commercial purposes. Moreover, it is not at all inconceivable that the Government might, in one way or another, pass the economic burden of such in-lieu payments to the taxpayer using its property even though he was also compelled to pay the tax imposed by Public Act 189.

mitting States to tax what would have otherwise been immune. To hold that the tax imposed here on a private business violates the Government's constitutional tax immunity would improperly impair the taxing power of the State.

Affirmed.

[For opinion of MR. JUSTICE FRANKFURTER, see *post*, p. 495.]

[For opinion of MR. JUSTICE HARLAN, see *post*, p. 505.]

MR. JUSTICE WHITTAKER, with whom MR. JUSTICE BURTON joins, dissenting.

I respectfully dissent. Understanding of the bases of my convictions and reasons for doing so requires a rather full treatment of the case.

The United States owned an industrial plant in Detroit which it had leased, for a short term, to Borg-Warner, at a fixed annual rental, for use in its private business. The lease provided that if the lessee was required to pay any taxes upon the property to the State of Michigan, under the statute quoted, *infra*, or otherwise, during the term of the lease, the lessee might deduct the same from the rents, but the Government reserved the right to contest the validity of any such taxes.

The State of Michigan had recently enacted a statute, known as Public Act 189 of 1953 (6 Mich. Stat. Ann., 1957 Cum. Supp., § 7.7 (5) and (6)) which, in pertinent part, says:

> "*Taxation of Lessees and Users of Tax-Exempt Real Property.*
>
> "SECTION 1. When any real property which for any reason *is exempt from taxation* is leased, loaned or otherwise made available to *and used by* a private

individual, association or corporation in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public . . . park . . . or similar property which is available to the use of the general public, shall [*sic*] be subject to taxation *in the same amount and to the same extent as though the lessee or user were the owner of such property: Provided,* however, That the foregoing shall not apply *to federal property* for which payments are made in lieu of taxes in amounts equivalent to taxes *which might otherwise be lawfully assessed* . . . .

"SEC. 2. Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes *assessed to owners of real property,* except that such taxes *shall not become a lien against the property.* When due, such taxes shall constitute a debt due from the lessee or user to the township, city, village, county and school district for which the taxes were assessed and shall be recoverable by direct action of *assumpsit.*" (Emphasis supplied.)

Acting under that statute, the City of Detroit levied a tax against the lessee, computed on the assessed value of the Government's industrial plant and calculated in the same manner and at the same rate applicable to all real estate in Michigan. Protest was made without avail and, after administrative remedies were exhausted without success, the tax was paid, and the United States and the lessee, Borg-Warner, sued for refund in the state court, contending that the tax was repugnant to the Constitution because it constituted a tax upon property owned by the Government and discriminated against the lessee. The trial court sustained the tax, and the Supreme Court of Michigan affirmed (345 Mich. 601, 77 N. W. 2d 79), holding that the tax was neither *on* property owned by the United States nor discriminatory against the lessee,

but was, instead, a nondiscriminatory tax on the lessee's privilege of using the Government's property in private business for profit. The case comes here on appeal.

The Court today affirms the decision and judgment of the Michigan courts, and sustains the tax. I believe that decision is not only unsound in principle but is also opposed to the precedents, and that appellants are quite right in both of their contentions. To me, it is evident that this tax has been levied, in major part at least, directly (though, perhaps, indirectly in form) upon a property interest of the Government and is, therefore, constitutionally invalid under *M'Culloch* v. *Maryland,* 4 Wheat. 316, and the myriad of uniformly conforming cases decided since its rendition in 1819.

In determining the nature of a tax we are not bound by, nor even permitted solely to look to, labels affixed by the State, but, rather, as pointed out in *United States* v. *Allegheny County,* 322 U. S. 174, 184:

> " 'Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.' *Carpenter* v. *Shaw,* 280 U. S. 363, 367–368."

Examination of the nature of this tax, and of its effect upon the federal rights asserted by appellants, shows that it purports to be a tax upon "real property which . . . is exempt from taxation," if it is "made available to and used by a private individual . . . or corporation in connection with a business conducted for profit," including "federal property for which payments [have not been] made in lieu of taxes in amounts equivalent to [general ad valorem] taxes which might otherwise be lawfully assessed" (§ 1), and the tax is to be "assessed to such lessees or users . . . in the same manner as taxes [are] assessed to owners of real property," though the tax "shall

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not become a lien against the property," but it "shall constitute a debt due from the lessee or user." § 2.

Thus, the tax, as it applies to this case, is computed not upon the value of the lessee's short-term leasehold estate in—nor, hence, upon the value of its term right to use—the federal property, but, rather, is computed upon the entire value of the whole of the federal property, in the same manner and at the same rate and amount, "as though the lessee or user were the owner of such property" (§ 1), but—and I think this is of particular significance—the tax is not to "apply to federal property" *if* the Government waives its sovereign immunity and pays general ad valorem taxes on the property, or the equivalent. Does not this really admit that the tax, in major part at least, is directly imposed upon the Government's property interests? The fact that the statute does not create a lien "on Government property itself, which could not be sustained in any event, hardly establishes that it is not being taxed. . . ." *United States* v. *Allegheny County, supra,* at 187.

Disregarding form and labels, and looking to substance, it is, I think, crystal clear that this is a transparent direct imposition upon the Government's property interests (as distinguished from the lessee's leasehold estate) in this real estate of the general ad valorem real property tax commonly assessed on, and against the owners of, all real estate in Michigan, but under the guise of a tax upon the lessee for the *privilege* (as construed by the majority)—granted by the Federal Government, not the State—*of using* (though it will be noted, the statute does not in terms tax "use," but, rather, taxes "real property"; see § 1) the Government's property, and, thus, the statute seeks to accomplish by indirection that which the State is constitutionally prohibited from doing directly. Such attempted evasion of the Government's constitutional immunity from state taxation cannot legally be per-

mitted to succeed. As said in *Miller* v. *Milwaukee,* 272 U. S. 713, 715: "If the avowed purpose or self-evident operation of a [state taxing] statute is to follow the bonds of the United States and to make up for [the State's] inability to reach them directly by indirectly achieving the same result, the statute must fail even if but for its purpose or special operation it would be perfectly good." In *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 393, after quoting the above language from the *Miller* case, the Court said: "But, as the Court in that case was careful to point out, in language later quoted with approval in *Macallen Co.* v. *Massachusetts* [279 U. S. 620, 631], 'A tax very well may be upheld as against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them . . . .' " Here the Michigan statute plainly says that the tax shall "apply to federal property for which payments are [not] made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed" (§ 1), and, hence, it cannot be said that this tax is "casual [in its] effect . . . upon the [property] of the United States"; and it must be said that the tax is plainly "aimed at [it]." *Educational Films Corp.* v. *Ward, supra,* at 393.

The majority rely principally upon *Henneford* v. *Silas Mason Co.,* 300 U. S. 577; *Esso Standard Oil Co.* v. *Evans,* 345 U. S. 495, and, as does also MR. JUSTICE HARLAN in his separate opinion, upon *Curry* v. *United States,* 314 U. S. 14, but, as I read them, those cases do not at all support the Court's conclusion. In *Henneford* this Court merely held that a tax imposed by a State upon its citizen for his use within the State of his own property which he had purchased in another State and imported in interstate commerce was not a prohibited tax on such commerce, which had earlier ended. It did not in any way involve a tax upon government property interests. The *Esso* case

simply upheld a state privilege tax imposed not upon any property interest of the Government but directly upon a storer of gasoline, on a gallonage basis, for his privilege of conducting that business within the State. One of its customers was the Government which had, *by contract,* agreed to reimburse Esso for any tax imposed upon it by the State in consequence of having stored the Government's gasoline. Thus the tax was not imposed by the State upon the Government's property interests but upon Esso which did not share the Government's immunity from state taxation, and the obligation of the Government derived not from the statute but *through operation of the contract.* The *Curry* case merely held that government cost-plus contractors who had imported into the State certain materials which they used in the performance of their contract were not entitled to share the Government's constitutional immunity from a state use tax, and said: "If the state law lays the tax upon them rather than the [Government] with whom they enter into a cost-plus contract like the present one, then it affects the Government . . . only as the economic burden is shifted to it *through operation of the contract.*" 314 U. S., at 18. (Emphasis supplied.) Here the tax is imposed by the Michigan statute directly upon the Government's property interests—including its right to the use of its property—and it is not suffered by any voluntary assumption or "through operation of [a] contract." [1]

In *United States* v. *Allegheny County, supra,* this Court pointed out that "Mesta [a lessee of government chattels] has some legal and beneficial interest in [the

[1] It is immaterial to the question here that the lease authorized the lessee to deduct from the rentals any taxes it might be required to pay under this statute during the term of the lease, because the direct thrust of the tax *upon the Government's right of use of its property,* so let to the lessee, arises from the terms of the statute independently of such contractual assumption.

Government's] property. It is a bailee for mutual benefit." [2] The Court then proceeded to say:

> "Whether such a right of possession and use in view of all the circumstances could be taxed by appropriate proceedings we do not decide." *Id.,* at 186.

However, the Court did proceed to decide that the Government's property interests in the chattels, distinguished from the bailee's interest therein, could not legally be subjected to any state tax. It said: ". . . the State has made no effort *to segregate Mesta's interest and tax it.* The *full value of the property,* including the whole ownership interest, *as well as whatever value proper appraisal might attribute to the leasehold,* was included in Mesta's assessment. . . . We think, however, that *the Government's property interests are not taxable* either to it or to its bailee." *Id.,* at 187. (Emphasis supplied.)

Here it is undeniable that (1) the Government owned this industrial plant, (2) the only element of economic value in its ownership of the plant is its right *to use it.* That right of use was a government property interest, and any state tax on that right of use is a tax on an instrumentality of the United States and, hence, invalid. See *M'Culloch* v. *Maryland, supra,* and *Allegheny,* at 186–189.

Before the lease, only one estate existed in the plant, namely, the Government's ownership in fee, which included its inherent right to use, and to let the use of, that property. That estate was, and continued to be, a property interest of the Government, to the fruits of which it was and is exclusively entitled; and its right

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[2] It seems quite certain that a "bailee" of chattels for mutual benefit stands in no different position or relation to the Government than a "lessee," and in fact the Mesta Company held the chattels under a lease in that case.

of use, so let to its lessee, in no way derived from any privilege granted—or that could be withheld—by the State, but, rather, derived solely from the United States, and, thus, was not a privilege which the State did or could grant or withhold, nor, hence, regulate or tax; but, on the contrary, it remained immune from state taxation, as pointed out in *Allegheny:*

> "A State may tax personal property and might well tax it to one in whose possession it was found, but it could hardly tax one of its citizens because of [property] of the United States which [was] *in his possession as . . . agent, or contractor.* We hold that Government-owned property, *to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee.*" *Id.,* at 188–189. (Emphasis supplied.)

By the lease, the Government, in exercise of its right to use, and to let the use of, its property, carved from its fee a subservient leasehold estate and vested the same in the lessee. That leasehold estate was private local property of the lessee and, therefore, was subject to state regulation, and, hence, to ad valorem or privilege of use taxation by the State, in such measure as is not unequal, unreasonable or confiscatory—on the basis of the value of the leasehold estate being taxed or used as the measure of the tax.[3]

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[3] The matter is so stated to point up what should be the obvious necessity, in levying any tax based on or measured by the value of a limited estate in property, of first identifying, and determining the nature and extent of, *the estate or interest* of the taxpayer therein, which, naturally, must be done before any valuation can properly be ascribed thereto, and, hence, before it can be known whether the tax is or is not equal, reasonable, and nonconfiscatory, and, therefore, meets or fails to meet state tests and Fourteenth Amendment Due Process.

Here, however, the statute does not purport to segregate the value of the leasehold estate from the Government's estate in fee, subject to the lease, in this property, but, rather, computes and imposes the tax on *both estates* "as though the lessee or user were the owner of such property." § 1. It, therefore, seems quite plain that the statute imposes the tax on the Government's property interest, which is immune from state taxation, as well as upon the local property of the lessee in its leasehold estate which is not exempt from state taxation, and thus lays a forbidden burden upon instrumentalities of the United States. *M'Culloch* v. *Maryland,* 4 Wheat. 316.

For these reasons, I would reverse the decision and judgment of the Michigan court.

UNITED STATES *v.* TOWNSHIP OF MUSKEGON ET AL.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 37. Argued November 14, 1957.—Decided March 3, 1958.*

Under Michigan Public Act 189 of 1953, the Township of Muskegon assessed against a private corporation engaged in business for profit taxes based on the value of real property owned by the United States and used by the corporation in the course of performing several supply contracts the corporation had with the Government on a cost-plus-fixed-fee basis. There was no lease and no rent was charged by the Government; but the corporation agreed not to include any part of the cost of the facilities furnished by the Government in the price of the goods supplied under the contracts. *Held:* This tax does not invade the constitutional immunity of federal property from taxation by the States. *United States* v. *City of Detroit, ante,* p. 466. Pp. 485–487.

(a) Since the corporation was using the property in connection with its own commercial activities, and not as a mere agent of the Government, a different result is not required by the fact that it was not formally designated a "lessee." P. 486.

(b) Since the corporation was acting as a private enterprise selling goods to the Government, a different result is not required by the fact that it was using the property in carrying out a contract with the Government. Pp. 486–487.

346 Mich. 218, 77 N. W. 2d 799, affirmed.

Roger Fisher argued the cause and was on a reply brief for the United States, appellant in No. 37. Also on a brief were *Solicitor General Rankin, Acting Assistant Attorney General Stull, A. F. Prescott* and *H. Eugene Heine, Jr.* for the United States, and *Victor W. Klein,* who submitted on the brief for the Continental Motors Corporation, appellant in No. 38.

Harold M. Street argued the causes for appellees. On the brief were *Charles A. Larnard* for the Township of

*Together with No. 38, *Continental Motors Corp.* v. *Township of Muskegon et al.*, also on appeal from the same Court.

Muskegon, Michigan, *Robert A. Cavanaugh* and *William P. Spaniola* for the County of Muskegon, Michigan, and *Mr. Street* for the Orchard View School District, appellees.

Keith L. Seegmiller filed a brief for the National Association of County Officials, as *amicus curiae.*

MR. JUSTICE BLACK delivered the opinion of the Court.

As the Government points out in its jurisdictional statement "this appeal presents precisely the same basic question" as is raised in No. 26, *United States* v. *City of Detroit, ante,* p. 466, also decided today. That question is whether Public Act 189, of 1953, of the State of Michigan is unconstitutional as applied to a corporation using government property in connection with a business conducted for its own private gain.

In this case the United States owns a manufacturing plant at Muskegon, Michigan. In 1952 it granted Continental Motors Corporation the right to use this plant in the course of performing several supply contracts Continental had with the Government. No rent was charged as such but Continental agreed not to include any part of the cost of the facilities furnished by the Government in the price of the goods supplied under the contracts.

On January 1, 1954, Continental was assessed a tax under Public Act 189. As in No. 26, this tax was levied because of Continental's use of tax-exempt property in its private business and was measured by the value of the exempt property which it was then using. Continental refused to pay the tax and this suit was brought by state authorities in a state court to recover the amount assessed. The United States intervened, contending that the tax was invalid because it imposed a levy on government property. But the lower court rejected this contention and entered judgment for the plaintiffs. The Michigan Supreme Court affirmed, 346 Mich. 218, 77

N. W. 2d 799. We noted probable jurisdiction of an appeal from this decision by both Continental and the United States, 352 U. S. 963, and now affirm the judgment below on the basis of our decision in No. 26.

There are only two factual differences between this case and No. 26. First, Continental is not using the property under a formal lease but under a "permit"; second, Continental is using the property in the performance of its contracts with the Government. We do not believe that either fact compels a different result.

Constitutional immunity from state taxation does not rest on such insubstantial formalities as whether the party using government property is formally designated a "lessee." Otherwise immunity could be conferred by a simple stroke of the draftsman's pen. The vital thing under the Michigan statute, and we think permissibly so, is that Continental was using the property in connection with its own commercial activities. The case might well be different if the Government had reserved such control over the activities and financial gain of Continental that it could properly be called a "servant" of the United States in agency terms. But here Continental was not so assimilated by the Government as to become one of its constituent parts. It was free within broad limits to use the property as it thought advantageous and convenient in performing its contracts and maximizing its profits from them.

If under certain conditions the State can tax Continental for use of government property in connection with its business conducted for profit—and as set forth in No. 26 we are of the opinion that it can—the fact that Continental was carrying out a contract with the Government does not materially alter the case. Continental was still acting as a private enterprise selling goods to the United States. In a certain loose way it might be called an "instrumentality" of the United States, but no

more so than any other private party supplying goods for his own gain to the Government. In a number of cases this Court has upheld state taxes on the activities of contractors performing services for the United States even though they were closely supervised in performing these functions by the Government. See, *e. g., James* v. *Dravo Contracting Co.,* 302 U. S. 134; *Alabama* v. *King & Boozer,* 314 U. S. 1; *Curry* v. *United States,* 314 U. S. 14; *Wilson* v. *Cook,* 327 U. S. 474.

The *Curry* case seems squarely in point. There a contractor acting pursuant to a cost-plus contract with the United States purchased certain materials. These materials were shipped to a government construction project where they were used by the contractor in the performance of the contract. By agreement title to the materials passed to the Government as soon as they were shipped by the vendor. The State imposed a tax on the contractor, based on the value of the materials, for using them after they had been delivered to the work site. This Court unanimously upheld that state use tax, although it clearly amounted to a tax on the use of government property in performing a government contract.

Affirmed.

[For opinion of MR. JUSTICE FRANKFURTER, see *post,* p. 495.]

[For opinion of MR. JUSTICE HARLAN, see *post,* p. 505.]

MR. JUSTICE WHITTAKER, with whom MR. JUSTICE BURTON joins, dissenting.

Though the tax involved in these appeals rests upon the same Michigan statute and generally the same legal principles as No. 26, *United States* v. *City of Detroit,* 355 U. S. 466, also decided today, the facts are sufficiently

different to render this tax even more clearly unconstitutional than the one there sustained.

Here the Government did not even lease nor rent its plant. It simply entered into a contract with Continental providing that the latter would produce certain military supplies at a price equal to its cost, plus a fixed fee; that the work would be done in the Government's plant which was to be furnished without rent (and also that the Government would furnish certain other facilities, and might furnish certain materials, required to produce the supplies) and that Continental would not include in its "cost" for the supplies any charge for the plant and other facilities and materials furnished by the Government.

Continental, thus, had no leasehold estate, tenancy, or other property interest in the plant; and the right to use the plant belonged to and was provided by the Government as a part of the facilities which, under the contract, it was to furnish for production of the supplies. It thus seems plain to us that the Government itself was actually using its plant in the full and only sense that the "Government," being an abstraction, can ever use its military plants. *United States* v. *Allegheny County,* 322 U. S. 174, 187–188. Therefore, Continental not only had no estate in this real estate to be taxed, but, moreover, it had no independent right of use of the Government's plant to be subjected to a use tax. We think it must follow, even under the majority's interpretation of the law—which we believe to be erroneous—that the tax here imposed by the State, however it may be viewed, is a direct tax against the Government and is, hence, invalid.

For these reasons and also those stated in my dissenting opinion in No. 26, as well as those stated in my dissenting opinion in Nos. 18 and 36, *City of Detroit* v. *Murray Corporation,* 355 U. S. 489, also decided today, I dissent, and would reverse the decision and judgment below.

CITY OF DETROIT ET AL. *v.* MURRAY CORPORATION OF AMERICA ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 18. Argued November 13–14, 1957.—Decided March 3, 1958.*

Michigan municipalities assessed a tax against a subcontractor under a prime contract between the United States and two other private corporations for the manufacture of airplanes and airplane parts. The tax was based in part on the value of materials and work in process actually in the possession of the subcontractor but legal title to which had passed to the United States under the terms of the subcontract upon the making of partial payments therefor. *Held:* This tax does not infringe the Federal Government's constitutional immunity from state taxation or discriminate against the Government, its property or those with whom it does business. *United States* v. *City of Detroit, ante,* p. 466; *United States* v. *Township of Muskegon, ante,* p. 484. Pp. 490–495.

(a) As applied, these taxes were not levied against the United States or its property but were levied on a private party possessing government property which it was using or possessing in the course of its own business. Pp. 492–493.

(b) So far as constitutional tax immunity is concerned, there is no essential difference between taxing a private party for using property he possesses and taxing him for possessing property he uses when in both instances he uses the property for his own private ends. P. 493.

(c) The particular state taxing statutes involved here do not expressly state that the person in possession is taxed "for the privilege of using or possessing" personal property; but to strike down a tax on the possessor because of such verbal omission would only prove a victory for empty formalisms. P. 493.

(d) The Government eventually will feel the financial burden of at least some of this tax; but the imposition of an increased financial burden on the Government does not by itself invalidate a state tax. P. 494.

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*Together with No. 36, *City of Detroit et al.* v. *Murray Corporation of America et al.,* on certiorari to the same Court.

(e) *United States* v. *Allegheny County*, 322 U. S. 174, distinguished. Pp. 494–495.

(f) This tax involves no discrimination against the Federal Government, its property or those with whom it does business, no crippling obstruction of any of its functions, no sinister effort to hamstring its power and not even the slightest interference with its property. P. 495.

234 F. 2d 380, reversed and remanded.

Vance G. Ingalls argued the cause for the City of Detroit, Michigan, and *Hobart Taylor, Jr.* for the County of Wayne, Michigan. On the brief were *Mr. Ingalls, Julius C. Pliskow* and *G. Edwin Slater* for the City of Detroit, and *Mr. Taylor* and *Albert E. Champney* for the County of Wayne, appellants-petitioners.

Roger Fisher argued the cause for the United States, appellee-respondent. On the brief were *Solicitor General Rankin, Assistant Attorney General Rice, J. Dwight Evans, Jr., Robert N. Anderson, Lyle M. Turner* and *H. Eugene Heine, Jr.*

Victor W. Klein argued the cause for the Murray Corporation of America, appellee-respondent. With him on the brief were *William M. Saxton* and *Meyer H. Dreety.*

Briefs of *amici curiae* urging reversal were filed by *Robert V. Baker* and *Wm. J. P. Aberg* for the City of Kenosha, Wisconsin, and *Roger Arnebergh, Peter Campbell Brown, E. R. Christensen, J. Elliott Drinard, Marshall F. Hurley, J. Frank McKenna, John C. Melaniphy* and *Charles S. Rhyne* for the National Institute of Municipal Law Officers.

Mr. Justice Black delivered the opinion of the Court.

This is the third in a series of cases from the State of Michigan decided today involving a claim of constitutional tax immunity.

In 1952 Murray Corporation was acting as a subcontractor under a prime contract for the manufacture of airplane parts between two other private companies and the United States. From time to time Murray received partial payments from the two prime contractors as it performed its obligations under the subcontract. By agreement, title to all parts, materials and work in process acquired by Murray in performance of the subcontract vested in the United States upon any such partial payment, even though Murray retained possession.

On January 1, 1952, the City of Detroit and the County of Wayne, Michigan, each assessed a tax against Murray which in part was based on the value of materials and work in process in its possession to which the United States held legal title under the title-vesting provisions of the subcontract.[1] Murray paid this part of each tax under protest and then sued in a Federal District Court for a refund from the city and county. It contended that full title to the property was in the United States and that the taxes infringed the Federal Government's immunity from state taxation to the extent they were based on such property. The Government intervened on Murray's behalf. On motion for summary judgment the District Court entered judgment for Murray and the Court of Appeals for the Sixth Circuit affirmed. 234 F. 2d 380. From this decision the city and county both appealed and petitioned for certiorari. We granted certiorari and

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[1] The relevant statutory provisions are set forth in full in 6 Mich. Stat. Ann., 1950, §§ 7.1, 7.10, 7.81, and Tit. VI, c. II, § 1, and Tit. VI, c. IV, §§ 1, 7, 26, 27, of the Charter of the City of Detroit. They provide in part that "The owners or persons in possession of any personal property shall pay all taxes assessed thereon. . . . In case any person by agreement or otherwise ought to pay such tax, or any part thereof, the person in possession who shall pay the same may recover the amount from the person who ought to have paid the same . . . ."

postponed the question of jurisdiction on appeal to the hearing on the merits. 352 U. S. 960, 963. The appeal was proper. 28 U. S. C. § 1254 (2).

We believe that this case is also controlled by the principles expressed in our opinions in Nos. 26 and 37, *ante*, pp. 466, 484, and that the taxes challenged here do not violate the Constitution.[2] These taxes were not levied directly against the United States or its property. To the contrary they were imposed on Murray, a private corporation, and there was no effort to hold the United States or its property accountable. In fact Michigan expressly exempts from taxation all public property belonging to the United States, 6 Mich. Stat. Ann., 1950, § 7.7, and these taxes were assessed from the beginning "subject to prior rights of the Federal Government." Cf. *S. R. A.* v. *Minnesota*, 327 U. S. 558, 559, 561; *City of New Brunswick* v. *United States*, 276 U. S. 547.

The taxes imposed on Murray were styled a personal property tax by the Michigan statutes and it relies upon this to support its contention that they were actually laid against government property. However in passing on the constitutionality of a state tax "we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 280. Consequently in determining whether these taxes violate the Government's constitutional immunity we must look through form and behind labels to substance. This is at least as true to uphold a state tax as to strike one down. Cf. *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 443–445;

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[2] For purposes of this case we assume that the United States had full title to the property not just a bare security interest. But cf. *S. R. A.* v. *Minnesota*, 327 U. S. 558, affirming 213 Minn. 487, 7 N. W. 2d 484, and 219 Minn. 493, 18 N. W. 2d 442; *Land O'Lakes Dairy Co.* v. *Wadena County*, 338 U. S. 897, affirming 229 Minn. 263, 39 N. W. 2d 164; *Offutt Housing Co.* v. *Sarpy County*, 351 U. S. 253.

Capitol Greyhound Lines v. *Brice,* 339 U. S. 542. Due regard for the State's power to tax requires no less. As applied—and of course that is the way they must be judged—the taxes involved here imposed a levy on a private party possessing government property which it was using or processing in the course of its own business. It is not disputed that Michigan law authorizes the taxation of the party in possession under such circumstances. Cf. *Detroit Shipbuilding Co.* v. *Detroit,* 228 Mich. 145, 199 N. W. 645; *City of Detroit* v. *Gray,* 314 Mich. 516, 22 N. W. 2d 771.

In their practical operation and effect the taxes in question are identical to those which we upheld in Nos. 26 and 37 on persons using exempt real property. We see no essential difference so far as constitutional tax immunity is concerned between taxing a person for using property he possesses and taxing him for possessing property he uses when in both instances he uses the property for his own private ends. Nor have we been pointed to anything else which would bar a State from taxing possession in such circumstances. Cf. *Carstairs* v. *Cochran,* 193 U. S. 10. Lawful possession of property is a valuable right when the possessor can use it for his own personal benefit.

It is true that the particular Michigan taxing statutes involved here do not expressly state that the person in possession is taxed "for the privilege of using or possessing" personal property, but to strike down a tax on the possessor because of such verbal omission would only prove a victory for empty formalisms. And empty formalisms are too shadowy a basis for invalidating state tax laws. Cf. *Henneford* v. *Silas Mason Co.,* 300 U. S. 577, 582. In the circumstances of this case the State could obviate such grounds for invalidity by merely adding a few words to its statutes. Yet their operation and practical effect would remain precisely the same.

There is no claim that the challenged taxes discriminate against persons holding government property. To the contrary the tax is a general tax which applies and has been applied throughout the State. If anything the economic burden on the United States is more remote and less certain than in other cases where this Court has upheld taxes on private parties. Of course the Government will eventually feel the financial burden of at least some of the tax but the one principle in this area which has heretofore been clearly settled is that the imposition of an increased financial burden on the Government does not by itself invalidate a state tax.

The respondents rely heavily on *United States* v. *Allegheny County,* 322 U. S. 174. Petitioners on the other hand contend that the decision in *Allegheny* is inconsistent with the general trend of our decisions in this field, that it has already been distinguished to the point where it retains no meaningful vitality and that it is erroneous. However that may be, we do not think that case is controlling, essentially for the reasons set forth in *United States* v. *City of Detroit, ante,* p. 466. In *Allegheny* the Court emphasized that the tax against Mesta Machine Company was, in its view, a general property tax laid on government property as such. The Court pointed out that the State had "made no effort to segregate Mesta's interest and tax it." The question was expressly reserved whether the State could tax a person possessing government property for the possession and use of such property in connection with his own profit-making activities. Here, however, state law specifically authorizes assessment against the person in possession. And the taxing authorities were careful not to attempt to tax the Government's interest in the property.

In all important particulars the taxes imposed here are very similar to that upheld in *Esso Standard Oil Co.* v. *Evans,* 345 U. S. 495, on the storage of gasoline for the

United States. A tax on storage is not intrinsically different from a tax on possession, at least where in both instances the private party is holding the property for his own gain. The tax in *Esso* was measured by the quantity of government gasoline stored while the taxes here are measured by the value of government property possessed but such technical distinction is of no significance in determining whether the Constitution bars this tax and is completely unrelated to any rational basis for governmental tax immunity.

We find nothing in the Constitution which compels us to strike down these state taxes. There was no discrimination against the Federal Government, its property or those with whom it does business. There was no crippling obstruction of any of the Government's functions, no sinister effort to hamstring its power, not even the slightest interference with its property. Cf. *M'Culloch* v. *Maryland,* 4 Wheat. 316. In such circumstances the Congress is the proper agency, as we pointed out in *United States* v. *City of Detroit,* to make the difficult policy decisions necessarily involved in determining whether and to what extent private parties who do business with the Government should be given immunity from state taxes.

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

It is so ordered.

Opinion of MR. JUSTICE FRANKFURTER.*

Adjustment of the interpenetrating factors involved in the Nation-State relation of our federal system, insofar as they are amenable to adjudication, is a subtle and complicated process. It precludes easy application even

*[NOTE: This opinion applies also to No. 26, *United States* v. *City of Detroit, ante,* p. 466, and No. 37, *United States* v. *Township of Muskegon, ante,* p. 484.]

of accepted legal formulas. Particularly is this true when the taxing power of the States is asserted against claims of intrusion into areas reserved to the Nation. In this domain it is asking too much for rules of certainty and simplicity in application that are hardly to be found in any live branch of the law. Even the Rule Against Perpetuities has only precarious certainty. The necessity for judicial accommodation between the intersecting interests of the States' power to tax and the concerns of the Nation in carrying on its government presents problems solutions for which cannot be sought by a formula assuring a bright, straight line of decisions. Accordingly, we have been admonished in the leading modern case dealing with these problems that they require "the observing of close distinctions in order to maintain the essential freedom of government in performing its functions, without unduly limiting the taxing power which is equally essential to both Nation and State under our dual system." *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 150.

The diversity of views expressed in these cases, even when there is concurrence in result, suggests the desirability of recalling, to use an old-fashioned phrase, "first principles." After all, we are dealing with problems that have, howsoever they may have appeared in particular situations, an unbroken history of nearly a century and a half. Temerarious as the claim may appear, there is a residuum of continuity in the reconciliation that the numerous cases since *M'Culloch* v. *Maryland,* 4 Wheat. 316 (1819), have made between the power of the States to tax and the restriction against laying a tax upon "the Government, its property or officers." *James* v. *Dravo Contracting Co., supra,* at 149. The governing principles, as Chief Justice Marshall himself formulated them, bear quotation:

> " 'That all subjects to which the sovereign power of a State extends, are objects of taxation; but those

over which it does not extend are, upon the soundest principles, exempt from taxation.'

" 'That the sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but not to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States.'

" 'That the attempt to use the power of taxation on the means employed by the government of the Union in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give.'

" 'That the States have no power by taxation, or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress, to carry into execution the powers vested in the General government.' " *Weston* v. *City Council of Charleston,* 2 Pet. 449, 467, as quoted by Mr. Justice Bradley in *Railroad Co.* v. *Peniston,* 18 Wall. 5, 38–39 (dissenting opinion).

No less helpful in giving directions for the path of solution to our immediate problems are the comments on these principles by Mr. Justice Bradley, whose powers of penetrating analysis, particularly in this field, were in my view second to none.

"Whilst no one disputes the general power of taxation in the States, which is so elaborately set forth in the opinion of the majority, it must be conceded that there are limits to that power. The States cannot tax the powers, the operations, or the property of the United States, nor the means which it employs to carry its powers into execution. The government of the United States, within the scope of its powers, is supreme, and cannot be interfered with or impeded in their exercise.

> "The case differs *toto cœlo* from that wherein the government enters into a contract with an individual or corporation to perform services necessary for carrying on the functions of government—as for carrying the mails, or troops, or supplies, or for building ships or works for government use. In those cases the government has no further concern with the contractor than in his contract and its execution. It has no concern with his property or his faculties independent of that. How much he may be taxed by, or what duties he may be obliged to perform towards, his State is of no consequence to the government, so long as his contract and its execution are not interfered with. In that case the contract is the means employed for carrying into execution the powers of the government, and the contract alone, and not the contractor, is exempt from taxation or other interference by the State government." *Railroad Co.* v. *Peniston, supra,* at 41–42 (dissenting opinion).

When Mr. Chief Justice Hughes quoted the latter paragraph in support of the decision in *James* v. *Dravo Contracting Co., supra,* at 155, he impliedly indicated that some decisions that gave government contractors immunity from taxation for their property, profits, or purchases deviated from the traditional doctrines of implied governmental immunity, and that the decision in the *Dravo* case was essentially a return to orthodoxy as Mr. Justice Bradley had elucidated it. I venture to say that whatever deviations or even aberrations from true doctrine cases here and there and now happily laid to rest may disclose, there is a residuum of continuity over the long course of judicial adjustment of the States' power to tax and the limits placed upon it by the implied immunity of the National Government from the demands of the state tax collectors. No decision has ever questioned that a tax cannot be laid upon "the Government,

its property or officers," *James* v. *Dravo Contracting Co., supra,* at 149, or, as it was phrased in *United States* v. *Allegheny County,* 322 U. S. 174, 177, "that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation." This at least has been a bright straight line running undeviatingly through the decisions of this Court. See *Van Brocklin* v. *Tennessee,* 117 U. S. 151; *United States* v. *Alabama,* 313 U. S. 274, 279.

As Mr. Chief Justice Stone stated for a unanimous court in *Alabama* v. *King & Boozer,* 314 U. S. 1, 9, the application, and therefore the outcome, in cases like those before us of these general principles "turns on the terms of the contract and the rights and obligations of the parties under it." Nothing better illustrates the truth of this statement than a comparison of *King & Boozer* with *Kern-Limerick, Inc.* v. *Scurlock,* 347 U. S. 110, a case whose relevance is not minimized by the loud silence the Court's present opinions accord it. Since "intergovernmental submission to taxation is primarily a problem of finance and legislation," 347 U. S., at 122, it is immaterial that contracts by the Government have been purposefully drawn so as to vest title to the property that is the subject of the tax in the Government, and thereby withdraw it from the taxing power of the States.

If a legal decision were a vehicle for the expression of merely personal views, I might take satisfaction as a dissenter on the facts from the *Allegheny* decision that those who concurred in the result now for all practical purposes repudiate it. The principle on which the decision rested, that a tax cannot be laid on the property of the Federal Government, was not, as the opinion stated, questioned in that case. 322 U. S., at 177. The division turned on a relevant construction of the Pennsylvania taxing system in respect to fixtures in their enhancement of

concededly taxable realty owned by a government contractor. The Court found that the Pennsylvania scheme of taxation was in fact "the old and widely used ad valorem general property tax." 322 U. S., at 184. As we are told by the Court in the present case, "Reviewing all the circumstances the Court [in *Allegheny*] concluded that the tax was simply and forthrightly imposed on the property itself, not on the privilege of using or possessing it." But this is so, *a fortiori,* in the circumstances of Nos. 18 and 36 now before us. Surely the detailed analysis of my brother WHITTAKER of "the terms of the contract and the rights and obligations of the parties under it," in relation to the taxing system of Michigan, demonstrates, if anything is demonstrable in the law, that the tax imposed has all the incidents of a general ad valorem property tax, and that it has them to a more conclusive degree than was true of the tax levied by Pennsylvania in the *Allegheny* case.

ALLEGHENY.	*NOS. 18 & 36.*
The Contract.	
Contract to manufacture ordnance. Machinery needed to produce ordnance to be furnished by Government, or to be manufactured or purchased by contractor.	Subcontract to manufacture airplane parts, subassemblies and nondurable tools (supplies).
Title to machinery furnished by Government to remain in Government; title to machinery manufactured or purchased by contractor to vest in Government upon delivery to site of work and inspection and acceptance on behalf of Government.	Title to parts, materials, inventories, work in process, and nondurable tools (materials) to vest in Government upon making of partial payments on such materials to contractor.
Machinery to be leased to contractor during period of contract.	
Machinery bolted to concrete foundations in contractor's plant.	Materials segregated and identified as Government property, and records kept when withdrawn for use in producing supplies.

ALLEGHENY—Continued.	*NOS. 18 & 36*—Continued.
Action of Taxing Authority.	
Revised contractor's previously determined assessment for ad valorem taxes by adding thereto the value of the machinery.	Assessment of contractor's personal property made including amount for materials acquired for performance of contract.
Authorization.	
Statute provided: "The following subjects and property shall . . . be valued and assessed and subject to taxation . . . (a) All real estate . . . ." 347 Pa. 191, 193, 32 A. 2d 236, 237–238. State Supreme Court held that machinery constituted part of the mill for purposes of assessment and was properly assessed as real estate.	Statute entitled "General Property Tax Act," "AN ACT to provide for the assessment of property and the levy and collection of taxes thereon . . . . That all property, real and personal, within the jurisdiction of this state . . . shall be subject to taxation." 6 Mich. Stat. Ann., 1950, §§ 7.1–7.2. City Charter provided: "City Treasurer shall enforce the collection of all unpaid taxes which are assessed against the property or value other than real estate." Charter of the City of Detroit, Tit. VI, c. IV, § 26.
State Supreme Court found that the tax was assessed not against the Government but against the contractor.	Statute provided that taxes assessed "shall become at once a debt due . . . from the persons to whom they are assessed . . . ." 6 Mich. Stat. Ann., 1950, § 7.81. City Charter provided that, "The owners or persons in possession of any personal property shall pay all taxes assessed thereon," that all city taxes upon personal property "shall become a debt against the owner from the time of the listing of the property for assessment . . . ," and that if the taxes remain unpaid, "the City Treasurer shall forthwith levy upon . . . the personal property of any person refusing or neglecting to pay such tax . . . ." Tit. VI, c. IV, §§ 1, 27, 26.

ALLEGHENY—Continued.

Statute provided: taxes are "declared to be a first lien on said property." 322 U. S. 174, 185.

State Supreme Court found that even if contractor defaulted in payment of tax, the rights of the Government in the machinery could not in any way be affected.

NOS. 18 & 36—Continued.

Statute provided: "all personal taxes hereafter levied or assessed shall also be a first lien . . . on all personal property of such persons so assessed . . . . The personal property taxes hereafter levied or assessed by any city or village shall be a first lien . . . upon the personal property assessed . . . ." 6 Mich. Stat. Ann., 1950, § 7.81.

City Charter provided that all city taxes "shall become a lien on the property taxed . . . ," and that "All city taxes upon personal property shall become . . . a lien thereon and so remain until paid . . . ." Tit. VI, c. IV, §§ 1, 26.

Assessor inscribed on tax roll: "Assessed Subject to Prior Rights of Federal Government."

I cannot believe that the Court would outright reject the doctrine of constitutional immunity from taxation of the Government and its property. I cannot believe that the Court is prepared frankly to jettison what has been part of our constitutional system for almost 150 years. But it does not save the principle to disregard it in practice. And it disregards it in practice to argue from the right of a State to levy an excise tax against a contractor for the enjoyment of property that gives him an economic advantage because it is otherwise immune from taxation, to the right of a State professedly and directly to lay an ad valorem property tax on what is indubitably government property.

A totally different problem is presented by Nos. 26, 37, and 38. These cases present the question whether enjoyment of the use of property that carries special economic

advantages to the user because, for one reason or another, the property as such cannot be the subject of a tax, is included within Chief Justice Marshall's principle that "all subjects over which the sovereign power of a state extends, are objects of taxation . . . ." *Weston* v. *City Council of Charleston,* 2 Pet. 449, 467. If a State may impose an excise tax on something that gives advantage or pleasure, such as the practice of a particular profession, why is it not also a taxable advantage that is had from being able to use property that for reasons extraneous to the user is not subject to the taxing power? Cf. *Watson* v. *State Comptroller,* 254 U. S. 122.

The only right that a taxpayer can assert against the state taxing power on the basis of governmental immunity is a "derivative one," *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 158, *supra,* and if he is to resist the exercise of this power he must stand in the Government's shoes. The immunity that he asserts is the Government's immunity, not his own. In taxing the enjoyment or use of property that is itself free from taxation, the State taxes an interest of the taxpayer, not of the Federal Government, and the tax is not laid on "the Government, its property or officers." The taxpayer is not immune from a tax because as a matter of dollars and cents it may affect the Government. To be sure, the excise in Nos. 26, 37, and 38 is measured by the value of the property, so that if the property were directly taxed the tax bill would be the same. But if the enjoyment of otherwise tax-free property is something different from the property itself for purposes of taxation, it does not lose this characteristic because the admeasurement is the same.

A principle with the uninterrupted historic longevity attributable to the immunity of government property from state taxation has a momentum of authority that reflects, if not a detailed exposition of considerations of policy demanded by our federal system, certainly a deep

instinct that there are such considerations, and that the distinction between a tax on government property and a tax on a third person for the privilege of using such property is not an "empty formalism." The distinction embodies a considered judgment as to the minimum safeguard necessary for the National Government to carry on its essential functions without hindrance from the exercise of power by another sovereign within the same territory. That in a particular case there may in fact be no conflict in the exercise of the two governmental powers is not to the point. It is in avoiding the potentialities of friction and furthering the smooth operation of complicated governmental machinery that the constitutional doctrine of immunity finds its explanation and justification.

The danger of hindrance of the Federal Government in the use of its property, resulting in erosion of the fundamental command of the Supremacy Clause, is at its greatest when the State may, through regulation or taxation, move directly against the activities of the Government. Scarcely less is the danger when the subject of a tax, that at which the State has consciously and purposefully aimed in attaching the consequence of taxability, is the property of the Federal Government. It is not only that the likelihood of local legislation deliberately or unwittingly discriminatory against government property either by its terms or application may be enhanced. Even a nondiscriminatory tax, if it is expressly laid on government property, is more likely to result in interference with the effective use of that property, whether because of an ill-advised attempt by the tax collector to levy on the property itself or because it is sought to hold the Government or its officers to account for the tax, even if ultimately the endeavor may fail. The defense of sovereign immunity to a suit against government officers for the tax, or a suit to assert title to

or recover property erroneously levied upon to satisfy a tax, may in practice be an inadequate substitute for the clear assertion of federal interest at the threshold.

The fact that a tax on a third party for the privilege of using government property may itself have an indirect impeding effect is no reason against a rule designed to avoid the more direct and obvious evil. Because a constitutional doctrine is not pushed to the logical extremities of its policy is no argument against maintaining it as far as it has historically extended. From the beginning a broad cloak of immunity for government property has been thought the best way to allay the danger of state encroachment on the national interest, and the character of our federal system and the relations between the Nation and the States have not in this regard so changed that the principle has become outmoded.

If the distinctions between the taxes involved in these cases seem nice, it is because "nice distinctions are to be expected," *Galveston, H. & S. A. R. Co.* v. *Texas,* 210 U. S. 217, 225, and they are none the worse for it. Not to make them, to lump all these cases together as though some similarities and assumed similar consequences amount to identities, is to disregard a long, unbroken course of judicial history and practicalities of government that doubtless have led, under prior decisions of this Court, to the drawing of countless contracts covering the use of government property.

Accordingly, I dissent from the Court's opinion in Nos. 18 and 36, and concur in the result in Nos. 26, 37, and 38.

Opinion of MR. JUSTICE HARLAN.*

Because all but two members of the Court consider that the taxes involved in these cases all stand or fall

*[NOTE: This opinion applies also to No. 26, *United States* v. *City of Detroit, ante,* p. 466, and No. 37, *United States* v. *Township of Muskegon, ante,* p. 484.]

together, I deem it advisable to state my reasons for believing that these cases require different conclusions as to the constitutionality of the taxes involved.

In determining the constitutionality of a state tax against a claim of federal immunity, past cases in this Court have established a distinction between "property" and "privilege" taxes of one kind or another. That is, broadly speaking, a State may not constitutionally tax property owned by the Federal Government, even though the property is in private hands and the tax is to be collected from a private taxpayer, *United States* v. *Allegheny County,* 322 U. S. 174, but it may tax activities of private persons, even though these activities involve the use of government property and the value or amount of such property becomes the partial or exclusive basis for the measurement of the tax. *Curry* v. *United States,* 314 U. S. 14; *Esso Standard Oil Co.* v. *Evans,* 345 U. S. 495. Cf. *Plummer* v. *Coler,* 178 U. S. 115; *Educational Films Corp.* v. *Ward,* 282 U. S. 379. Although the opinions of the Court in the present cases stop short of repudiating this established distinction, they seem to me to blur it to the point where the extent of its future application is left confused and uncertain.

In view of this Court's past decisions in the privilege-tax cases, I agree with the majority today that the lessee's and user's tax in Nos. 26, 37 and 38, construed by the state court to be a tax on the privilege of using tax-exempt property, is constitutional as applied. The dissenting opinion, which I do not believe can be reconciled with these past decisions, concludes that the tax imposed upon those using tax-exempt property for private profit should be regarded in substance as a tax on the property itself because the privilege tax is measured by the full value of the leased or used property, rather than merely by the value of the lessee's or user's interest.

In effect, it seems to me that the dissenters equate the measure of the tax with the subject of the tax. But I do not think that the formula here employed by Michigan to measure these taxes can be meaningfully distinguished from that applied in the Alabama use tax upheld in *Curry* v. *United States, supra.* There the use tax collected from a government contractor was measured by a percentage of the full value of government-owned property used by the contractor to execute its obligations. Indeed, the only distinction I can see is that the compensating use tax in *Curry* was imposed just once, whereas the privilege tax in Michigan is assessed yearly; but having regard to the wide latitude of a State's taxing power within the due-process limitations of the Fourteenth Amendment, I can hardly believe that this difference points to a contrary constitutional result. The decision in *Esso Standard Oil Co.* v. *Evans, supra,* which upheld a state tax assessed to a private taxpayer on the privilege of storing gasoline although the tax was measured in part by the amount of government gasoline stored multiplied by a fixed rate, provides further support for this conclusion. And in both of those cases, as is true here, the Government bore the full economic burden of the state taxes.

It should be observed that the state taxes here, as those in *Curry* and *Esso Standard Oil Co.,* do not operate in a discriminatory fashion by so measuring the tax on use or activities as to impose an unequal tax burden on lessees or users of government property *vis-à-vis* lessees, users, or owners of other tax-exempt or nonexempt property. And since this is so, I cannot agree with the dissenting opinion that this Court's view of the state legislature's purpose in enacting the statute should affect our determination of its constitutionality. Although Michigan here sought to equalize tax burdens on users of normal and tax-exempt property, or perhaps even to by-pass *Alle-*

gheny, I think it hardly repaying to speculate on the motives behind a local tax, as long as it is otherwise constitutionally permissible. Finally, it should be noted that assessment of the privilege tax to the user of government property in Nos. 37 and 38 would present a quite different problem if the user were deemed to be an instrumentality of the United States Government, but petitioners in those cases make no such showing, and I do not understand the dissenters here to rely on such a ground.

In Nos. 18 and 36 the Court holds that a tax which the dissenting opinions convincingly show is nothing but a conventional ad valorem personal property tax should be regarded instead as a tax upon the *possession* of government property privately used. This the Court finds constitutionally indistinguishable from the tax upon the use of government property privately possessed which has been upheld as a privilege tax in Nos. 26, 37, and 38. That is to say, the Court finds that the Government's property here was simply the measure, and not the subject matter, of a tax which was in effect imposed on the privilege of possessing property used for private gain.

In so holding, the Court, proceeding on the premise that Detroit's characterization of this tax as a personal property tax does not bind us, *Carpenter* v. *Shaw,* 280 U. S. 363, 367–368, relies on the circumstances that this government property was used for private gain, that the tax was collectible under the statute from the subcontractor and not from the Government or out of its property, and that the tax was nondiscriminatory. But all of these factors were present in *United States* v. *Allegheny County, supra,* where the Court struck down a local tax also cast in the traditional language of a "property" tax. Although the Court here purports to distinguish *Allegheny,* it seems to me that the authority of that case has now been reduced almost to the vanishing point, for neither the tax statute

here nor that in *Allegheny* qualified application of the tax to property employed in private commercial activity.

What has happened in these two groups of cases no doubt reflects the difficulty of reconciling *Allegheny* with the privilege tax cases, and bears witness to the truth of Mr. Justice Jackson's statement in *Allegheny* that in the evolution of the law in this difficult field "the line between the taxable and the immune has been drawn by an unsteady hand." 322 U. S., at 176. Since the economic incidence of a state tax on the Federal Government is no longer a controlling factor, *James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Alabama* v. *King & Boozer*, 314 U. S. 1, and since the use of federally owned property as the measure, by value or amount, of a tax on the privilege of using (*Curry* v. *United States, supra*) or storing (*Esso Standard Oil Co.* v. *Evans, supra*) such property is permissible, the distinction between "property" and "privilege" taxes as a yardstick for judging constitutionality when both taxes are collectible from a private taxpayer holding the property is certainly left in a high degree of artificiality. See Powell, Intergovernmental Tax Immunities, 58 Harv. L. Rev. 633, 757; cf. *Society for Savings* v. *Bowers*, 349 U. S. 143, 148. This is certainly so where the property tax applies to property used by a private party in some activity which is a proper subject of state taxation, see *M'Culloch* v. *Maryland*, 4 Wheat. 316, 429, and where, as here, the State does not seek to accomplish what would in any event be procedurally impossible because of the doctrine of sovereign immunity from suit—enforcement of a lien asserted against government property. It is quite understandable, therefore, that the Court should wish to minimize the importance of that distinction.

But by holding that the ad valorem personal property taxes involved in Nos. 18 and 36 should be regarded as

"privilege" taxes, it seems to me that the Court has injected further uncertainties into a field already plagued by excessive refinements. For until today the line between property and privilege taxes, if "drawn by an unsteady hand," was at least visible. A State could not tax government property, even though the property was in the hands of, and the tax was collectible only from, private persons. However, it now appears that not all property taxes are indeed "property" taxes for purposes of constitutional immunity, even though so characterized or construed by state authorities. Henceforth, apparently, we must determine whether the tax which a State has drafted as and denominated a "property" tax could, had the State so desired, have been constitutionally imposed as a "privilege" tax, measured by the value of the taxed property, upon some activity embracing the use of the property.

In my opinion, so fluid a rule incorporating these elusive additional distinctions will hardly help those who in their daily business must negotiate contracts for or with the Government. Indeed, the difficulty of its application is effectively illustrated by the divergence of opinion in these very cases, wherein five members of the Court have concluded that these particular "property" taxes are in reality "privilege" taxes. Rather than add further complications to an already troubled area of the law, I think the preferable course is to follow our past cases, upon which those contracting for the Government have undoubtedly relied, and to leave to Congress the task of adjusting to the needs of today the law which *Allegheny* and the privilege tax cases have created.

For these reasons, I have joined the opinion of the Court in Nos. 26, 37 and 38, and the dissenting opinion of MR. JUSTICE WHITTAKER in Nos. 18 and 36.

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

I respectfully dissent. The bases of my disagreement can be made clear only by a full treatment of the case.

On December 20, 1950, the United States entered into a contract with Kaiser Manufacturing Company under which the latter agreed to produce and deliver to the Air Force certain airplanes, airplane parts and subassemblies, at fixed prices; and on December 12, 1950, a similar contract was made by the Government with Curtiss-Wright Corporation. As contemplated by the parties, Kaiser, on March 23, 1951, and Curtiss-Wright, on April 19, 1951, entered into subcontracts with respondent, The Murray Corporation of America, under which the latter agreed to produce and deliver to those prime contractors certain airplane parts, subassemblies and nondurable tools (hereinafter called *supplies*) at fixed prices, which subcontracts were approved by the contracting officer of the Air Force. The subcontracts contained "partial payment" provisions which provided, among other things, that upon the making of any partial payments to Murray under the subcontracts "title to all parts, materials, inventories, work in process and non-durable tools theretofore [and thereafter, upon acquisition] acquired or produced by the [sub]contractor for the performance of [the] contract[s], and properly chargeable thereto . . . shall forthwith vest in the Government." Such property will hereinafter be called *materials*. After the date of the subcontracts, and prior to January 1, 1952, the Government, through the prime contractors, made "partial payments" to Murray in the amount of $674,776.87.[1] None of the supplies to

[1] In the period beginning August 10 and ending December 31, 1951, partial payments were made to Murray, by the Government, under

be produced by respondent under the subcontracts had been completed or delivered prior to January 1, 1952.

On the 1952 tax assessment date of January 1, 1952, petitioners, the City of Detroit and the County of Wayne, made an assessment (valuation) of Murray's personal property in the amount of $12,183,180, which included $2,043,670 for materials originally acquired by Murray for the performance of the subcontracts, and properly chargeable thereto. Applying their respective tax rates to that assessment, the City of Detroit imposed a tax of $67,714.96 and the County of Wayne imposed a tax of $12,572.66, more than would have been the case if the value of the materials of $2,043,670 had not been included in the 1952 assessment against Murray.

Murray paid those taxes under written protest,[2] and after having exhausted all administrative remedies, it brought three actions against petitioners in the United States District Court for the Eastern District of Michigan for refund of that part thereof ($80,287.62 plus interest) allocable to inclusion in the assessment of the $2,043,670 upon the materials referred to.[3] The United

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the Kaiser prime contract in the total amount of $163,949.20, and under the Curtiss-Wright contract in the total amount of $510,827.67, aggregating $674,776.87, and on the latter date requests for further partial payments in the amount of $569,211.09 were outstanding and being processed.

[2] It there contended that materials of the value of $2,043,670, included in the assessment against it and its personal property, were owned by the Federal Government and were therefore constitutionally immune from state taxation, and that the additional tax assessed on account thereof of $80,287.62 was void.

[3] It appears that Detroit personal property taxes are payable in two installments. The first two suits (Nos. 12108 and 12482) were brought against the City of Detroit for refund of the first and second halves, respectively, of the taxes so paid under protest. The third suit (No. 12483) was brought against the County of Wayne for refund of the taxes so paid to it under protest.

States intervened in the actions and, by stipulation, they were consolidated for trial. Murray moved for summary judgments, and the parties stipulated that no genuine issue of material fact existed in the actions. The court, after considering the motion, and the exhibits and affidavits in support of and in opposition thereto, and hearing the arguments and considering the briefs of counsel, granted the motion and rendered judgment in each of the actions in favor of Murray and against petitioners for the amount prayed, plus interest. 132 F. Supp. 899. The Court of Appeals, holding that the materials were owned by the Government, and not by Murray, on the assessment date, that the tax assessed and imposed thereon and collected by petitioners was a general ad valorem personal property tax on the Government's property, and that the Government was constitutionally immune from such taxes, affirmed the judgments of the District Court. 234 F. 2d 380.

The majority now reverses the Court of Appeals and reinstates the assessment and tax. In doing so, I believe, they are not only in serious error, but also they add words to the taxing Acts involved and the opinion openly so admits. See p. 493, *supra*.

Three principal issues are presented, namely: (1) Did the Government, by the terms of the "partial payment" provisions of the subcontracts, become "vest[ed]" with "title" to all elements of property and incidents of ownership in the materials referred to prior to the assessment date, or did it thereby acquire "title" thereto only as security and, thus, become only a lienor? (2) Is this a general ad valorem tax imposed *on* the materials, as contended by respondents and as found by the Court of Appeals? (3) If the materials were, in fact, the property of the Government on the assessment date, and the tax constitutes a general ad valorem tax *on* that property, may the tax be constitutionally imposed?

I.

The first question of whether the Government acquired complete and absolute title to the materials prior to, and beneficially owned them on, the assessment date, as respondents contend, or had acquired "title" thereto only as security and was therefore only a lienor, as contended by petitioners, depends upon the terms of the "partial payment" provisions of the subcontracts and upon actual operations thereunder, for the question, in last analysis, is one of intention of the contracting parties.

The partial payment provisions, in pertinent part, provide:

> "11. *Partial payments.*—Partial payments . . . may be made upon the following terms and conditions.
>
> "(a) The contracting officer may, from time to time, authorize partial payments to The Murray Corporation of America (hereinafter called 'the Contractor') upon property acquired or produced by it for the performance of this contract: *Provided,* that such partial payments shall not exceed 90 percent of the cost to the Contractor of the property upon which payment is made [and] in no event shall the total of unliquidated partial payments (see (c) below) . . . made under this contract, exceed 80 percent of the contract price of supplies still to be delivered.
>
> "(b) Upon the making of any partial payment under this contract, *title* to all parts, materials, inventories, work in process and non-durable tools theretofore [and thereafter, upon acquisition] acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto . . . *shall forthwith vest in the Government* . . . .

"(c) In making payment for the supplies furnished hereunder, there shall be deducted from the contract price therefor a proportionate amount of the partial payments theretofore made to the Contractor, under the authority herein contained.

"(d) It is recognized that [the materials], *title to which is or may hereafter become vested in the Government pursuant to this Article* will from time to time be used by . . . the Contractor in connection with the performance of this contract. The Contractor, either before or after receipt of notice of termination [by the Government], *may acquire or dispose of property to which title is vested in the Government* under this Article, upon terms approved by the Contracting Officer . . . . The agreed price (in case of acquisition by the contractor) or the proceeds received by the Contractor (in case of any other disposition), shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder, be paid or credited to the Government as the Contracting Officer shall direct; and such unliquidated balance shall be reduced accordingly. Current production scrap may be sold by the Contractor without approval of the Contracting Officer but the proceeds will be [paid or credited to the Government] . . . . Upon liquidation of all partial payments hereunder or upon completion of deliveries called for by this contract, *title to all* property (or the proceeds thereof) which has not been delivered to and accepted by the Government under this contract or which has not been incorporated in supplies delivered to and accepted by the Government under this contract and to which title has vested in the Government under this Article *shall vest in the Contractor.*

> "(e) . . . The provisions of this Article shall not relieve the Contractor from risk of loss or destruction of or damage to property to which title vests in the Government under the provisions hereof." (Emphasis supplied.)

It was shown, by an uncontradicted affidavit, at the hearing on the motion for summary judgments that the materials originally acquired by Murray for performance of the subcontracts, and properly chargeable thereto, were completely segregated from all other personal property in its plant and were "clearly identified," by "tagging [or] labeling," as property of the Government; that as materials were withdrawn by Murray, for use in producing the supplies, complete records of the materials so withdrawn, and the Government's costs therefor, were made and kept; and that when the supplies were completed and delivered by Murray and accepted by the Government, Murray paid the Government for the materials so consumed by crediting the contract price for the supplies with an amount equal to the Government's cost (90 percent of Murray's original cost) for the materials consumed in producing the supplies, as provided in subparagraph (c) of the partial payment provisions.

As noted, *supra,* subparagraph (b) of the partial payment provisions of the subcontracts expressly provides that, upon the making of any partial payment to Murray under the subcontracts, *"title"* to the materials *"shall forthwith vest in the Government."* Beginning on August 10, 1951, partial payments were made from time to time by the Government to Murray in very substantial amounts (see note 1). It cannot be doubted that the plain and simple language of subparagraph (b) was appropriate, apt and adequate to vest the *title* to the

materials in the Government.[4] Petitioners concede, and the majority assumes, that this is so. Petitioners' position is, however, that the title so vested in the Govern-

[4] Petitioners, however, contend that the partial payment provisions of the subcontracts are invalid as beyond the power of the Government to make. They rely principally upon the provisions of the Armed Services Procurement Act of 1947, c. 65, 62 Stat. 21, and particularly upon the language in § 5 (a) and (b) thereof saying, in pertinent part:

"(a) The agency head may make *advance payments* under negotiated contracts . . . in any amount not exceeding the contract price . . . *Provided,* That advance payments shall be made only upon *adequate security* . . . . (b) The terms governing *advance payments* may include *as security* provision for, and upon inclusion of such provision there shall thereby be created, a lien in favor of the Government, paramount to all other liens, upon . . . such of the material and other property acquired for performance of the contract as the parties shall agree." (Emphasis supplied.)

They therefore argue that the Government is not empowered to enter into contracts to make "partial payments" for the purchase of materials as was done here. This argument fails to recognize the long-existing and well-established distinction between "advance payments" dealt with in § 5 and "partial payments." At the time the Act was passed the terms "advance payments" and "partial payments" had long since become terms of art in government procurement laws and regulations. (See Joint Resolution No. 24, May 5, 1894, 28 Stat. 582; Act of August 22, 1911, c. 42, 37 Stat. 32; Act of October 6, 1917, c. 79, § 5, 40 Stat. 345, 383; Act of June 28, 1940, c. 440, 54 Stat. 676; Act of July 2, 1940, c. 508, 54 Stat. 712; First War Powers Act, 1941, c. 593, 55 Stat. 838, § 201; Executive Order 9001 (December 27, 1941), 6 Fed. Reg. 6787; War Department Procurement Regulations (July 1, 1942), §§ 81.321, 81.331, 81.347, 81.348, 7 Fed. Reg. 6098, 6105, 6108, 6112, 6113; War Department Procurement Regulations (August 25, 1945), §§ 803.321, 803.330, 803.331, 10 Fed. Reg. 10449, 10501–10503, 10507–10508; Army Procurement Regulations (November 18, 1947) §§ 804.400–804.407, 805.405, 805.407–2 (a) (b), 12 Fed. Reg. 7692–7693, 7700–7705.) The two terms are not synonymous. It has long been recognized and understood that an "advance payment" is a loan by the Government and can be made "only upon adequate security" as provided in § 5 of the

ment was for security purposes, and created only a lien on the materials as security to the Government, and also that actual operations under the contracts were incon-

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Armed Services Procurement Act, but "partial payments" are payments made by the Government in purchase of materials and are authorized when ownership thereto vests in the Government. Army Procurement Regulations (November 18, 1947), §§ 804.400–7, 805.405, 805.407–2 (a) (b), 12 Fed. Reg. 7692–7693, 7700, 7704–7705. The distinction is made clear in Armed Services Procurement Regulations of November 23, 1950 (32 CFR (1949 ed.) § 402.501), saying:

"Advance payments shall be deemed to be payments made by the Government to a contractor in the form of loans or advances prior to and in anticipation of complete performance under a contract. *Advance payments are to be distinguished from 'partial payments' and 'progress payments' and other payments made because of performance or part performance of a contract.*" (Emphasis supplied.)

The bill which became the Armed Services Procurement Act of 1947 was introduced at a time when there were existing War Department Procurement Regulations describing and making provisions for both "advance payments" and "partial payments." The latter provisions required that title to all materials acquired by the contractor for performance of the contract should vest in the Government on the making of such "partial payments." War Department Procurement Regulations, August 25, 1945, §§ 803.330–803.331, 10 Fed. Reg. 10507–10508. Against this historical background the terms of § 5 of the Armed Services Procurement Act of 1947 cannot be construed to prohibit the making of "partial payments" by the Government to a contractor in respect to materials procured for performance of a government contract when title to those materials, by the terms of the contract, vests in the Government. These were negotiated contracts made in pursuance of § 2, c. 65, of the Armed Services Procurement Act of 1947 (62 Stat. 21), and being such, Congress, by § 4 of that Act, has expressly granted wide discretion to the agency head in determining the type of contract which will promote the best interests of the Government. There being no prohibition against the use in government contracts of partial payment provisions made in purchase of materials, contracting officers are free to follow business practices. *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110, 116. Thus, there is no merit in petitioners' claim that the Government was not empowered to agree to the partial payment provisions in these contracts.

sistent with any real intention to convey actual ownership of the materials to the Government.

As to petitioners' "lien" contention, we must ask ourselves: A lien as security for what? Admittedly Murray was not indebted, nor to become indebted, to the Government under the subcontracts and, hence, there was and would be no debt to secure. Nor can it be said that the vesting of title to the materials in the Government was in any way to secure repayment of the partial payments made by the Government to Murray, because those partial payments were not to be repaid to the Government, but were expressly made by the Government in payment of the purchase price for the materials. Neither can it be said that the vesting of title to the materials in the Government was for the purpose of securing performance of the contracts by Murray, as conveyance of the materials to the Government could not possibly have any such legal effect.

Petitioners advance several arguments in support of their claim that the terms of the subcontracts, and actual operations under them, were inconsistent with any real intention to convey actual ownership of the materials to the Government.

As to the terms of the subcontracts, they argue, first, that subparagraph (d) of the partial payment provisions, saying that "[c]urrent production scrap may be sold by the Contractor without approval of the Contracting Officer," supports their contention. That argument overlooks the fact that the subparagraph continues, saying, "but the proceeds will be [paid or credited to the Government]." Thus, the contractor is authorized merely to sell the current production scrap as agent for the Government and must account to it for the proceeds, and, hence, this procedure is in no way inconsistent with the Government's ownership of the scrap. Second, they argue that the language of subparagraph (d) saying that, "[u]pon

liquidation of all partial payments hereunder or upon completion of deliveries called for by this contract, title to all property (or the proceeds thereof) which has not been delivered to and accepted by the Government under this contract or which has not been incorporated in supplies delivered to and accepted by the Government under this contract and to which title has vested in the Government under this Article *shall vest in the Contractor,*" shows that the Government's title to the materials was not real and beneficial. (Emphasis supplied.) This argument cannot be accepted, for if, as was plainly true, the language of subparagraph (b) saying that, upon the making of partial payments by the Government to Murray, title to the materials "shall forthwith vest in the Government" was adequate to effect a transfer by Murray to the Government, it must follow that the similar language in subparagraph (d) was adequate to effect a retransfer, upon full completion of the subcontracts, of any remnant of the materials by the Government to Murray; nor can it be denied that the Government had the right and power validly to retransfer that property under those circumstances.

Concerning operations under the subcontracts, petitioners argue, first, that the use of the partial payment provisions in the subcontracts was a legal device for the purpose of escaping state ad valorem personal property taxation. This argument is not only unacceptable on its merits (cf. *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110, 116, 122 [5]), but, in addition, it is contrary to the stipula-

[5] A similar contention was made in that case, and in rejecting it this Court said: "[W]e turn to examine the validity of the argument that the naming of the Government as purchaser was only colorable and left the contractor the real purchaser and the transaction subject to the Arkansas tax. *Alabama* v. *King & Boozer*, 314 U. S. 1, is relied upon primarily. We consider this argument under the assumption, made by the Supreme Court of Arkansas,

tion made by the parties at the hearing in the District Court.[6] Second, they argue that the fact that Murray insured the materials and its admittedly owned property in one policy in its own favor is inconsistent with government ownership of the materials and indicates that Murray regarded these materials as owned by it. As noted, *supra,* Murray agreed, under the terms of the contracts, to be liable to the Government for loss or destruction of or damage to the materials, occurring while in its possession, "to which title [had] vest[ed] in the Government under the provisions [of the subcontracts]." To insure that contractual liability Murray caused its insurance policy to be expanded to cover, *inter alia,* ". . . personal property . . . sold but not delivered or removed, or for which [it is] liable, all while located in and/or on the premises occupied by the insured." [7] Plainly, this precautionary action by Murray was in no way inconsistent with outright government ownership of the

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that the contract was designed to avoid the necessity in this cost-plus contract of the ultimate payment of a state tax by the United States. . . . We find that the purchaser under this contract was the United States. . . . [We do not] think that the drafting of the contract by the Navy Department to conserve Government funds, if that was the purpose, changes the character of the transaction." 347 U. S., at 116, 122.

[6] It was stipulated that in the negotiation of the subcontracts the "parties did not consider the possible avoidance of City and County ad valorem and personal property taxes as an element in their decision as to whether or not the standard partial payment clause (referred to in procurement regulations) should be inserted in these contracts."

[7] That insurance coverage provision reads as follows: "All real and personal property of the insured, including manuscripts, mechanical drawings, tools, dies, jigs and patterns, their own, or held by them in trust or on commission, or on consignment, or sold but not delivered or removed, or for which they are liable, all while located in and/or on the premises occupied by the insured."

materials, but, on the contrary, it strongly indicates Murray's intention and understanding that the materials had been sold to and were owned by the Government though not delivered. Cf. *United States* v. *Ansonia Brass & Copper Co.*, 218 U. S. 452, 467.

In *United States* v. *Ansonia Brass & Copper Co., supra,* this Court dealt at length with like contentions. There the Government had entered into a contract for the construction and delivery of a seagoing dredge to be named the *Benyuard.* The contract provided that the Government was to make 10 equal partial payments to the contractor, to aggregate 80 percent of the contract price, the first to be made when the hull and propelling machinery should be 10 percent complete, the second when 20 percent complete, and so on to the last payment, which was to be made when the vessel was delivered to and accepted by the Government, when the reserved 20 percent of the contract price was to be paid; and that "[t]he parts paid for under the system of partial payments above specified [were to] become thereby the sole property of the United States." *Id.*, at 466. Before completion of the dredge the contractor became insolvent and was unable to pay bills for materials used in the vessel, and a receiver was appointed. An issue arose as to whether the provisions of the contract had conveyed ownership of the unfinished vessel to the Government, thus preventing levy thereon of materialmen's liens created under state law. The Government contended ". . . that the terms of this contract [were] such that by its expressed provisions the vessel was to become the property of the United States as fast as it was paid for." *Ibid.* Upon that issue this Court said:

> "It is undoubtedly true that the mere facts that the vessel is to be paid for in installments as the work progresses, and to be built under the superintendence

of a government inspector, who had power to reject or approve the materials, will not of themselves work the transfer of the title of a vessel to be constructed, in advance of its completion. But it is equally well settled that if the contract is such as to clearly express the intention of the parties that the builders shall sell and the purchasers shall buy the ship before its completion, and at the different stages of its progress, and this purpose is expressed in the words of the contract, it is binding and effectual in law to pass the title. . . .

. . . . . .

"As we construe the contract for the construction of the Benyuard, it did 'divest the builder of any title to the property in the vessel during the process of construction.' . . .

. . . . . .

". . . We are not now dealing with the right of a State to provide for such liens while property to the chattel in process of construction remains in the builder, who may be constructing the same with a view to transferring title therein to the United States upon its acceptance under a contract with the Government. We are now treating of property which the United States owns. . . . The Benyuard, as fast as constructed, became one of the instrumentalities of the Government . . . ." *Id.*, at 466, 470, 471.

This Court thus held that the contract—containing title-vesting provisions almost identical with the ones here—conveyed full ownership of the unfinished vessel—not a mere lien—to the Government, and it, therefore, reversed the judgment of the court below which had allowed state-created materialmen's liens to be imposed upon the unfinished vessel. The principles of that deci-

sion appear to have been followed in every decided case in this country upon the question [8] save one.[9]

I believe that these considerations require the conclusion that the District Court and the Court of Appeals were right in holding that the contracts in question conveyed full beneficial title—all elements of property and incidents of ownership—in the materials to the Government.

II.

Is this a general ad valorem tax imposed *on the materials?* The majority holds, we think erroneously, that it is not. Under the Constitution of the State of Michigan [10] only two general methods of taxation by the State or its subdivisions are authorized, namely, (1) ad valorem taxes, and (2) excise or privilege taxes. *C. F. Smith Co.* v. *Fitzgerald,* 270 Mich. 659, 672, 259 N. W. 352, 357; *Pingree* v. *Auditor General,* 120 Mich. 95, 102, 109, 78 N. W. 1025, 1027, 1029–1030. The taxes here questioned were levied both by the city and county subject to the authority of the General Property Tax Act of Michigan. Act 206 of the Public Acts of Michigan, 1893, as amended (6 Mich. Stat. Ann., 1950, §§ 7.1–7.243) ("[a]n act to provide for the assessment of property and the levy and collection of

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[8] *In re Read-York, Inc.,* 152 F. 2d 313, 316, 317; *Douglas Aircraft Co.* v. *Byram,* 57 Cal. App. 2d 311, 134 P. 2d 15; *Craig* v. *Ingalls Shipbuilding Corp.,* 192 Miss. 254, 5 So. 2d 676; *State ex rel. Superior Shipbuilding Co.* v. *Beckley,* 175 Wis. 272, 185 N. W. 199; and cf. *Kern-Limerick, Inc.* v. *Scurlock,* 347 U. S. 110, 116–122; *United States* v. *Allegheny County,* 322 U. S. 174, 178, 183; *In re American Boiler Works,* 220 F. 2d 319, 321, and *Wright Aeronautical Corp.* v. *Glander Corp.,* 151 Ohio St. 29, 84 N. E. 2d 483.

[9] The one exception is *American Motors Corp.* v. *City of Kenosha,* 274 Wis. 315, 80 N. W. 2d 363, but even that case fails to mention that court's earlier decision to the contrary in *State ex rel. Superior Shipbuilding Co.* v. *Beckley, supra.*

[10] Mich. Const., Art. X, § 3.

taxes thereon . . . ."). Section 211.40 of Mich. Comp. Laws, 1948 (6 Mich. Stat. Ann., 1950, § 7.81) provides in pertinent part: "property taxes; lien, priority. [§ 40.] The taxes thus assessed shall become at once a debt due to the . . . city . . . and county from the persons to whom they are assessed . . . . And all personal taxes hereafter levied or assessed *shall also be a first lien . . . on all personal property of such persons so assessed* . . . and so remain until paid, which said tax liens shall take precedence over all other claims, encumbrances and liens upon said personal property whatsoever . . . ." (Emphasis supplied.)

The pertinent parts of the Charter of the City of Detroit, under which that city acted, are set forth in the margin.[11] Briefly summarized, they provide that "[a]ll

[11] Tit. VI, c. II, § 1. "All real and personal property within the city subject to taxation by the laws of this state shall be assessed at its true cash value . . . ."

The following sections appear in Tit. VI, c. IV:

"Section 1. All city taxes shall be due and payable on the fifteenth day of July in each year, and on that date *shall become a lien on the property taxed* . . . [and] the owners or persons in possession of any personal property shall pay all taxes assessed thereon."

"Sec. 7. In case any person by agreement or otherwise ought to pay such tax, or any part thereof, the person in possession who shall pay the same may recover the amount from the person who ought to have paid the same, in an action of *assumpsit* as for moneys paid out and expended for his benefit, or may deduct the amount from any rent due or to become due to the person who should have paid such tax."

"Sec. 26. On and after the twenty-sixth day of August in each year . . . the City Treasurer shall enforce the collection of all unpaid taxes which are assessed *against the property* or value other than real estate. If such taxes shall remain unpaid *the City Treasurer shall forthwith levy upon and sell at public auction the personal property of any person refusing or neglecting to pay such tax,* or collect the same through the courts. . . . All city taxes upon personal property shall become on said fifteenth day of July *a lien thereon and so*

real and personal property within the city, subject to taxation by the laws of Michigan, shall be assessed at its true cash value, and that all city taxes shall be due and payable on the fifteenth day of July in each year, and on that date shall become a lien on the property taxed"; that the "owners or persons in possession" of personal property shall pay the taxes assessed thereon but in case any other person, "by agreement or otherwise," ought to have paid the tax the person in possession who has paid the same "may recover the amount from the person who ought to have paid the same" in an action of *assumpsit,* or may deduct the amount from rents due or to become due; and that if the "taxes which are *assessed against the property*" are not paid by the 26th day of August the City Treasurer "shall forthwith *levy upon and sell at public auction the personal property*"; that the personal property taxes "*in addition to being a lien upon the property assessed* shall become a debt *against the owner* from the time of the listing of the property for assessment, and shall remain a debt *against the owner of the property* or his estate after his death, until the same are paid." (Emphasis supplied.)

We fail to see how it could be more plainly stated that these taxes are ad valorem taxes *on the property.* One cannot profitably elaborate a truth so evident. And the Michigan courts have repeatedly so held. *City of Detroit* v. *Phillip,* 313 Mich. 211, 213, 20 N. W. 2d 868, 869; *Pingree* v. *Auditor General, supra.* Cf. *Crawford* v. *Koch,* 169 Mich. 372, 379, 135 N. W. 339, 342; *In re Ever*

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remain until paid, and no transfer of the personal property assessed shall operate to divest or destroy such lien.

"Sec. 27. All city taxes upon personal property . . . *in addition to being a lien upon the property assessed shall become a debt against the owner* from the time of the listing of the property for assessment, and shall remain a debt *against the owner of the property* or his estate after his death, until the same are paid." (Emphasis supplied.)

Krisp Food Products Co., 307 Mich. 182, 196, 11 N. W. 2d 852, 856. Actually the pleadings formally admit that this is so.[12]

Petitioners stridently argue that the language in § 211.40 of the Michigan Comp. Laws saying that "[t]he taxes thus assessed shall become at once a debt due to the . . . city . . . and county from the persons to whom they are assessed," and the language in §§ 1 and 7 of Tit. VI, c. IV, of the Detroit Charter, saying that "[t]he owners or persons in possession of any personal property shall pay all taxes assessed thereon [and if he] shall pay the same [he] may recover the amount from the person who ought to have paid the same . . . ," shows that the tax is not upon the materials but is, rather, upon the "owners or persons in possession." This argument overlooks the fact that § 211.40 continues, saying that "all personal taxes hereafter levied or assessed *shall also be a first lien . . . on all personal property of such persons so assessed* . . . and so remain until paid." The argument also overlooks the fact that Tit. VI, c. IV, § 1 of the Detroit Charter further provides that "[a]ll city taxes shall be due and payable on the fifteenth day of July in each year, and on that date *shall become a lien on the property taxed,*" as does § 26; and § 27 says "all city taxes upon personal property . . . *in addition to being a lien upon the property assessed* shall become a debt *against the owner* from the time of the listing of the property for

[12] Paragraph 3 of the complaint in the first action alleged—and it is stipulated that the complaints in the three cases were the same—that the tax was assessed as "the ad valorem tax on the personal property of this plaintiff for the year 1952 . . . ." The answer of the city "admits the allegations in paragraph three" and the answer of the county "admits . . . that the assessed valuation placed upon the personal property of plaintiff [by the city and adopted by the county was] the ad valorem tax on the personal property of plaintiff for the year 1952."

assessment, and shall remain a debt *against the owner of the property* . . . until the same are paid." See note 11. (Emphasis supplied.) Thus, though the Michigan statute makes the tax a debt of the "owner or person in possession," it also makes the tax "a lien on the property taxed," and the Detroit Charter in addition to making the tax a debt "against the owner" makes it "a lien upon the property assessed." Moreover, the precise question was specifically ruled by this Court in *United States* v. *Allegheny County,* 322 U. S. 174, where it was said:

> "While personal liability for the [personal property] tax may be and sometimes is imposed, the power to tax is predicated upon jurisdiction of the property, not upon jurisdiction of the person of the owner, which often is lacking without impairment of the power to tax. In both theory and practice the property is the subject of the tax and stands as security for its payment." *Id.,* at 184. "But in all of these cases [13] what we have denied is immunity for the contractor's own property, profits, or purchases. We have not held either that the Government could be taxed *or its contractors taxed because property of the Government was in their hands.*" *Id.,* at 186. "We think, however, that the Government's property interests are not taxable *either to it or to its bailee.*" *Id.,* at 187. "A State may tax personal property and might well tax it to one in whose possession it was found, but it could hardly tax one of its citizens because of moneys of the United States which were *in his possession* as . . . *agent, or contractor.* We hold that Government-owned property, to the full extent of the Government's interest therein, is

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[13] *James* v. *Dravo Contracting Co.,* 302 U. S. 134; *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, and *Alabama* v. *King & Boozer,* 314 U. S. 1.

immune from taxation, either as against the Government itself *or as against one who holds it as a bailee.*" *Id.*, at 188–189. (Emphasis supplied.)

Petitioners further argue that the Detroit assessor's action in writing on the tax roll, in this instance, the words "assessed subject to prior rights of the Federal Government" shows that the tax is not on the Government's interest, if any, in the materials. It principally relies upon *S. R. A.* v. *Minnesota,* 327 U. S. 558, and *City of New Brunswick* v. *United States,* 276 U. S. 547. While those cases, in an abstract sense, are relevant to the point as urged by petitioners, concretely they are inapposite [14] for in each of those instances the tax was assessed directly upon property beneficially owned by third parties, while here the tax is directly assessed on property beneficially owned by the Government. Moreover, "renunciation of any lien on Government property itself, which could not be sustained in any event, hardly establishes that it is not being taxed. . . ." *United States* v. *Allegheny County, supra,* at 187. Furthermore, inasmuch as the Government in this case beneficially owned the *entire interest* in the materials and the Detroit tax was assessed "subject to" the Government's interest therein, it would seem to follow that the Detroit tax in question was never in fact assessed against anyone.

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[14] In *S. R. A.* v. *Minnesota,* the Government had sold real estate in Minnesota to S. R. A., Inc., under an installment contract for a deed but had retained legal title only as security and was, in effect, a mortgagee. S. R. A. took possession and improved the land. Afterward the State assessed general ad valorem taxes upon the property "subject to fee title remaining in the United States." S. R. A. claimed exemption from the tax on the ground that title to the property was in the United States. This Court upheld the tax because the contract of sale had transferred to the purchaser the equity in the property upon which alone the tax was levied. *City of New Brunswick* v. *United States* is almost identical to the *S. R. A.* case and varies from it in no substantial respect.

It, therefore, seems inescapable that the tax here involved was an ad valorem tax *on the property* of the Government.

III.

Since the landmark case of *M'Culloch* v. *Maryland*, 4 Wheat. 316, no legal principle has been more firmly established than that property owned by the Federal Government is constitutionally immune from direct taxation by a State. I agree with the majority that this, of course, does not mean that taxes directly imposed upon third parties—such as agents, contractors or employees—who may be doing business with the Government, share the Government's immunity even though the economic burden of the tax, through higher prices and the like, may ultimately fall upon the Government [15] for such "is but a normal incident of the organization within the same territory of two independent taxing sovereignties." *Alabama* v. *King & Boozer*, 314 U. S. 1, 9. In that case this Court upheld a state sales tax imposed, not directly upon the Government, but, rather, directly upon a government contractor relating to materials purchased by him for use

[15] See *Trinityfarm Co.* v. *Grosjean*, 291 U. S. 466, which sustained an excise tax imposed by a State directly upon a government contractor on account of gasoline consumed by him in the performance of a government contract; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 160, which upheld a gross receipts tax imposed by a State directly upon a government contractor on account of materials purchased by it for its use in performing the contract; *Helvering* v. *Gerhardt*, 304 U. S. 405, which sustained an income tax levied directly upon a construction engineer and two assistant general managers, employees of an agency of the United States, in respect of their salaries from the United States; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, is precisely like the *Gerhardt* case; *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495, which upheld a state privilege tax imposed directly by a State upon a storer of gasoline even though, *by contract*, the Government, which had stored its gasoline with the storer, assumed liability for all state taxes.

in the performance of a government contract.[16] The case of *Kern-Limerick, Inc.* v. *Scurlock,* 347 U. S. 110, makes the distinction clear. In that case the government contractor was authorized to and did purchase, *as agent of and directly for the United States,* certain tractors which the contractor was permitted to use in the performance of his "cost-plus-fixed-fee" contract with the Government. The purchaser was the Government and it paid the vendor for and took title to the tractors. The state law required the vendor to collect from the vendee, and remit to the State, a sales tax on local sales. The vendor, at the request of the Government, paid the tax on these sales under protest and sued for refund. The State Supreme Court sustained the tax. On certiorari this Court reversed, holding that the sale was directly to the Government and that the tax was imposed directly upon the Government which was immune from state taxation.

Under the facts and circumstances here we think the case of *United States* v. *Allegheny County, supra,* is entirely controlling. There, Mesta Machine Company owned a factory in Pennsylvania suitable for the manufacture of ordnance required by the Government. The Government entered into a contract with Mesta under which the latter undertook to make and deliver guns to the Gov-

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[16] In its companion case of *Curry* v. *United States,* 314 U. S. 14, the Court followed the same principle in holding that government cost-plus contractors who had imported into the State certain materials which they used in the performance of their contract were not entitled to share the Government's constitutional immunity from a state use tax, and said: "If the state law lays the tax upon them rather than the [Government] with whom they enter into a cost-plus contract like the present one, then it affects the Government . . . only as the economic burden is shifted to it *through operation of the contract.*" *Id.,* at 18. (Emphasis supplied.) As in *King & Boozer,* the impact of the tax upon the Government derived from the Government's voluntary assumption, or, as said by the Court, "through operation of the contract."

ernment at a fixed price. Mesta lacked some of the necessary machine tools to do the contemplated work. The contract provided that the Government would, and it did, furnish various lathes and other machines, which were "leased" to Mesta and installed in its factory by being "bolted on concrete foundations [and] could be removed without damage to the building." *Id.*, at 179. The contract further provided that if Mesta, after using every effort short of litigation to procure exemption or refund, should be compelled to pay any state, county or municipal tax upon the government-owned machinery, the Government would reimburse Mesta for that amount. Subsequently Allegheny County revised Mesta's previously determined assessment for ad valorem taxes by adding thereto the value of the government-owned machinery and assessed an additional tax on that account. Mesta protested and exhausted administrative remedies without avail and then sued for refund. The United States intervened. The trial court held that the machinery in question "was 'owned by the United States' and so for constitutional reasons could not be included." *Id.*, at 180. The Supreme Court of Pennsylvania reversed, and reinstated the assessment and tax. It acknowledged that the government-owned property was " 'beyond the pale of taxation' by a state" (*ibid.*), but thought that the tax was not against the United States but was assessed against Mesta, as a part of its real estate, and constituted a *debt* of Mesta and a lien on its real estate, but not a debt of the Government nor a lien on its chattels. The case came here on appeal and this Court reversed, saying, *inter alia:*

> "It is not contended that the scheme of taxation employed by Pennsylvania is anything other than the old and widely used *ad valorem* general property

> tax. . . . This form of taxation is not regarded primarily as a form of personal taxation but rather as a tax *against the property as a thing.* Its procedures are more nearly analogous to procedures *in rem* than to those *in personam.* While personal liability for the tax may be and sometimes is imposed, the power to tax is predicated upon jurisdiction of the property, not upon jurisdiction of the person of the owner, which often is lacking without impairment of the power to tax. *In both theory and practice the property is the subject of the tax and stands as security for its payment.*" *Id.,* at 184.
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> "The assessors simply and forthrightly valued Mesta's land as land, and the Government's machines as machinery, and added the latter to the former. We discern little theoretical difference, and no practical difference at all, between what was done and what would be done if the machinery were taxed in form. Its full value was ascertained and added to the base to which the annual rates would apply for county, city, borough, town, township, school, and poor purposes.
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> "We hold that the substance of this procedure is to lay an *ad valorem* general property tax on property owned by the United States." *Id.,* at 185. (Emphasis supplied.)

The foregoing demonstrates, I think, that the Government owned the materials on the assessment date; that the tax was imposed *on those materials;* that the tax was a general ad valorem tax; and that the Government was constitutionally immune from such taxation by the State.

These are my reasons for dissenting, and, upon them, I would affirm the judgment of the Court of Appeals.

PUBLIC UTILITIES COMMISSION OF CALIFORNIA *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 23. Argued January 7, 1958.—Decided March 3, 1958.

California enacted, and its Public Utilities Commission plainly indicated an intent to enforce, a statute which would have made contingent upon the Commission's prior approval continuation of the Federal Government's long-established practice, sanctioned by federal law and regulations, of negotiating with common carriers special rates for the shipment of government property within the State. The United States sued in a federal court for a declaratory judgment declaring the state statute unconstitutional insofar as it prohibits carriers from transporting government property at rates other than those approved by the Commission. *Held:*

1. The federal court had jurisdiction of the case and power to grant the relief sought. Pp. 536–540.

(a) There was an "actual controversy" between the United States and the Commission within the meaning of the Declaratory Judgment Act, 28 U. S. C. § 2201. Pp. 536–539.

(b) In the circumstances of this case, the Government's complaint was not barred by its failure to exhaust administrative remedies. Pp. 539–540.

(c) Injunctive relief in this case was not barred by 28 U. S. C. § 1342. P. 540.

2. When Congress authorizes its procurement agents to negotiate rates, a State may not require that those rates be approved by it. The United States cannot be subjected to discretionary authority of a state agency for the terms on which, by grace, it can make arrangements for services to be rendered it. Pp. 540–546.

141 F. Supp. 168, affirmed.

J. Thomason Phelps and *Everett C. McKeage* argued the cause and filed a brief for appellant.

John F. Davis argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Hansen* and *Henry Geller.*

Briefs of *amici curiae* urging reversal were filed by *Will Wilson,* Attorney General, *James N. Ludlum,* First Assistant Attorney General, and *J. W. Wheller,* Assistant Attorney General, for the Railroad Commission of Texas et al., *Phillip Robinson* for the Texas Independent Motor Carriers, *Daryal A. Myse* for Hughes Transportation, Inc., and *Austin L. Roberts, Jr.* and *R. Everette Kreeger* for the National Association of Railroad and Utilities Commissioners.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Section 530 of the California Public Utilities Code, Cal. Stat. 1955, c. 1966, provides in part:

> "Every common carrier subject to the provisions of this part may transport, free or at reduced rates:
> "(a) Persons for the United States, ...
>
> . . . . . .
>
> "The commission may permit common carriers to transport property *at reduced rates for the United States,* state, county, or municipal governments, *to such extent and subject to such conditions as it may consider just and reasonable.* Nothing herein shall prevent any common carrier subject to the provisions of this part from transporting property for the United States, state, county, or municipal governments, at reduced rates no lower than rates which lawfully may be assessed and charged by any other such common carrier or by highway permit carriers as defined in the Highway Carriers' Act." (Italics added.)

There is a large volume of military traffic between points in California. For many years the United States has negotiated special agreements with carriers as to the rates governing the transportation of government property. Property for the armed services has usually been transported at negotiated rates substantially equal to or lower than those applicable to regular commercial shipments.

The United States filed this suit for declaratory relief, 28 U. S. C. § 2201, in a three-judge District Court, asking that § 530 be declared unconstitutional insofar as it prohibits carriers from transporting government property at rates other than those approved by the Commission and requesting relief by injunction.

The District Court rendered judgment for the United States, 141 F. Supp. 168. The case is here by appeal, 28 U. S. C. §§ 1253, 2101 (b). We noted probable jurisdiction. 352 U. S. 924.

We are met at the outset with a contention that there is no "actual controversy" between the United States and the Commission within the meaning of 28 U. S. C. § 2201. If so, there is a fatal constitutional, as well as statutory, defect because of the manner in which the judicial power is defined by Art. III, § 2, cl. 1, of the Constitution. See *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227. The argument is that there is no allegation that the Commission had done or had threatened to do anything adverse to the United States or its agent.

Prior to 1955, § 530 provided that every common carrier "may transport, free or at reduced rates: . . . property for the United States . . . ." [1] In 1955, § 530 was amended to eliminate that provision and substitute the provision already noted that the Commission "may per-

[1] Cal. Stat. 1951, c. 764, p. 2045.

mit" common carriers to transport property of the United States at reduced rates "to such extent and subject to such conditions as it may consider just and reasonable." As also noted above, this amendment further provided that no common carrier shall be prevented from transporting property of the United States "at reduced rates no lower than rates which lawfully may be assessed and charged by any other such common carrier or by highway permit carriers . . . ." [2] Prior to this amendment the Commission had authorized highway permit carriers to deviate from the prescribed minimum rates in connection with the transportation of property for the armed forces of the United States. To prevent the continuation of this exemption the Commission on August 16, 1955, canceled the deviation authorization for permit carriers as of September 7, 1955, the effective date of the amendment to § 530. On request of the Department of Defense the Commission postponed the effectiveness of that cancellation until December 5, 1955. On November 29, 1955, the Commission denied a further extension, stating:

> "The provision of Item No. 20 of Minimum Rate Tariff No. 2 which permits carriers to deviate from the minimum rates in connection with the transportation of property for the Armed Forces of the United States constitutes an exception which was established prior to the amendment of Section 530. So long as this provision remains in effect, not only the permitted carriers but also the common carriers are without the rate regulation which clearly was contemplated under the recent legislative enactment. . . .

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[2] California Public Utilities Code § 3515 defines a "highway permit carrier" as "every highway carrier other than a highway common carrier or a petroleum irregular route carrier."

> "The intent of the legislature should be carried out without further delay. Accordingly, the petition for further postponement will be denied. This action will in no way preclude carriers from filing applications for such rate exceptions as they may consider to be just and reasonable."

As a result of this denial, common carriers could no longer transport any United States property at lower negotiated rates without Commission approval. For § 486 requires common carriers to file their rates with the Commission. Section 493 provides that no common carrier shall engage in transportation until its schedules of rates have been filed. Section 494 provides that no common carrier "shall charge, demand, collect, or receive a different compensation for the transportation of persons or property . . . than the applicable rates . . . specified in its schedules filed . . . ." (A like provision is contained in Art. XII, § 22 of the California Constitution.) Moreover the Public Utilities Code provides penalties for violations of its provisions and orders issued thereunder. §§ 2107, 2112. These penalties are applicable not only to the carrier but to shippers as well. California Public Utilities Code, § 2112. As stated by the District Court, "If a United States officer were to negotiate with a carrier for 'reduced rates' without permitting the defendant to determine whether it 'considered' the conditions of the contract 'just and reasonable', he could be thrown into the county jail." 141 F. Supp., at 186.

The Commission has plainly indicated an intent to enforce the Act; and prohibition of the statute is so broad as to deny the United States the right to ship at reduced rates, unless the Commission first gives its approval. The case is, therefore, quite different from *Public Service Comm'n* v. *Wycoff Co.*, 344 U. S. 237, where a carrier sought relief in a federal court against a state commission

in order "to guard against the possibility," *id.*, at 244, that the Commission would assume jurisdiction. Here the statute limits transportation at reduced rates unless the Commission first gives approval. The controversy is present and concrete—whether the United States has the right to obtain transportation service at such rates as it may negotiate or whether it can do so only with state approval.

There is a large group of cases involving the doctrine of primary jurisdiction which requires the complainant first to seek relief in the administrative proceeding before a remedy will be supplied by the courts. See *Far East Conference* v. *United States,* 342 U. S. 570; *United States* v. *Western Pacific R. Co.,* 352 U. S. 59. In related situations we have insisted that an aggrieved party pursue his administrative remedy before the state agency and the state court prior to bringing his complaint to the federal court, so that the true interpretation of the state law may be known and its actual, as opposed to its theoretical, impact on the litigant authoritatively determined before the federal court undertakes to sit in judgment. See *Alabama Federation of Labor* v. *McAdory,* 325 U. S. 450; *Leiter Minerals, Inc.,* v. *United States,* 352 U. S. 220.

These cases are inapposite. We know the statute applies to shipments of the United States. We know that it is unlawful to ship at reduced rates unless the Commission approves those rates. The question is whether the United States can be subjected to the discretionary authority of a state agency for the terms on which, by grace, it can make arrangements for services to be rendered it. That issue is a constitutional one that the Commission can hardly be expected to entertain. If, as in *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U. S. 752, and *Allen* v. *Grand Central Aircraft Co.,* 347 U. S. 535, an administrative proceeding might leave no

remnant of the constitutional question, the administrative remedy plainly should be pursued. But where the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right. In that posture the case is kin to those that hold that "failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this Court of a judgment of conviction under such an ordinance." *Staub* v. *City of Baxley*, 355 U. S. 313, 319, and cases cited; *Thomas* v. *Collins*, 323 U. S. 516.

It is argued that 28 U. S. C. § 1342, bars the grant of relief in this case. It provides that the federal courts "shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

"(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution . . . ."

Assuming, *arguendo*, that the Act applies to the sovereign who made it, there is no violation of its mandate in the relief granted here. In the present case, the challenge is not to a rate "order" but to a statute which requires the United States to submit its negotiated rates to the California Commission for approval. The United States wants to be rid of the system that subjects its procurement services to that form of state supervision.

We come to the merits. Congress has provided a comprehensive policy governing procurement. 10 U. S. C. (Supp. V) §§ 2301–2314. While competitive bidding is

the general policy, § 2304 provides that "the head of an agency may negotiate such a purchase or contract, if—

. . . . . .

"(2) the public exigency will not permit the delay incident to advertising;

. . . . . .

"(10) the purchase or contract is for property or services for which it is impracticable to obtain competition; [3]

. . . . . .

"(12) the purchase or contract is for property or services whose procurement he determines should not be

[3] The purpose of this subsection is "to place the maximum responsibility for decisions as to when it is impracticable to secure competition in the hands of the agency concerned." S. Rep. No. 571, 80th Cong., 1st Sess., p. 8. The Senate Report goes on to state: "The experiences of the war and contracts negotiated since the war in the fields of stevedoring, ship repairs, chartering of vessels, where prices are set by law or regulation, or where there is a single source of supply, have shown clearly that the competitive-bid-advertising method is not only frequently impracticable but does not always operate to the best interests of the Government. It is, therefore, intended that this section should be construed liberally and that the review of these contracts should be confined to the validity and legality of the action taken and should not extend to reversal of bona fide determinations of impracticability where any reasonable ground for such determination exists."

It would seem, therefore, that negotiation was contemplated where rates, fixed by a government agency, are involved. And see H. R. Rep. No. 109, 80th Cong., 1st Sess., pp. 8–9. As stated by W. John Kenney, Acting Secretary of the Navy, who submitted the draft of this bill:

"The primary purpose of the bill is to permit the War and Navy Departments to award contracts by negotiation when the national defense or sound business judgment dictates the use of negotiation rather than the rigid limitations of formal advertising, bid, and award procedures." Hearings before House Committee on Armed Services on H. R. 1366, 80th Cong., 1st Sess., Vol. 1, p. 425.

438765 O—58——40

publicly disclosed because of their character, ingredients, or components; . . . ."

The regulations, promulgated to carry out these statutory provisions,[4] are numerous and extensive.[5] One provides that "volume shipments" shall be referred "at the earliest practicable time to the appropriate military traffic management office for a determination of the reasonableness of applicable current rates and, when appropriate, for negotiation of adjusted or modified rates." [6]

The Army regulations provide that the "least costly means of transportation will be selected which will meet military requirements and still be consistent with governing procurement regulations and transportation policies as expressed by Congress, contingent upon carrier ability to provide safe, adequate, and efficient transportation." [7] Navy regulations provide that when applicable freight rates "appear excessive" they "may be negotiated for more equitable rates." [8] The Air Force regulations provide for negotiations for adjustments or modifications of "commercial carriers' rates . . . only after a determination has been made as to the unreasonableness, unjustness or otherwise apparent unlawfulness of effective rates . . . ." [9]

It seems clear that these regulations—which have the force of law, *Leslie Miller, Inc.*, v. *Arkansas*, 352 U. S. 187;

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[4] 10 U. S. C. § 3012 (g) provides, "The Secretary [of the Army] may prescribe regulations to carry out his functions, powers, and duties under this title." For comparable provisions applicable to the Navy and Air Force see 10 U. S. C. § 6011 and 10 U. S. C. § 8012 (f) respectively.

[5] Armed Services Procurement Regulations, 32 CFR, 1957 Cum. Pocket Supp., § 1.108 *et seq.*

[6] *Id.*, § 1.306–10.

[7] Army Regulation 55–142, ¶ 2, dated April 19, 1956.

[8] Navy Shipping Guide, Part I, Art. 1800 (d) (3) (20).

[9] Air Force Manual 75–1, ¶ 80501 (b), dated July 10, 1956.

Standard Oil Co. v. *Johnson,* 316 U. S. 481—sanction the policy of negotiating rates for shipment of federal property and entrust the procurement officers with the discretion to determine when existing rates [10] will be accepted and when negotiation for lower rates will be undertaken. It also seems clear that under § 530 of the California Public Utilities Code this discretion of the federal officers may be exercised and reduced rates used only if the Commission approves. The question is whether California may impose this restraint or control on federal transportation procurement.

We lay to one side these cases which sustain nondiscriminatory state taxes on activities of contractors and others who do business for the United States, as their impact at most is to increase the costs of the operation. See, *e. g., Esso Standard Oil Co.* v. *Evans,* 345 U. S. 495; *Smith* v. *Davis,* 323 U. S. 111; *Alabama* v. *King & Boozer,* 314 U. S. 1; *James* v. *Dravo Contracting Co.,* 302 U. S. 134. We also need do no more than mention cases where, absent a conflicting federal regulation, a State seeks to impose safety or other requirements on a contractor who does business for the United States. See, *e. g., Baltimore & Annapolis R. Co.* v. *Lichtenberg,* 176 Md. 383, 4 A. 2d 734, appeal dismissed, 308 U. S. 525; *James Stewart & Co.* v. *Sadrakula,* 309 U. S. 94. *Penn Dairies* v. *Milk Control Comm'n,* 318 U. S. 261, can likewise be put to one side. There the question, much mooted, was whether

[10] Section 22 of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. § 22, exempts transportation for the United States from the rate provisions of that Act. The provision in the law, respecting land-grant rates, which imposes on the United States the obligation to pay "the full applicable commercial rates," 49 U. S. C. § 65, applies only to rates fixed by the Interstate Commerce Commission and is made expressly subject to § 22 of the Interstate Commerce Act.

the federal policy conflicted with the state policy fixing the price of milk which the United States purchased. The Court concluded that the state regulation "imposes no prohibition on the national government or its officers." *Id.*, at 270. Here, however, the State places a prohibition on the Federal Government. Here the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates seems to us to be clear. The conflict is as plain as it was in *Arizona* v. *California,* 283 U. S. 423, 451, where a State sought authority over plans and specifications for a federal dam, in *Leslie Miller, Inc.,* v. *Arkansas, supra,* where state standards regulating contractors conflicted with federal standards for those contractors, and in *Johnson* v. *Maryland,* 254 U. S. 51, where a State sought to exact a license requirement from a federal employee driving a mail truck. The conflict seems to us to be as clear as any that the Supremacy Clause, Art. VI, cl. 2, of the Constitution was designed to resolve. As Chief Justice Marshall said in *M'Culloch* v. *Maryland,* 4 Wheat. 316, 427,

> "It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence."

The seriousness of the impact of California's regulation on the action of federal procurement officials is dramatically shown by this record.

It is the practice of the Government not only to negotiate separate rates which vary from the class or "paper rate" [11] but also to negotiate a "freight all kinds" rate

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[11] The findings of the District Court state:

"Under the theory of rate regulation in California and elsewhere, every common carrier is required to have in existence at all times a

which will cover hundreds of diverse items for the supply of a division of the Army or for a vessel that are needed at one place at one particular time. There is no provision in the California Code or the regulations for the making of such shipments. The findings are that if the Code is applied here, this type of arrangement would be abolished:

> "This would make it necessary for the shipping officers to classify the hundreds and thousands of different items used in military operations, to segregate such items in accordance with published tariffs and classifications, to rearrange the boxing and crating of such items in order to meet the classifications and requirements of commercial traffic and fill out voluminous documents. This additional process could cause delays as high as thirteen hours in the shipment of one truckload or carload. In many situations a delay of this sort would seriously hamper or disrupt the military mission for which the shipment was made."

Moreover, no rates exist for much of the military traffic, which means that, unless the United States can negotiate rates for each shipment, the shipments will be delayed for Commission action unless shipped under the established rates which are higher than negotiated rates.

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published rate to cover the shipment of every known item between every conceivable point. This rate structure is known as the class or 'paper rate.' Since the channels of commercial traffic are regular and well defined in accordance with the stability of trade, large commercial shippers seldom use the class rate but negotiate rates with the carriers known as 'commercial rates,' which are peculiarly suited and adapted to the requirements of the commerce involved. These commercial rates are usually considerably lower than the class rates. Very little commercial traffic moves at the class rate."

General Edmond C. R. Lasher of the United States Army, who was Assistant Chief of Transportation, testified at the trial:

> "for us to make these arrangements at the Washington level with the various states, let us say 48 states, with 48 varieties of methods to follow, we would find ourselves in an administrative morass out of which we would never fight our way, we would never win the war."

Affirmed.

MR. JUSTICE HARLAN, whom THE CHIEF JUSTICE and MR. JUSTICE BURTON join, dissenting.

I think that the Court moves with unnecessary haste in striking down this California statute which was intended to deal with rate-cutting practices of California carriers handling the heavy volume of military traffic in that State. These practices, the State tells us, have a seriously depressing influence upon revenues of carriers and might lead to a deterioration of the economic position of the California carrier industry as a whole. To guard against this possibility, the California Legislature amended § 530 of the Public Utilities Code by extending rate regulation to carriers dealing with the Federal Government. Maintenance of the proper balance between federal and state concerns in this area should lead us to proceed with caution before deciding that this regulatory statute is unconstitutional. We should not reach this conclusion before giving California an opportunity to interpret and implement this enactment so that we can fairly judge whether it does in truth trespass upon paramount federal interests. Accordingly, I dissent upon the several grounds given below.

I.

Although Congress can no doubt foreclose a State from regulation of transportation rates between the Government and private carriers, such a purpose must be made manifest. The excerpts from federal procurement statutes and regulations quoted in the Court's opinion provide, in my view, an inadequate foundation for the conclusion that Congress has directed procurement officers to by-pass state minimum-price or rate regulation. It is difficult to believe that so important a decision has been taken in such an obscure manner. In contrast to the situation presented by the express exemption in § 22 of the Interstate Commerce Act, 49 U. S. C. § 22, of transportation for the United States from the rate provisions of that Act, no procurement statute declares inapplicable rate schedules covering *intrastate* transportation pursuant to state law, and there is no indication that federal procurement officers were not to operate within the framework of state economic regulation in negotiating to secure the best terms possible. The statutes and regulations relied upon by the Court as a manifestation of congressional intent to displace state economic regulation are substantially the same as those found wanting in this respect in *Penn Dairies, Inc.,* v. *Milk Control Comm'n of Pennsylvania,* 318 U. S. 261, where this Court said (at 275):

> "An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication [citing cases] should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation."

II.

In the absence of an express federal policy to nullify state regulation, this Court's decisions make clear that the fact that the Government may not henceforth receive more advantageous shipping rates in California than those applicable to other intrastate shippers is not sufficient by itself to vitiate this state statute. The fact that the economic incidence of state price regulation or taxation falls upon the Government no longer alone gives rise to an implied constitutional immunity from such regulation. *E. g., Penn Dairies, supra,* at 269; *Alabama* v. *King & Boozer,* 314 U. S. 1; *James* v. *Dravo Contracting Co.,* 302 U. S. 134. In *Penn Dairies,* the Court upheld a Pennsylvania law setting minimum prices for milk as applied to a dealer selling milk in Pennsylvania to the United States for consumption at military camps. I can see no constitutional distinction between state regulation of the price of milk the Government must buy and of the price at which the Government must ship the milk it has bought. And surely, insofar as economic effect is concerned, nothing turns on the character of the commodity shipped, whether it be milk or a hydrogen bomb. Apart from discriminatory application of such a regulatory statute to the Government and other considerations not pertinent here, the constitutional validity of this California statute depends entirely on its noneconomic impact upon the Government—that is, upon a determination whether this statute interferes with the performance of governmental functions by military personnel or other federal employees. See *Johnson* v. *Maryland,* 254 U. S. 51; *Arizona* v. *California,* 283 U. S. 423.

III.

The aspects of the California statute which the Court finds fatal to its constitutionality simply reflect antici-

patory views as to how the rate regulation will work in practice. I consider this to be an insufficient basis on which to proceed to the serious business of striking down state regulation, and I believe that final judgment as to constitutionality should be deferred until we know how California intends to apply § 530 of its Public Utilities Code and to accommodate the state interest in a stable rate structure with the federal interest in unimpeded performance of military and other governmental functions. In view of the fact that the possible effect of § 530 in imposing an increased economic burden upon the Government does not in itself require invalidation of this statute, it is to my mind no answer to say that a decision upon the statute's constitutionality need not be deferred pending recourse by the Government to the state Commission and courts, because the statute is unconstitutional on its face in that it subjects government arrangements with California carriers to control by the Commission. Indeed, the very intention of the California Legislature in making special provision for the Government to negotiate with the Commission was to enable it to secure advantageous rates which would not even have been possible if the rate schedules were binding upon all shippers without the possibility of administratively granted exceptions. Cf. *Penn Dairies, supra.*

The purpose in requiring the Government to proceed through the state Commission in the first instance, the path which I think should be followed here, would not be to permit the state Commission or courts to pass upon the statute's constitutionality. That of course is the ultimate responsibility of this Court. Rather the purpose would be to determine if the statute can be so implemented as to overcome objections which the Government could present to the Commission. After such proceedings, we would not be compelled to consider the constitutional question under the uninformed view as to

the actual operation of the statute which we now have. More than abstract or potential impingement upon, or the mere possibility of interference with, some federal function should be shown before we are justified in thwarting otherwise legitimate state policy.

Some examples of the factors stressed by the Government as indicating the obstructive effect of this statute upon military functions suffice, I think, to demonstrate that the Court has acted prematurely in passing on constitutionality at this stage: (1) The Government has contended that disproportionately high rates would be imposed on military traffic because special "commodity" rates normally have not been established for many articles peculiar to military transportation, thus requiring recourse to higher "class" rates. The State has countered with the suggestion that the Commission might authorize retroactive rates which would enable the Government in effect to achieve commodity rates after shipments of presently unscheduled items. (2) It is alleged that excessive delay of vital military shipments may result if army officers are required to determine in advance applicable rates for all items in a varied shipment. Again the State suggests that retroactive determination of rates after the shipment may be the solution. (3) We are told that national security may be prejudiced if the military is forced to reveal the content of particular shipments to determine applicable rates in existing schedules, in lieu of following the present practice of negotiating a general rate for an entire shipment without specifying its content. This obviously important concern is recognized by the State, which emphasizes the Commission's ability to cope with this problem, as by exempting from the usual procedures under § 530 all shipments declared to be "security shipments" by a responsible federal authority. (4) The "freight all kinds" rate noted by the Court as in current widespread use in military shipments is not expressly

provided for by the California statute. Appellant, although frankly stating that this rate is a major vehicle for the price-cutting practices which the amended § 530 was designed to prevent, raises the possibility that a comparable method less productive of such practices might be approved by the Commission. If so, major administrative problems portrayed by the Government would evaporate. (5) The Court adverts to the possibility that state criminal statutes punishing certain parties for deviation from established rates might be applied against federal procurement officers. It will be time enough to dispose of this problem if such a prosecution should ever be brought, a possibility the State here emphatically discards.

I do not, of course, venture to predict whether the Commission might have been able to meet all objections of the Government by restricting the statute to purely economic regulation if it had been given the opportunity, but I do not see how we can say that such a possibility does not exist. It may be that what is now envisioned by the Government would not come to pass at all, for we should not assume that California will be less sensitive than others to the serious considerations urged by the Government with respect to shipments of vital military supplies. Moreover, it is hardly likely that the objections asserted against the application of the statute to military shipments would have the same force with respect to shipments of nonmilitary commodities by other government agencies; yet as to these too the Court annuls the statute.

Unless something more than the remote possibility of hindrance of government functions is enough to justify invalidation of such state statutes, I fail to see why under this decision all state tariff regulation is not automatically ineffective as against the Federal Government. I would not so extend the doctrine of implied

federal immunities, especially when Congress has the undoubted power to deal directly with such matters according to its assessment of the competing state and federal interests involved. The Court has not heretofore gone to the extreme of this decision, and I find it anomalous that the very Term which witnesses a further diminution of the doctrine of implied intergovernmental tax immunities should produce this decision. See, *e. g., City of Detroit* v. *Murray Corp.*, 355 U. S. 489, decided this day.

IV.

This Court should scrupulously withhold its hand from voiding state legislation until the effect on federal interests has appeared with reasonable certainty through clarifying construction and implementation of the challenged enactment by the State. Past decisions of the Court reflect the application of this general principle in a variety of situations involving state statutes or administrative action. *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U. S. 496, 501; *Spector Motor Service, Inc.*, v. *McLaughlin*, 323 U. S. 101, 105; *Leiter Minerals, Inc.*, v. *United States*, 352 U. S. 220, 228–229. Cf. *Alabama Federation of Labor* v. *McAdory*, 325 U. S. 450, 471; *Public Service Comm'n of Utah* v. *Wycoff Co.*, 344 U. S. 237, 246–247. In *Spector Motor*, the Court stated: "[A]s questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law." 323 U. S., at 105. And the language of the Court in *Alabama Federation of Labor* v. *McAdory*, 325 U. S., at 471, is very much in point here:

> "The extent to which the declaratory judgment procedure may be used in the federal courts to control

> state action lies in the sound discretion of the Court. . . . It would be an abuse of discretion for this Court to make a pronouncement on the constitutionality of a state statute . . . when the Court is left in uncertainty, which it cannot authoritatively resolve, as to the meaning of the statute when applied to any particular state of facts. . . . In the exercise of this Court's discretionary power to grant or withhold the declaratory judgment remedy it is of controlling significance that it is in the public interest to avoid the needless determination of constitutional questions and the needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes."

I see no good reason for departing now from that wise policy. In my view the Government should be remitted to the California Commission and courts to test there, in the first instance, the application of this statute, and the federal courts should withhold final judgment on constitutionality until the true effect of the statute has thus become known. The Government, however, should be permitted to proceed during this period as it had before § 530 was amended, for any possibility of state interference with military or other governmental operations would thereby be avoided. I would therefore vacate the judgment below and so frame a remand as to enable the District Court to stay the operation of this statute until proceedings before the state Commission or courts have run their full course. Cf. *Leiter Minerals, Inc., supra.* The proper accommodation of the state and federal concerns here involved makes this in my view the appropriate disposition of this case.

ANDREW G. NELSON, INC., *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 16. Argued December 11, 1957.—Decided March 3, 1958.

Under the "grandfather clause" of § 209 (a) of the Motor Carrier Act of 1935, the Interstate Commerce Commission granted contract carrier permits to appellant and its predecessor. Subsequently, after a hearing, the Commission interpreted "stock in trade of drug stores," a commodity description in appellant's permit, to authorize carriage of only those goods which at time of movement are, or are intended to become, part of the stock in trade of a drugstore. On the basis of this interpretation, the Commission issued an appropriate cease and desist order prohibiting carriage of unauthorized goods. *Held:* The Commission's order is sustained. Pp. 555–562.

(a) There being no patent ambiguity or specialized trade usage involved, the ordinary meaning of the words used in the commodity description is controlling. Pp. 557–558.

(b) The Commission's intent in issuing the permit is not to be ascertained from evidence unknown to the Commission at the time of its issuance. P. 557, n. 3.

(c) The Commission's interpretation of "stock in trade of drug stores" is not clearly erroneous, and, therefore, it must be sustained. Pp. 558–560.

(d) Since the Commission's interpretation accords with the plain meaning of the commodity description, it is immaterial whether the Commission had ever applied the intended use restriction prior to issuance of this permit. Retroactive application here, if any, of such restrictions could not prejudice appellant. Pp. 560–561.

(e) If the permit, as thus construed, is not as broad as the operations carried on by appellant's predecessor prior to the Act, appellant's remedy is to petition the Commission to reopen the grandfather proceedings; the permit cannot be attacked collaterally in a proceeding for its violation. Pp. 561–562.

(f) Appellant's arguments based on noncompliance with the Administrative Procedure Act have no merit. P. 562.

150 F. Supp. 181, affirmed.

Paul E. Blanchard argued the cause for appellant. With him on the brief were *Victor L. Lewis* and *Edward W. Rothe.*

Roger Fisher argued the cause for appellees. On the brief were *Solicitor General Rankin, Assistant Attorney General Hansen, Robert W. Ginnane* and *Isaac K. Hay* for the United States and the Interstate Commerce Commission, appellees.

MR. JUSTICE CLARK delivered the opinion of the Court.

This appeal concerns the scope of a contract carrier permit granted appellant by the Interstate Commerce Commission under the "grandfather clause" of the Motor Carrier Act of 1935.[1] The Commission interpreted "stock in trade of drug stores," a commodity description in appellant's permit, to authorize carriage of only those goods which at time of movement are, or are intended to become, part of the stock in trade of a drugstore. On the basis of that interpretation, an appropriate cease and desist order prohibiting carriage of unauthorized goods was entered. 63 M. C. C. 407. After a three-judge District Court refused to enjoin enforcement of the order, 150 F. Supp. 181, direct appeal was taken to this Court, and we noted probable jurisdiction. 352 U. S. 905 (1956). For reasons hereinafter stated we affirm the judgment of the District Court.

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[1] This Act became Part II of the Interstate Commerce Act. Section 209 (a), 49 Stat. 552, as amended, 52 Stat. 1238, 64 Stat. 575, 49 U. S. C. § 309 (a)(1), makes it unlawful to engage in interstate contract carriage by motor vehicle without a permit from the Interstate Commerce Commission; however, the first proviso thereto provides that the Commission shall issue a permit as a matter of course upon application by a carrier for authority to operate a route over which the carrier or a predecessor in interest was in bona fide operation on July 1, 1935. That proviso is commonly called the "grandfather clause."

Appellant's predecessor, Andrew G. Nelson, having operated as a contract carrier before enactment of the Motor Carrier Act, applied for a permit to continue his operation subsequent to passage of the Act, as contemplated by § 209 (a) thereof. The application described Nelson's complete operation as "transportation . . . of store fixtures and miscellaneous merchandise, and household goods of employes, for Walgreen Co., in connection with the opening, closing and remodeling of stores." In a supporting affidavit Nelson stated that he was "an interstate contract carrier of property for the Walgreen Company and for it alone . . . to and from Walgreen Retail Stores . . . the commodities so transported [being] usually store fixtures and equipment and merchandise for the opening stock." Filed with the affidavit were 17 delivery receipts showing contract carriage for Walgreen in 1934–1935.

On March 13, 1942, the Commission issued the permit in controversy without a hearing, relying on the application and supporting papers filed by Nelson. The permit authorized contract carriage of "[n]ew and used store fixtures, new and used household goods, and stock in trade of drug stores" [2] over irregular routes in 10 States. Upon Nelson's incorporation in 1951, the Commission issued an identical permit to the corporation, the appellant here. In 1954, an investigation by the Commission to determine if appellant was operating beyond the bounds of its permit authority revealed that appellant was carrying a wide range of commodities for many kinds of shippers, including groceries for grocery stores, beer and wine to liquor distributors, dry glue to manufacturers of gummed products, and automobile batteries to department stores. The Commission held that such carriage, all of which

[2] Since neither party attaches any significance to certain underscoring of language in the permit, we do not italicize that language.

appellant attempted to justify under the description "stock in trade of drug stores," violated § 209 of the Act, which prohibits contract carriage without a permit authorizing the business in question.

Appellant contends that the critical language of the permit, "stock in trade of drug stores," is a generic description of commodities by reference to place of sale, entitling it to transport goods like those stocked by present-day drugstores to any consignee within the authorized operating territory. The Commission, however, regards these words as a description of commodities by reference to intended use, authorizing a more limited carriage: goods moving to a drugstore for sale therein, or if moving elsewhere, then with the intention at the time of movement that they ultimately will become part of the goods stocked by a drugstore. Appellant argues that the intended use of the goods is of no consequence here because (1) intended use restrictions are never applied to commodity descriptions by reference to place of sale, and (2) intended use restrictions were developed by the Commission long after issuance of Nelson's permit and cannot now be applied retroactively. Finally, having offered evidence of a much more extensive grandfather operation than was set out in Nelson's application and affidavits, appellant contends that the Commission erred in excluding such evidence.

Before considering these contentions, we first note that the plain meaning of words in a commodity description is controlling in the absence of ambiguity or specialized usage in the trade. Neither of the parties believes the description here patently ambiguous,[3] nor do we consider

[3] Appellant does argue alternatively that if the Commission's interpretation is adopted, the description necessarily would be ambiguous. This is a considerable twisting of appellant's earlier position, consistently maintained throughout these proceedings, that

it to be such. Moreover, appellant is unwilling to say that the instant description is a term of art, while the Commission specifically asserts that it is not. Consequently, the ordinary meaning of the words used in the permit is determinative. In ascertaining that meaning, we are not given *carte blanche;* just as "[t]he precise delineation of an enterprise which seeks the protection of the 'grandfather' clause has been reserved for the Commission," *Noble* v. *United States,* 319 U. S. 88, 93 (1943), subsequent construction of the grandfather permit by the Commission is controlling on the courts unless clearly erroneous. *Dart Transit Co.* v. *Interstate Commerce Comm'n,* 110 F. Supp. 876, aff'd, 345 U. S. 980 (1953).[4]

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the permit's phraseology exhibits no ambiguity or indefiniteness. In this regard, the Commission held, "We agree with the contention of the parties and the examiner's conclusion that there is no such patent ambiguity in the permit as to warrant our going back of it and giving consideration to events prior to its issuance." 63 M. C. C., at 409.

Absent patent ambiguity, it is well established that the Commission will not refer to the underlying grandfather operation. *P. Saldutti & Son, Inc.—Interpretation of Permit,* 63 M. C. C. 593. Even if such reference is made here, however, the Nelson application and all the documents filed with it describe an operation solely for the Walgreen Drug Company; appellant admits that all the record evidence before the Commission gives "the impression that Nelson was hauling only for Walgreen." That background in nowise supports appellant's position here, since it shows Nelson to have been carrying goods actually destined to become part of the stock of a drugstore, and not merely goods like those stocked by such a store. Although appellant offers evidence now of a grandfather operation more extensive than carriage merely for Walgreen, it seems obvious that the Commission's intent in issuing the present permit is not to be ascertained from evidence unknown to the Commission at the time of issuance.

[4] It is true, of course, that limitations on Commission power to modify motor carrier permits, established in § 212 (a) of the Act, cannot be by-passed under a guise of interpretative action. Com-

In construing "stock in trade of drug stores," the Commission found the controverted words to be a commodity description by reference to intended use; it held them equivalent to "drug stores' stock" and analogized the latter to such descriptions as "contractors' equipment" [5] or "packing house supplies." [6] On that basis it required that the goods transported be intended for use by a drugstore as part of its stock in trade.

The Commission rejected appellant's contention that the words of this permit are a description by reference to place of sale.[7] In making that contention appellant equates the permit's language with "goods such as are sold in drug stores." It is obvious to us that such a reading enlarges the ordinary meaning of the words. As pointed out by the examiner, 63 M. C. C., at 414, the description used in the permit connotes possession, and therefore lends itself more readily to "drug stores' stock" than it does to "goods such as are sold in drug stores." [8]

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mission interpretation of the meaning of a permit, being simply a definitive declaration of what rights existed from the very beginning under the permit, cannot be equated with modification, however, unless found to be clearly erroneous.

[5] See *C. & H. Transportation Co.—Interpretation of Certificate,* 62 M. C. C. 586, holding that "contractors' equipment and supplies" authorized transportation of such goods only when intended for use by a contractor; transportation of similar goods for use by a branch of the armed services was held unauthorized.

[6] See *Dart Transit Co.—Modification of Permit,* 49 M. C. C. 607, holding that "packing house supplies" means supplies that in fact are intended to be used in a packing house, and not supplies like those used in packing houses.

[7] In contending, then, that the Commission erred in applying the intended use test to a commodity description by reference to place of sale, appellant clearly begs the question at issue.

[8] Appellant argues that *McAteer Contract Carrier Application,* 42 M. C. C. 35, equates the phrases "goods such as are sold in" and "stock in trade of." The opinion's single use of the latter phrase, however, gives no support to such a contention.

Moreover, an examination of the Commission's decisions indicates use of a definite and distinctive linguistic pattern whenever descriptions are made by reference to place of sale: if the Commission's purpose has been to authorize transportation of goods like those named in the permit, that purpose consistently has been revealed by use of the phrase "such as," or a close variation thereof.[9] Yet there is no such phrase in the present permit. These considerations are bulwarked by the record Nelson put before the Commission in 1942, clearly showing that he was hauling Walgreen's drugstore stock, and not goods such as might be stocked for sale by Walgreen. On balance, therefore, we are compelled to think the Commission right; certainly it is not clearly wrong.

Appellant contends that the permit language cannot embody an intended use restriction because such restrictions were not formulated by the Commission until after issuance of Nelson's permit and cannot be retroactively applied as a limitation on the same. The Commission challenges the assertion that the intended use restriction was never applied prior to issuance of the permit. It is

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[9] See, *e. g.*, *Interstate Commerce Comm'n* v. *Ratner*, 6 CCH Fed. Carriers Cases ¶ 80,415 ("such merchandise as is dealt in by wholesale food business houses"); *Anton Vidas Contract Carrier Application*, 62 M. C. C. 106 ("such commodities as are sold by retail mail-order houses"); *National Trucking Co. Extension—Electrical Appliances*, 51 M. C. C. 638 ("such commodities as are dealt in by wholesale and retail hardware stores"); *Sanders Extension of Operations*, 47 M. C. C. 210 ("such general merchandise as is dealt in by wholesale and retail grocery stores"); *McAteer Contract Carrier Application*, 42 M. C. C. 35 ("such merchandise as is dealt in by wholesale, retail, and chain grocery and food business houses"); *Onondaga Freight Corp. Common Carrier Application*, 28 M. C. C. 53 ("such merchandise as is dealt in by retail food stores"); *Keystone Transportation Co. Contract Carrier Application*, 19 M. C. C. 475 ("such merchandise as is dealt in by wholesale, retail, and chain grocery and food business houses").

unnecessary for us to resolve that question, however. Assuming that the intended use test first appeared as a commodity description technique after appellant's predecessor obtained his permit, we think the Commission still free to interpret the permit as it has done. Its determination accords with the common, ordinary meaning of the words used, and in no way strains or artificializes that meaning.[10] If the controverted words fairly lend themselves now to the construction made here, they always have done so. Consequently, any retroactive application of the intended use test could work no prejudice to appellant; once it is determined that the ordinary meaning of the description is neither more nor less than the Commission's interpretation, the manner in which the Commission arrived at its conclusion is not controlling.[11]

Finally, appellant contends that the Commission's interpretation limits the actual—though previously unasserted—scope of grandfather operations carried on by appellant's predecessor, thus subverting the substantial parity which a grandfather permit should establish between pre-Act and post-Act operations. *Alton R. Co.* v. *United States,* 315 U. S. 15 (1942). If this be so, the remedy lies elsewhere: in the event the grandfather permit does not correctly reflect the scope of the grandfather operation, the carrier's recourse is to petition the Commission to reopen the grandfather proceedings for consideration of the evidence not previously brought to the

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[10] Contrast the Commission's interpretation here with those in *Bird Trucking Co.—Modification of Certificate,* 61 M. C. C. 311, rev'd, 11 CCH Fed. Carriers Cases ¶ 81,028; *Johnson Truck Service* v. *Salvino,* 61 M. C. C. 329, rev'd, 119 F. Supp. 277, on which appellant relies.

[11] The intended use test, as applied by the Commission here, is descriptive rather than determinative: it describes the result obtained by taking the language of the permit at face value, and in no sense is a factor in arriving at that result.

Commission's attention. Such a contention is no answer to the present charge of permit violation, since the permit cannot be collaterally attacked. *Callanan Road Improvement Co.* v. *United States,* 345 U. S. 507 (1953); *Interstate Commerce Comm'n* v. *Consolidated Freightways, Inc.,* 41 F. Supp. 651. To hold otherwise would render meaningless the congressional requirement of a permit to continue grandfather operations subsequent to the Act.

Appellant's arguments based on noncompliance with the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. §§ 1001–1011, have no merit.

Affirmed.

MR. JUSTICE DOUGLAS dissents.

Syllabus.

WEYERHAEUSER STEAMSHIP CO. *v.* NACIREMA OPERATING CO., INC.

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

No. 75. Argued January 6, 1958.—Decided March 3, 1958.

A stevedoring company, which had contracted to unload a vessel in New York and Boston, permitted its Boston employees to use, without inspection, a temporary shelter erected by it in New York but not removed by the shipowner upon sailing for Boston. A longshoreman injured by a board which fell from the shelter sued the shipowner on claims of negligence and unseaworthiness. The shipowner impleaded the stevedoring company, claiming a right to indemnity. A jury in the main case found for the longshoreman on the issue of negligence and for the shipowner on the issue of seaworthiness, and the longshoreman was awarded a judgment against the shipowner. Concluding that the jury's verdict was also dispositive of the third-party action, the judge directed a verdict for the stevedoring company. *Held:* The liability of the stevedoring company depended on principles different from those governing the liability of the shipowner; all issues of fact involved in the third-party action should have been submitted to the jury; and the court erred in directing a verdict for the stevedoring company based on the finding for the longshoreman. Pp. 564–569.

(a) The stevedoring company's contractual obligation to perform its duties with reasonable safety related not only to the handling of the cargo but also to the use of equipment incidental thereto, such as the shelter involved here. P. 567.

(b) If in that regard the stevedoring company rendered a substandard performance which led to foreseeable liability of the shipowner, the latter was entitled to indemnity, absent conduct on its part sufficient to preclude recovery. P. 567.

(c) The evidence bearing on these issues was for jury consideration under appropriate instructions, and these issues were not encompassed by the instructions in the main case. Pp. 567–568.

(d) Since the liability of the stevedoring company depended on principles different from those governing liability of the shipowner, all issues of fact involved in the third-party case should have been submitted to the jury after the verdict in the main case. P. 568.

(e) The verdict for the longshoreman did not *ipso facto* preclude recovery of indemnity by the shipowner. Pp. 568–569.

(f) In the area of contractual indemnity, an application of the theories of "active" or "passive" as well as "primary" or "secondary" negligence is inappropriate. P. 569.

236 F. 2d 848, reversed and remanded.

William Garth Symmers argued the cause for petitioner. With him on the brief were *Frederick Fish* and *William Warner*.

Leavenworth Colby argued the cause for the United States, as *amicus curiae*, urging reversal. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Doub, Paul A. Sweeney* and *Herman Marcuse*.

Patrick E. Gibbons argued the cause for respondent. With him on the brief was *Oscar A. Thompson*.

Mr. Justice Clark delivered the opinion of the Court.

The question here involves the right to trial by jury under principles of maritime liability enunciated in *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956). Respondent, a stevedoring company, contracted to furnish petitioner, a shipowner, with stevedoring services, and a longshoreman employed by respondent was injured while unloading petitioner's vessel. When the longshoreman sued petitioner on claims of negligence and unseaworthiness, petitioner impleaded respondent, claiming a right to indemnity for any damages the longshoreman might recover. The main case, involving the longshoreman's claims, was submitted to the jury, which found for the longshoreman on the issue of negligence and for petitioner on the issue of seaworthiness. That judgment has since been satisfied and is not before us. After receiving the verdict, the judge decided that it also was dispositive of the third-party action, and directed a

verdict for respondent. A divided Court of Appeals affirmed, 236 F. 2d 848, and we granted certiorari. 352 U. S. 1030 (1957). Petitioner contends, *inter alia,* that certain issues of fact should have been submitted to the jury. We agree with petitioner on this point.

Petitioner's claim for indemnity primarily rests on the contractual relationship between it and respondent. While the stevedoring contract contained no express indemnity clause,[1] it obligated respondent "to faithfully furnish such stevedoring services as may be required," and to provide all necessary labor and supervision for "the proper and efficient conduct of the work." As this Court said in *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp., supra,* such language constitutes "a contractual undertaking to [perform] 'with reasonable safety,' " 350 U. S., at 130, and to discharge "foreseeable damages resulting to the shipowner from the contractor's improper performance." 350 U. S., at 129, footnote 3. Petitioner contends that a breach of this undertaking by respondent caused the injury to the longshoreman, and that petitioner's liability resulting from the breach was "foreseeable."

The *F. E. Weyerhaeuser,* the vessel upon which the accident occurred, had sailed from the West Coast with a cargo of lumber for New York and Boston, the ports where respondent was to perform the stevedoring operations. The vessel arrived in New York on January 25, 1952, and in the ensuing five days the deck load and part of the underdeck cargo was discharged. On January 30 the ship left New York, arriving in Boston the next day. Respondent's crews boarded the vessel and the unloading continued. On the fifth day of the Boston operations one Connolly, a longshoreman employed by respondent,

[1] See, generally, Weinstock, The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers, 103 U. of Pa. L. Rev. 321, 332–346 (1954).

was injured when struck on the head by a piece of wood while working in a lower hold. The parties agree that the wood must have fallen into the hold from the top of a temporary winch shelter which protected the winch drivers from the elements.

The evidence indicated that winch shelters are customarily erected by longshoremen at the beginning of their unloading operations. They consist of a scrap lumber framework with a tarpaulin stretched across the top. Because of their flimsy construction they are considered a hazard in the winds at sea, and "automatically" are torn down by the ship's crew when the vessel leaves port. Both the captain and the second officer of the *F. E. Weyerhaeuser* testified that it would be carelessness on their part to allow winch shelters to remain in place when the vessel goes to sea. We need not discuss the details which may have led the jury to find for Connolly in the main case, but implicit in the jury verdict was a finding that the structure was on the ship when it arrived in Boston.[2] Respondent, through its employees stationed in New York, must have built the shelter while the ship was in New York harbor,[3] and we may assume that petitioner failed to remove it upon leaving for Boston. The record is silent as to the exact circumstances under which it was made available to respondent in Boston. It does appear, however, that the shelter was

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[2] The jury found for Connolly on the issue of negligence after being instructed as follows:

"Now, if you find from the evidence that the structure, that is, this shelter, was on the ship when it came into Boston Harbor and that the ship offered it to the stevedores to use and work with, and if you find that in permitting that to be there the ship was guilty of some act of negligence as I have defined it to you, then you could find a verdict for Mr. Connolly."

[3] There was undisputed evidence that the shelter could not have been assembled prior to the removal of the deck cargo in New York.

used in the stevedoring operations by respondent's Boston employees, in spite of the fact that respondent as well as petitioner must have known of its journey from New York and the possible effect of such a journey on an already flimsy structure. There was evidence that the shelter was not inspected by either party until the injury to Connolly five days after the arrival in Boston.[4]

We believe that respondent's contractual obligation to perform its duties with reasonable safety related not only to the handling of cargo, as in *Ryan,* but also to the use of equipment incidental thereto, such as the winch shelter involved here. *American President Lines* v. *Marine Terminals Corp.,* 234 F. 2d 753, 758; *United States* v. *Arrow Stevedoring Co.,* 175 F. 2d 329, 331. If in that regard respondent rendered a substandard performance [5] which led to foreseeable liability of petitioner, the latter was entitled to indemnity absent conduct on its part sufficient to preclude recovery. The evidence bearing on these issues—petitioner's action in making the shelter on its ship available to respondent's employees in Boston although it apparently was unsafe,[6] as well as respondent's continued use of the shelter for five days thereafter without inspection—was for jury consideration under appropriate instructions. These issues were not encompassed by the instructions in the main case, where the test of

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[4] A witness testified that after the accident he stood on one of the winches to permit a view of the shelter top, which was approximately seven feet above the deck, and discovered a second piece of tarpaulin secured only by two loose pieces of wood similar to that which struck Connolly.

[5] It should be noted that "[t]he shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service." *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp., supra,* at 134.

[6] See Corbin, Contracts, §§ 571, 947, 1264; cf. Restatement, Contracts, §§ 295, 315.

petitioner's liability was based on failure to perform a nondelegable duty to Connolly. Since the liability of respondent depended on different principles, *Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784, 792, all fact issues involved in the third-party action should have been submitted to the jury after the verdict in the main case.[7] Further, the verdict for Connolly did not *ipso facto* preclude recovery of indemnity by petitioner, for as we have indicated, the duties owing from petitioner to Connolly were not identical with those from petitioner to respondent. While the jury found petitioner "guilty of some act of negligence," that ultimate finding might have been predicated, *inter alia,* on a failure of petitioner to remove the shelter when the ship left New York, or a failure to correct or warn respondent of a latent dangerous condition known to petitioner when respondent began the Boston unloading. Likewise, the finding might have been predicated on a failure of petitioner during the five days in Boston to inspect the shelter, detect and correct the unsafe condition. Although any of these possibilities could provide Connolly a basis of recovery, at least the latter would not, under *Ryan,* prevent recovery by petitioner in the third-party action. 350 U. S., at 134–135. See *Cornec* v. *Baltimore & O. R. Co.*, 48 F. 2d 497, 502; *Boston Woven Hose & Rubber Co.* v. *Kendall,* 178 Mass. 232, 59 N. E. 657 (opinion of Chief Justice Holmes). It

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[7] The following explanation in the charge to the jury suggests that the trial judge intended to submit the third-party action upon return of the verdict in the main case:

"I shall ask you to go out and consider the claims of Mr. Connolly against the Weyerhaeuser Steamship Company first and then when you come back with your verdict on that I shall ask you to retire again and consider the issues in the second suit, namely Weyerhaeuser Steamship Company against the Nacirema Operating Company, and before I submit that second one to you I shall give you some instructions which apply peculiarly to that."

was improper, therefore, for the court to direct a verdict for respondent based on the finding for Connolly.

In view of the new trial to which petitioner is entitled, we believe sound judicial administration requires us to point out that in the area of contractual indemnity an application of the theories of "active" or "passive" as well as "primary" or "secondary" negligence is inappropriate. *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Co., supra,* at 132–133.

The judgment of the Court of Appeals is reversed and the case is remanded for proceedings in conformity with this opinion.

It is so ordered.

UNITED STATES *v.* HVASS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA.

No. 92. Argued January 27, 1958.—Decided March 3, 1958.

1. When a Federal District Court dismisses an indictment on the ground that it does not allege a violation of the statute upon which it was founded, not merely because of some deficiency in pleading but with respect to the substance of the charge, that is necessarily a construction of the statute, and a direct appeal to this Court lies under 18 U. S. C. § 3731. Pp. 573–574.

2. A willfully false statement of a material fact, made by an attorney under oath during a Federal District Court's examination into his fitness to practice before it, constitutes perjury within the meaning of 18 U. S. C. § 1621, when the examination was made under a local rule of the District Court specifically authorizing such examination under oath; since such an examination is a "case in which a law of the United States authorizes an oath to be administered," within the meaning of the statute. Pp. 574–577.

   (a) The phrase "a law of the United States," as used in the perjury statute, is not limited to statutes, but includes as well rules and regulations which have been lawfully authorized and have a clear legislative base, and also decisional law. P. 575.

   (b) There can be no doubt that the District Court was lawfully authorized to prescribe its local rules and that they have a clear legislative base. Pp. 575–577.

147 F. Supp. 594, reversed and remanded.

Ralph S. Spritzer argued the cause for the United States. On the brief were *Solicitor General Rankin, Warren Olney, III,* then Assistant Attorney General, and *Beatrice Rosenberg.*

Warren B. King argued the cause for appellee. With him on the brief was *Charles Alan Wright.*

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

The question for decision is whether a willfully false statement of a material fact, made by an attorney under oath during the District Court's examination, under its local rule, into his fitness to practice before it, constitutes perjury within the meaning of 18 U. S. C. § 1621.[1]

Acting under 28 U. S. C. §§ 1654, 2071, and Rule 83 of Federal Rules of Civil Procedure, authorizing federal courts to prescribe rules for the conduct of their business, the District Courts for the Northern and Southern Districts of Iowa promulgated local rules governing practice in those courts. Their Rule 3, in pertinent part, provides:

> "All attorneys residing outside of the State of Iowa and having civil matters in the court shall associate with them a resident attorney on whom notice may be served and who shall have the authority to act for and on behalf of the client in all matters . . . . Non-resident attorneys who have so associated with them a resident attorney shall be permitted to participate in a particular case upon satisfactory showing of good moral character.
>
> "Provided further that where the action is one to recover damages for personal injuries sustained in Iowa by one who at the time was a resident of Iowa . . . , the Court may on its own motion, or on motion of a member of the bar of either District,

[1] That section, in pertinent part, provides: "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, . . . willfully and contrary to such oath states . . . any material matter which he does not believe to be true, is guilty of perjury . . . ."

> before permitting a nonresident attorney to participate in the case, require a satisfactory showing that the connection of the said attorney [with the case] was not occasioned or brought about in violation of the standards of conduct specified in Rule 8 hereof.[2] The Court as a part of said showing may require the plaintiff and the said attorney to appear and be examined under oath."

Appellee, an attorney residing and maintaining his office in Minneapolis, Minnesota, had instituted two actions in the District Court for the Northern District of Iowa, as counsel for citizens of Iowa, seeking damages for bodily injuries which they had sustained in that State. On October 3, 1955, the court, acting under its Rule 3, entered an order scheduling a hearing to be held by the court on October 12, 1955, for the purpose of affording an opportunity to appellee to show that his connection with the two damage suits was not brought about in violation of the standards of conduct specified in its Rule 8, and directing appellee to appear at that time and to submit to an examination under oath, if he wished further to participate as counsel in those actions. Appellee appeared at the hearing and, after being sworn by the Clerk, was examined by the District Attorney on matters deemed relevant to the hearing. On November 1, 1955, the court entered an order finding that "the applicant [had] not made satisfactory showing of the matters which must be satisfactorily shown under said Local Rule 3," and it struck his appearance as counsel in the two damage actions from the record.

On March 20, 1956, a four-count indictment was returned against appellee in the same District Court. Each count charged that appellee, while under oath as a wit-

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[2] Rule 8 is a substantial adoption of the Canons of Professional Ethics of the American Bar Association.

ness at the hearing of October 12, 1955, "unlawfully, wilfully, and knowingly, and contrary to [his] oath, [stated] material matters which he did not believe to be true" (in particulars set forth in each count), "in violation of Section 1621, Title 18, United States Code." Appellee moved to dismiss the indictment for failure of any of the counts to state an offense against the United States. The court,[3] after full hearing upon the motion, concluded "that Rule 3, under which the defendant took his oath, is not such a law of the United States as was intended by Congress to support an indictment for perjury," and, on that ground, dismissed the indictment. 147 F. Supp. 594. The Government brought the case here by direct appeal under the Criminal Appeals Act, 18 U. S. C. § 3731. We postponed further consideration of the question of jurisdiction to the hearing on the merits, 353 U. S. 980.

At the threshold we are met with appellee's contention that we do not have jurisdiction of this appeal. We think the contention is unsound. 18 U. S. C. § 3731, in pertinent part, provides that: "An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States . . . [f]rom a decision or judgment . . . dismissing any indictment . . . where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment . . . is founded." This indictment was founded on the federal perjury statute, 18 U. S. C. § 1621. The District Court dismissed the indictment not because of any deficiency in pleading or procedure but solely because it held that Rule 3 "is not such a law of the United States as was intended by Congress to support an indictment for perjury." It thus dismissed the indictment upon its construction of the federal

[3] The court was then being presided over by a district judge from another district, sitting by designation.

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perjury statute. In these circumstances, the question of our jurisdiction is settled by *United States* v. *Borden Co.*, 308 U. S. 188, 193:

> "When the District Court holds that the indictment, not merely because of some deficiency in pleading but with respect to the substance of the charge, does not allege a violation of the statute upon which the indictment is founded, that is necessarily a construction of that statute."

Such is the case here, and the result is that we have jurisdiction of this appeal.

This brings us to the merits. The scope of this appeal is very limited. No question concerning the validity of the District Court's Rule 3 is properly before us. Nor are we at liberty to consider any question other than the single one decided by the District Court, for when, as here, "the District Court has rested its decision upon the construction of the underlying statute this Court is not at liberty to go beyond the question of the correctness of that construction and consider other objections to the indictment. The Government's appeal does not open the whole case." *United States* v. *Borden Co., supra,* at 193.

"The essential elements of the crime of perjury as defined in 18 U. S. C. § 1621 are (1) an oath authorized by a law of the United States, (2) taken before a competent tribunal, officer or person, and (3) a false statement wilfully made as to facts material to the hearing." *United States* v. *Debrow,* 346 U. S. 374, 376. Only the first element of perjury is involved here because the District Court's dismissal of the indictment was upon the sole ground that "Rule 3 . . . is not such a law of the United States as was intended by Congress to support an indictment for perjury." Therefore, the only question open here is whether the admission hearing, held under the District Court's Rule 3, and at which appellee testified under

oath, was a "case in which a law of the United States authorizes an oath to be administered," within the meaning of that clause as used in the perjury statute. We think it was.

The phrase "a law of the United States," as used in the perjury statute, is not limited to statutes, but includes as well Rules and Regulations which have been lawfully authorized and have a clear legislative base (*United States* v. *Smull,* 236 U. S. 405; *Caha* v. *United States,* 152 U. S. 211; *Viereck* v. *United States,* 318 U. S. 236; *Lilly* v. *Grand Trunk R. Co.,* 317 U. S. 481), and also decisional law. *Glickstein* v. *United States,* 222 U. S. 139. And see Wigmore, Evidence (3d ed.), §§ 1815, 1816, 1824.[4]

28 U. S. C. § 2071 provides: "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." And 28 U. S. C. A. § 1654 provides: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, *by the rules of such courts, respectively,* are permitted to manage and conduct causes therein." (Emphasis supplied.) Consistently, Rule 83 of Federal Rules of Civil Procedure, in pertinent part, provides: "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. . . ." These statutes and Rule 83 leave no room to doubt that the District Court was lawfully authorized to prescribe its

[4] The author there shows that the requirement that a witness must take an oath before giving testimony goes back to early civilizations and has a long history at common law (§ 1815), and that for centuries Anglo-American law has remained faithful to the precept that "for *all testimonial statements made in court* the oath is a requisite." § 1824.

local rules and that they have a clear legislative base. Whether or not its Rule 3 is invalid for any reason—which, as stated, is a question not before us—it was prescribed pursuant to statutory authority, and expressly provides that, under the conditions specified, the court may require the "attorney to appear and be examined under oath."

Rule 3 had at least as clear a legislative base as did the Regulations involved in *Caha* v. *United States, supra,* and *United States* v. *Smull, supra.* In the *Caha* case defendant was indicted under the federal perjury statute—then in precisely the same terms as it is now—and charged with perjury through the making of a false affidavit to officials of the Land Office of the Department of the Interior in respect of a contest, then pending in the Land Office, over the validity of a homestead entry. The defendant was convicted and on appeal contended that no statute authorized such a contest and that therefore it could not "be said that the oath was taken in a 'case in which a law of the United States authorizes an oath to be administered.' " By statute Congress had authorized the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, "to enforce and carry into execution, by appropriate regulations, every part of the [laws relating to public lands]." Pursuant to that authority the Commissioner adopted rules of practice including an express provision "for a contest before the local land officers in respect to homestead as well as preëmption entries, and for the taking of testimony before such officers . . . ." This Court, in denying defendant's contention and in sustaining the conviction, said:

> "We have, therefore, a general grant of authority to the Land Department to prescribe appropriate regulations for the disposition of the public land . . . . Clearly then . . . the local land officers in hearing and deciding upon a contest with respect

> to a homestead entry constituted a competent tribunal, *and the contest so pending before them was a case in which the laws of the United States authorized an oath to be administered.*" *Id.*, at 218. (Emphasis supplied.)

The *Smull* case involved very similar facts. The District Court sustained a demurrer to the indictment, "ruling that the affidavit was not within the statute defining perjury." The Government brought the case here under the Criminal Appeals Act. This Court reversed, saying:

> "The charge of crime must have clear legislative basis. . . . This statute [the perjury statute, in precisely the same terms as the present one] takes the place of the similar provision of § 5392 of the Revised Statutes, which in turn was a substitute for a number of statutes in regard to perjury and was phrased so as to embrace all cases of false swearing whether in a court of justice or before administrative officers acting within their powers . . . . It cannot be doubted that a charge of perjury may be based upon [the perjury statute] where the affidavit is required either expressly by an act of Congress or by an authorized regulation of the General Land Office, and is known by the affiant to be false in a material statement. . . . [W]hen by a valid regulation the Department requires that an affidavit shall be made before an officer otherwise competent, that officer is authorized to administer the oath within the meaning of [the perjury statute]. The false swearing is made a crime, not by the Department, but by Congress; the statute, not the Department, fixes the penalty." [5] *Id.*, at 408–409.

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[5] These cases, as well as *United States* v. *Morehead*, 243 U. S. 607, show that the perjury statute covers *ex parte* proceedings or investigations as well as ordinary adversary suits and proceedings.

It follows that the admission hearing, held under the District Court's Rule 3, and at which appellee testified under oath, was a "case in which a law of the United States authorizes an oath to be administered," within the meaning of that clause as used in the perjury statute.

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

Reversed.

MR. JUSTICE DOUGLAS agrees that the Court has jurisdiction of the appeal; but he dissents on the merits. In his view this judge-made rule is not "a law of the United States" within the meaning of the perjury statute, 18 U. S. C. § 1621.

Per Curiam.

HARMON *v.* BRUCKER, SECRETARY OF THE ARMY.

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

No. 80. Argued January 14–15, 1958.—Decided March 3, 1958.

The Secretary of the Army issued less than "honorable" discharge certificates to two soldiers, based on their activities prior to induction. This action was sustained by the Army Review Board under 38 U. S. C. § 693h. The soldiers sued in a Federal District Court for judgments declaring that the Secretary had exceeded his authority and directing him to issue "honorable" discharge certificates to them. *Held:*

1. The District Court had jurisdiction to construe the applicable statutes to determine whether the Secretary had exceeded his authority. Pp. 581–582.

2. The requirement of 10 U. S. C. § 652a that no person be discharged from military service "without a certificate of discharge" must be read in harmony with 38 U. S. C. § 693h, which requires that the findings of the Army Review Board "shall be based upon all available records of the [Army] relating to the person requesting such review"; the word "records" means records of military service; and the Secretary exceeded his authority in basing these discharges on the soldiers' activities prior to induction. Pp. 582–583.

100 U. S. App. D. C. 190, 256, 243 F. 2d 613, 834, reversed.

David I. Shapiro argued the cause and filed a brief for petitioner in No. 80.

Victor Rabinowitz argued the cause for petitioner in No. 141. With him on the brief was *Leonard B. Boudin.*

Donald B. MacGuineas argued the cause for respondent. On the brief were *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, B. Jenkins Middleton* and *George W. Hickman, Jr.,* Judge Advocate General of the Army.

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*Together with No. 141, *Abramowitz* v. *Brucker, Secretary of the Army,* argued January 15, 1958.

Briefs of *amici curiae* were filed by *Carl Rachlin* for the Workers Defense League in No. 80, and *Ben Margolis* and *John T. McTernan* for the Servicemen's Defense Committee in Nos. 80 and 141.

PER CURIAM.

The Secretary of the Army, relying upon 10 U. S. C. § 652a (Act of June 4, 1920, § 1, subch. II, 41 Stat. 809, as amended) and 38 U. S. C. § 693h (Act of June 22, 1944, 58 Stat. 286, as amended), and upon Department of Defense and Army Regulations deemed to be authorized by those statutes, discharged petitioners from the Army and issued to each of them a discharge certificate in form other than "honorable." In so doing, he took into account preinduction activities of petitioners rather than basing his action exclusively upon the record of their military service. After having exhausted available administrative remedies, petitioners separately brought these proceedings in the District Court seeking judgments declaring those determinations and actions of the Secretary to be void as in excess of his powers under the circumstances, and directing him to issue "honorable" discharge certificates to them. Being of the view that it was without jurisdiction to consider the actions, the District Court dismissed them, 137 F. Supp. 475, and the Court of Appeals affirmed, with one judge dissenting, 100 U. S. App. D. C. 190, 256, 243 F. 2d 613, 834. We granted certiorari, 353 U. S. 956 and 354 U. S. 920.

The respective contentions made here may be summarized as follows:

(1) Petitioners contend (a) that the Secretary acted in excess of his powers, because the statutes referred to did not authorize, nor support Department of Defense and Army Regulations when taken to authorize, consideration of petitioners' preinduction activities in determining the type of discharges to be issued to them upon

separation from the Army, and (b) that the action of respondent in issuing to them less than "honorable" discharges, and the action of the District Court and of the Court of Appeals in refusing review for what they thought was lack of judicial power, deprived petitioners of due process under the Fifth Amendment, and of a judicial trial under the Sixth Amendment, of the Constitution;

(2) Respondent contends (a) that by 10 U. S. C. § 652a, Congress required that, upon separation from the Army, a former soldier be given "a certificate of discharge, . . . in the manner prescribed by the Secretary of the Department of the Army . . ."; (b) that, inasmuch as all certificates of discharge are not required to be "honorable" ones, he was authorized to, and did, prescribe various types of discharge certificates running the gamut from the accolade of "Honorable discharge" to the odious "Dishonorable discharge"; (c) that by 38 U. S. C. § 693h, Congress directed the establishment of an Army Review Board with power to review, upon its own motion or that of the former soldier, the type of discharge issued, and "to change, correct, or modify any discharge or dismissal, and to issue a new discharge in accord with the facts presented to the board," and prescribed that "the findings thereof [shall] be final subject only to review by the Secretary of the Army"; (d) that the findings of the Board, made under those procedures so afforded to and availed of by petitioners, were *final* subject only to review by the Secretary of the Army; and (e) that, therefore, such administrative procedure is exclusive and the courts are without jurisdiction to review those findings.

In keeping with our duty to avoid deciding constitutional questions presented unless essential to proper disposition of a case, we look first to petitioners' nonconstitutional claim that respondent acted in excess of powers granted him by Congress. Generally, judicial relief is available to one who has been injured by an act

of a government official which is in excess of his express or implied powers. *American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94, 108; *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 621–622; *Stark* v. *Wickard,* 321 U. S. 288, 310. The District Court had not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether the respondent did exceed his powers. If he did so, his actions would not constitute exercises of his administrative discretion, and, in such circumstances as those before us, judicial relief from this illegality would be available. Moreover, the claims presented in these cases may be entertained by the District Court because petitioners have alleged judicially cognizable injuries. Cf. *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 159, 160, and see Army Regulation 615–360, par. 7.

This brings us to the merits. The Solicitor General conceded that if the District Court had jurisdiction to review respondent's determinations as to the discharges he issued these petitioners and if petitioners had standing to bring these suits, the action of respondent is not sustainable. On the basis of that concession and our consideration of the law and this record we conclude that the actions of the Secretary of the Army cannot be sustained in law. By § 652a, which provides that no person be discharged from military service "without a certificate of discharge," Congress granted to the Secretary of the Army authority to issue discharges. By § 693h it provided for review by the Army Review Board of the exercise of such authority. Surely these two provisions must be given an harmonious reading to the end that the basis on which the Secretary's action is reviewed is coterminous with the basis on which he is allowed to act. Section 693h expressly requires that the findings of the Army Review Board "shall be based upon all available records of the [Army] relating to the person requesting such

review . . . ." We think the word "records," as used in the statute, means *records of military service,* and that the statute, properly construed, means that the type of discharge to be issued is to be determined solely by the soldier's military record in the Army. An authoritative construction of the congressional grant of power is to be found in the regulations of the Department of the Army. Army Regulation 615–375, par. 2 (b) states: "The purpose of a discharge certificate is to record the separation of an individual from the military service and *to specify the character of service rendered during the period covered by the discharge.*" (Emphasis supplied.) Moreover, the Army's Regulation 615–360, par. 7 (which was in effect during the times here involved), further states: "Because the type of discharge may significantly influence the individual's civilian rights and eligibility for benefits provided by law, it is essential that all pertinent factors be considered *so that the type of discharge will reflect accurately the nature of service rendered. . . .*" (Emphasis supplied.)

The judgments of the Court of Appeals are reversed and the cases are remanded to the District Court for the relief to which petitioners are entitled in the light of this opinion.

Reversed.

MR. JUSTICE CLARK, dissenting.

I would affirm these cases on the basis of Judge Prettyman's opinion in the Court of Appeals. *Harmon* v. *Brucker,* 100 U. S. App. D. C. 190, 243 F. 2d 613. Since this Court does not reach the constitutional claims considered and rejected by Judge Prettyman, however, it is appropriate to add a word about the Court's basis for asserting jurisdiction and reversing on the merits, namely, the finding that the action of the Secretary of the Army was in excess of his statutory authority.

At the outset it is well to state what Harmon and Abramowitz, petitioners in these cases, do *not* contend. They do not contest the decision that their retention in the Army was inconsistent with national security, nor do they claim that the procedures adopted violated their legally protected rights. They concede the Army "an absolute right to discharge," but object to issuance of discharge certificates that reflect the determinations underlying the fact of their discharges, insisting that the Secretary be required to issue them honorable discharges. The controversy thus is confined to the type of discharge certificate that may be issued to servicemen discharged because of preinduction activity deemed to render them undesirable security risks.

Throughout our history the function of granting discharge certificates has been entrusted by the Congress to the President and, through him, to the respective Secretaries of the Armed Forces. At no time until today have the courts interfered in the exercise of this military function.[1] The lack of any judicial review is evidenced by the fact that for over 70 years Congress itself reviewed military discharges and frequently enacted private bills directing the appropriate Secretary to correct the type of discharge certificate given. By legislation in 1944 and 1946, Congress authorized creation of administrative boards to which it transferred the review of military discharges[2] in an effort to conserve its own time.[3] That legislation makes no provision for judicial review; on the contrary, the 1944 Act expressly states that the findings of the Army Discharge Review Board shall be "final sub-

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[1] See the numerous cases cited by Judge Prettyman in support of this conclusion. 100 U. S. App. D. C., at 195, 243 F. 2d, at 618.

[2] Servicemen's Readjustment Act of 1944, § 301, 58 Stat. 286, 38 U. S. C. § 693h; Legislative Reorganization Act of 1946, § 207, 60 Stat. 837, as amended, 65 Stat. 655, 5 U. S. C. § 191a.

[3] S. Rep. No. 1400, 79th Cong., 2d Sess. 7.

ject only to review by the Secretary of [the Army]," and the 1946 Act, as amended in 1951,[4] expressly provides that the determination of the Board to Correct Military Records shall be "final and conclusive on all officers of the Government except when procured by means of fraud." When this legislative expression of finality is viewed in context with the uninterrupted history of congressional review, culminated by Congress' transfer of the review function to administrative bodies, it cannot be said, in the absence of specific legislative grant, that Congress intended to permit judicial review.[5] The Court avoids these considerations by positing jurisdiction to review simply on its determination that the Secretary's action exceeded his statutory authority.

In reaching this exceptional position, the Court construes § 693h of the 1944 Act, *supra,* which provides that review of discharges shall be based on "all available records" of the department involved, to include not "all available records" of the Army concerning petitioners, but merely those "*solely* [concerned with] the soldier's military record in the Army." (Emphasis added.) This limitation of the clear meaning of the words used by the Congress—so that "all" is deemed to mean "some"—is lacking of any justification.

The construction adopted does enable the Court to by-pass the constitutional questions raised by petitioners. It is true that we avoid decision of constitutional ques-

[4] 65 Stat. 655, 5 U. S. C. § 191a.

[5] Neither the Court nor petitioners claim that the review provisions of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. § 1001 *et seq.*, have any application to these cases. Parenthetically, the Selective Service Act of 1948, which authorizes promulgation of regulations covering discharges prior to expiration of the regular service period, 62 Stat. 606, 50 U. S. C. App. § 454 (b), specifically states, "All functions performed under this title . . . shall be excluded from the operation of the Administrative Procedure Act . . . ." 62 Stat. 623, 50 U. S. C. App. § 463 (b).

tions "unless essential to proper disposition of a case." But as I see it, this rule should never compel a transparently artificial construction of a statute. The Court's interpretation here of § 693h must leave both the President and the Congress in a quandary as to the solution of an important problem involving the security of our country.

It is to be regretted that the Justice Department and the Army are at loggerheads over the proper disposition of these cases on the merits. However, the frank confession thereof by the Solicitor General is hardly sufficient reason to abandon our long-established policy of no review in such matters. If injustice has been done I have confidence in the Congress or the President to correct it. The proper recourse of petitioners is in that direction.[6]

Judge Prettyman aptly stated: "Surely the President may apply to military personnel the same program and policies as to security and loyalty which he applies to civilian personnel . . . . [I]f [Harmon] can be discharged as a security risk, the Army can determine whether he is or is not a security risk. And in that determination surely no data is more relevant and material than are his [preinduction] habits, activities and associations." 100 U. S. App. D. C., at 197, 243 F. 2d, at 620. The same type of data is commonly accepted among civilian agencies as relevant to the security screening of its employees. Those agencies also issue discharges in the form of severance papers based upon, and frequently reciting, security grounds. Such papers reflect the true condition upon which the discharge is made. It seems incongruous to me that the military services should not be able to do as much. I would not require the Secretary to issue a discharge certificate which on its face falsifies the real grounds for its issuance.

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[6] See *Orloff* v. *Willoughby*, 345 U. S. 83, 93–94 (1953).

Per Curiam.

UNITED STATES *v.* R. F. BALL CONSTRUCTION CO., INC., ET AL.

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

No. 97. Argued January 27, 1958.—Decided March 3, 1958.

1. In the circumstances of this case, an "assignment" made by a subcontractor to his performance-bond surety of all sums to become due for performance of the subcontract, as security for any indebtedness or liability thereafter incurred by the subcontractor to the surety, did not constitute the surety a "mortgagee" of those sums within the meaning of § 3672 (a) of the Internal Revenue Code of 1939, as amended, providing that a federal tax lien shall not be valid as against any "mortgagee" until notice thereof has been filed by the collector.
2. In the circumstances of this case, an allowance of attorney's fees to an interpleader, who was the debtor of the taxpayer-assignor, was not entitled to priority in the interpleaded fund as against a federal tax lien which had previously attached to the fund.

239 F. 2d 384, reversed.

Alexander F. Prescott argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Rice* and *George F. Lynch.*

Josh H. Groce argued the cause for respondents. With him on the brief was *Jack Hebdon* for the United Pacific Insurance Co., respondent. *Mr. Groce* also filed a brief for the R. F. Ball Construction Co., Inc., respondent.

PER CURIAM.

The judgment is reversed. The instrument involved being inchoate and unperfected, the provisions of § 3672 (a), Revenue Act of 1939, 53 Stat. 449, as amended, 53 Stat. 882, 56 Stat. 957, do not apply. See *United States* v. *Security Trust & Savings Bank,* 340 U. S. 47; *United*

States v. *City of New Britain,* 347 U. S. 81, 86–87. The claim of the interpleader for its costs is controlled by *United States* v. *Liverpool & London & Globe Ins. Co.,* 348 U. S. 215.

MR. JUSTICE WHITTAKER, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BURTON and MR. JUSTICE HARLAN join, dissenting.

The question presented is whether an "assignment" made by a subcontractor to his performance-bond surety of all sums to become due for performance of the subcontract, as security for any indebtedness or liability thereafter incurred by the subcontractor to the surety, constituted the surety a "mortgagee" of those sums within the meaning of § 3672 (a) of the Internal Revenue Code of 1939, as amended.

Ball Construction Company had contracted to construct a housing project in San Antonio, Texas. On July 17, 1951, it entered into a subcontract with Jacobs under which the latter agreed to do the necessary painting and decorating of the buildings, and to furnish the labor and materials required, for a stipulated price. The terms of the subcontract required Jacobs to furnish to Ball a corporate surety bond, in the amount of $229,029, guaranteeing performance of the subcontract. On July 21, 1951, Jacobs, to induce respondent, United Pacific Insurance Company, to sign the bond as surety, assigned to the surety all sums due or to become due under the subcontract, as collateral security to the surety for any liability it might sustain under its bond through nonperformance of the subcontract, and for "the payment of any other indebtedness or liability of the [subcontractor to the surety] whether [t]heretofore or [t]hereafter incurred," not exceeding the penalty of the bond. On April 30, 1953, a balance of $13,228.55 became due from

Ball under the subcontract, but, because of outstanding claims of materialmen against Jacobs, Ball did not pay the debt. In May, June, and September, 1953, the District Director of Internal Revenue filed, in the proper state office, federal tax liens against Jacobs, aggregating $17,010.85. Between December 1953 and March 1954—thus during the coexistent period of the bond and the assignment—Jacobs incurred indebtedness, independent of the subcontract, to the surety in the amount of $12,971.88.

The surety, contending that its assignment of July 21, 1951, constituted it a "mortgagee" within the meaning of § 3672 (a), claimed priority of right to the $13,228.55 fund over the subsequently filed federal tax liens. The Government disputed the claim and asserted a superior right to the fund under its tax liens. Several creditors of Jacobs, holding unpaid claims for materials furnished for and used in performing the subcontract, asserted priority to a portion of the fund over the claims of both the surety and the Government. Because of these rival claims, Ball instituted this interpleader action, under which he impleaded the surety, the Government, and the materialmen, and paid the fund into the registry of the court to abide the judgment. Before conclusion of the trial the materialmen's claims were satisfied. The District Court held that, by the terms of the "assignment" and on its date of July 21, 1951, the surety became a mortgagee of the fund and that its right thereto was superior, under § 3672 (a), to the subsequently filed federal tax liens. 140 F. Supp. 60. The Court of Appeals, adopting that opinion, affirmed. 239 F. 2d 384.

This Court now reverses summarily, citing *United States* v. *City of New Britain,* 347 U. S. 81, and *United States* v. *Security Trust & Savings Bank,* 340 U. S. 47. We believe those cases are not in point nor in any way controlling. Neither of them even involve either the ques-

tion here presented or the statute here conceded by the parties to be controlling. Rather, they involved entirely different facts, presented very different questions, and were controlled by and decided upon other statutes. They were controlled by and decided upon §§ 3670 and 3671 of the Internal Revenue Code of 1939,[1] which, in pertinent part, provided: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property . . . belonging to such person" (§ 3670) from the time ". . . the assessment list was received by the collector . . . ." (§ 3671.) Whereas the statute governing this case, as the parties concede, is § 3672 (a) of the Internal Revenue Code of 1939, as amended,[2] which, in pertinent part, provided: "Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—(1) . . . in the office in which the filing of such notice is authorized by the law of the State . . . in which the property subject to the lien is situated . . . ."

The controversy in *New Britain* was over that portion of the proceeds of a real estate mortgage foreclosure sale which exceeded the amount of the mortgage. The City of New Britain, in virtue of its unpaid annual ad valorem tax liens which attached to the real estate on October 1 in each of the years 1947 through 1951, and its water-rent liens which had accrued from December 1, 1947, to June 1, 1951, claimed priority of right to the fund over general federal tax liens against the mortgagor which had been effected under §§ 3670 and 3671 by deposit of assess-

[1] 53 Stat. 448 and 449, 26 U. S. C. (1952 ed.) §§ 3670 and 3671.

[2] 53 Stat. 449, as amended by § 401 of the Revenue Act of 1939, c. 247, 53 Stat. 882, and § 505 of the Revenue Act of 1942, c. 619, 56 Stat. 957, 26 U. S. C. § 3672 (a).

ment lists in the Collector's office on various dates between April 26, 1948, and September 21, 1950. Thus, some of the City's liens had attached to the real estate prior to receipt by the Collector of the assessment lists and some had not.

This Court was not there dealing with any mortgage, pledge or other contractual lien, but was only dealing, as it said, with "statutory liens" (*id.*, at 84); and in deciding the issue of their priority it observed that, although §§ 3670 and 3671 created a lien in favor of the United States upon all property of the taxpayer as of the time the assessment list was received by the Collector, "Congress [had] failed to expressly provide for federal priority . . ." (*id.*, at 85) under those sections, and the Court held ". . . that priority of these statutory liens is [to be] determined by [the] principle of law [that] 'the first in time is the first in right.'" *Ibid.* The Court then vacated the judgment of the state court and remanded the case for determination of the order of priority of the various liens asserted, in accordance with the opinion.

We think it is not only apparent that § 3672 (a) had no application to that case but also that the Court expressly so declared. It noted that the City of New Britain contended that, because applicable state statutes provided that real estate tax and water-rent liens should take precedence over all other liens and encumbrances and § 3672 (a) subordinated federal tax liens to antecedent mortgages, the Court should hold that the City's tax and water-rent liens—having priority over mortgages—were prior in rank to the federal tax liens; but the Court disagreed, saying: "There is nothing in the language of § 3672 [(a)] to show that Congress intended antecedent federal tax liens to rank behind *any but the specific categories of interests set out therein . . .*" *Id.*, at 88. (Emphasis supplied.) As we have observed,

supra, "the specific categories of interests set out" in § 3672 (a) were and are those of "any mortgagee, pledgee, purchaser or judgment creditor."

In the *Security Trust* case a creditor instituted a suit in California against one Styliano on a note and, on October 17, 1946, pursuant to provisions of the California Code of Civil Procedure, procured an attachment of a parcel of real estate owned by Styliano. While the attachment suit was pending the Government, on December 3, 5 and 10, 1946, filed notices of federal tax liens against Styliano in the proper state office. Thereafter, on April 24, 1947, judgment was rendered against Styliano in the attachment suit, thus perfecting the attachment lien on the real estate. Subsequently Styliano sold the real estate, subject to these liens, and the purchaser filed a suit to quiet his title, impleaded the attachment lienor and the Government, and paid the purchase price into the registry of the court to abide the judgment. The California trial court ordered the fund to be applied, first, in payment of the attachment lien, and, second, in payment of the federal tax liens. The California District Court of Appeal affirmed. On certiorari this Court reversed, pointing out that, under the law of California as declared in *Puissegur* v. *Yarbrough,* 29 Cal. 2d 409, 412, 175 P. 2d 830, 831–832, an attaching creditor obtains "only a potential right or a contingent lien" until a judgment perfecting the lien is rendered, and that meanwhile the lien "is contingent or inchoate—merely a *lis pendens* notice that a right to perfect a lien exists." *Id.,* at 50. Naturally, in those circumstances, the tax liens which became perfected in December 1946 were superior to the attachment lien which did not become perfected until May 1947. There, as in *New Britain,* this Court was not dealing with any mortgage, pledge or other contractual lien, or with any question of priority of an antecedent mortgage over subsequently filed tax liens.

It thus seems quite clear to us that the *New Britain* and *Security Trust* cases did not involve the question here presented nor deal with the statute here conceded to be controlling and, therefore, they do not in any way support the Court's decision here.

We also think that, under the law and the facts in this record, the "assignment" was in legal effect a "mortgage," and inasmuch as it antedated the filing of the federal tax liens it was superior to them under the expressed terms of § 3672 (a). That section does not define the term "mortgagee" and, hence, we must assume that it was there used in its ordinary and common-law sense. *United States* v. *Gilbert Associates, Inc.*, 345 U. S. 361, 364; *United States* v. *Security Trust & Savings Bank, supra,* at 52 (concurring opinion). Substance, not form or labels, controls the nature and effect of legal instruments. "State law creates legal interests and rights." *Morgan* v. *Commissioner,* 309 U. S. 78, 80. The law of Texas, where the questioned assignment was made and was to be performed, makes such an "assignment" a valid mortgage. *Southern Surety Co.* v. *Bering Mfg. Co.*, 295 S. W. 337, 341; *Williams* v. *Silliman,* 74 Tex. 626, 12 S. W. 534. Although the relation of a state-created right to federal laws for the collection of federal credits is a federal question, the State's classification of state-created rights must be given weight. *United States* v. *Security Trust & Savings Bank, supra,* at 49–50. Here, the State's determination that such assignments are mortgages in legal effect, and its classification of them accordingly, is not met by anything of countervailing weight. The period of the assignment was coextensive with the bond. The bond remained effective throughout the period here involved and, hence, so did the assignment. The fact that the assignment was of property to be afterwards acquired did not affect its validity as a "mortgage," *Conard* v. *Atlantic Ins. Co.*, 1 Pet. 386, 448, nor did uncertainty

in the amount (not exceeding the fixed maximum) of the generally identified obligation, so secured, do so. *Ibid.* Neither does the fact that the instrument was not recorded under the State's fraudulent conveyance statutes—thus to impart constructive notice to subsequent purchasers, mortgagees and the like—make any difference here, for the instrument was valid between the parties to it, and Congress, by § 3672 (a), expressly subordinated federal tax liens to antecedent mortgages. The questioned assignment conveyed to the surety all sums then due and thereafter to become due under, and for performance of, the then existing subcontract—performance of which was guaranteed by the surety's bond—as security for the payment of sufficiently identified but contingent and unliquidated obligations which the subcontractor might incur to the surety during the coextensive period of the bond and the assignment. In these circumstances, I think it is clear that the assignment was in legal effect a mortgage, completely perfected on its date, in all respects choate, and valid between the parties; and inasmuch as it antedated the filing of the federal tax liens it was expressly made superior to those liens by the terms of § 3672 (a).

For these reasons, I dissent and would affirm the decision and judgment of the Court of Appeals.

UNITED STATES *v.* MASSEI.

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

No. 98. Argued January 9, 1958.—Decided March 3, 1958.

In a tax-evasion prosecution based on the net-worth method of proof sustained in *Holland* v. *United States,* 348 U. S. 121, proof of a likely source of the defendant's net-worth increases is not essential if all possible sources of nontaxable income are negatived by the evidence.

241 F. 2d 895, affirmed on another ground.

Roger Fisher argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph F. Goetten.*

Richard Maguire argued the cause and filed a brief for respondent.

PER CURIAM.

The Court of Appeals has based its remand in part on the absence of "proof of likely source," which it regards as an "indispensable" element of the net worth method, citing *Holland* v. *United States,* 348 U. S. 121, in support of its conclusion. In *Holland* we held that proof of a likely source was "sufficient" to convict in a net worth case where the Government did not negative all the possible nontaxable sources of the alleged net worth increase. This was not intended to imply that proof of a likely source was necessary in every case. On the contrary, should all possible sources of nontaxable income be negatived, there would be no necessity for proof of a likely source. The above explanation must be taken

into consideration in applying the *Holland* doctrine to this case. A new trial being permissible under the terms of the order of the Court of Appeals, we affirm its judgment.

MR. JUSTICE DOUGLAS would affirm the judgment below on the opinion of the Court of Appeals, 241 F. 2d 895, 900–901.

Per Curiam.

WILSON ET AL. *v.* LOEW'S INCORPORATED ET AL.

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 33. Argued January 8, 1958.—Decided March 3, 1958.

A number of former employees of the motion-picture industry brought suit in a California state court for damages and injunctive relief against a number of motion-picture producers and distributors, alleging that the latter directly or indirectly controlled all motion-picture production and distribution in the United States and all employment opportunities therein and had agreed to deny employment to all employees and persons seeking employment who refused, on grounds of the Fifth Amendment, to answer questions concerning their political associations and beliefs put to them by the Un-American Activities Committee of the House of Representatives. The action of the trial court in sustaining a demurrer to the complaint without leave to amend was affirmed on appeal, on the ground that the plaintiffs had failed to allege particular job opportunities. The plaintiffs petitioned this Court for certiorari, claiming that they had been denied due process and equal protection of the laws in violation of the Fourteenth Amendment, and this Court granted certiorari. *Held:* The writ is dismissed as improvidently granted because the judgment rests on an adequate state ground.

Reported below: 142 Cal. App. 2d 183, 298 P. 2d 152.

Robert W. Kenny and *Ben Margolis* argued the cause for petitioners. With them on the brief was *Samuel Rosenwein.*

Irving M. Walker and *Herman F. Selvin* argued the cause and filed a brief for Loew's Incorporated et al., respondents.

Guy Richards Crump and *Henry W. Low* submitted on brief for Doyle et al., respondents.

Edward J. Ennis and *A. L. Wirin* filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

PER CURIAM.

The writ is dismissed as improvidently granted because the judgment rests on an adequate state ground.

MR. JUSTICE DOUGLAS, dissenting.

By demurrer to petitioners' complaint, the respondents in this case admitted that they agreed with each other to exclude from employment all persons who refused, on the grounds of the Fifth Amendment, to answer questions concerning their political associations and beliefs put by the Un-American Activities Committee of the House of Representatives. The complaint alleged, and the demurrer thereby conceded, that petitioners had considerable experience in the motion picture industry; and that respondents directly or indirectly controlled all motion picture production and distribution in the United States and all employment opportunities therein. The California court sustained the demurrer on the ground that petitioners had not "alleged that but for defendants' alleged interference any one of plaintiffs would, or even probably or possibly would, have been employed in the industry." 142 Cal. App. 2d 183, 195, 298 P. 2d 152, 160.

This ruling on California law should result in a reversal of this judgment.

This is a case of alleged interference with the pursuit of an occupation, not an alleged interference with a particular contract or business relationship. The California cases on interference with the "right to work" are broad in scope. In *James* v. *Marinship Corp.*, 25 Cal. 2d 721, 155 P. 2d 329, the California Supreme Court held that a union could not exclude Negroes from membership in the union when at the same time there was a closed shop in the industry. The *Marinship* case was later followed in *Williams* v. *International Brotherhood*, 27 Cal. 2d 586, 165 P. 2d 903, where some of the plaintiffs were former

employees. No showing of the possibility of employment was made. In *Williams* the court emphasized that a "closed shop agreement with a single employer is in itself a form of monopoly"; and it condemned attempts by a union "to control by arbitrary selection the fundamental right to work." 27 Cal. 2d, at 591, 165 P. 2d, at 906. Here on the pleadings the respondents comprise a nation-wide monopoly over the industry and arbitrarily place petitioners on a "black list."

Dotson v. *International Alliance,* 34 Cal. 2d 362, 210 P. 2d 5, held that out-of-state workers, qualified for union membership, could recover damages "for wrongful interference with their right to work" against the union which denied membership. 34 Cal. 2d, at 374, 210 P. 2d, at 12. No showing of a likelihood of employment was made in that monopoly situation.

Surely then, the failure of these petitioners to allege a particular job opportunity does not mean they did not state a cause of action within the meaning of those California cases. Their pleadings seem to bring them squarely within those decisions. The fact that damages may be uncertain is no barrier to enforcement of the right to work. See *Harris* v. *National Union of Cooks and Stewards,* 98 Cal. App. 2d 733, 738, 221 P. 2d 136, 139.

I, therefore, conclude that the lower court, in not mentioning these cases nor differentiating them, and drawing almost entirely on decisions from other jurisdictions, has fashioned a different rule for this case. I can see no difference where the "right to work" is denied because of race and where, as here, because the citizen has exercised Fifth Amendment rights. To draw such a line is to discriminate against the assertion of a particular federal constitutional right. That a State may not do consistently with the Equal Protection Clause of the Fourteenth Amendment. *Williams* v. *Georgia,* 349 U. S. 375.

BLACK ET AL. *v.* AMEN ET AL.

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

No. 13. Argued November 12–13, 1957.—Decided March 3, 1958.

On motion of petitioners, concurred in by attorneys for respondents, the case is remanded to the Court of Appeals with directions to remand it to the District Court to enable the parties to file their joint motion for entry of judgment dismissing the action, as provided in a settlement agreement.

Reported below: 234 F. 2d 12.

Dean Acheson argued the cause for petitioners. With him on the brief were *Stanley L. Temko, Scott W. Lucas* and *Malcolm Miller.*

Douglas F. Smith argued the cause for respondents. With him on the brief were *Arthur R. Seder, Jr., D. Arthur Walker, Jack O. Brown* and *Oliver H. Hughes.*

PER CURIAM.

Petitioners' amended motion, concurred in by the attorneys for respondents, is granted. The case is remanded to the Court of Appeals with directions to remand the cause to the United States District Court for the District of Kansas to enable the parties to file their joint motion for the entry of judgment dismissing the action, as provided in paragraph 3 of the Settlement Agreement dated February 27, 1958, a copy of which is annexed to the amended motion.

MR. JUSTICE FRANKFURTER desires to have it added that he assumes that the legal effect of the Court's order, in which he joins, upon the opinion and judgment of the Court of Appeals in this case is the conventional one when a case has become moot here pending our decision on the merits. *United States* v. *Munsingwear,* 340 U. S. 36, 39.

SPEVACK *v.* STRAUSS ET AL.

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

No. 641. Decided March 3, 1958.

Certiorari granted; judgment and orders of Court of Appeals vacated; and case remanded to that Court with instructions (1) to allow petitioner's proposed amendments to complaint, and (2) to determine, in light of amended complaint, the issues raised by petitioner's appeal.

Reported below: 101 U. S. App. D. C. 339, 248 F. 2d 752.

Carleton U. Edwards, II, Joseph Y. Houghton and *Bernard Margolius* for petitioner.

Solicitor General Rankin, Assistant Attorney General Doub, E. Riley Casey and *Roland A. Anderson* for respondents.

Briefs of *amici curiae* in support of the petition for a writ of certiorari were filed by *Elisha Hanson, Arthur B. Hanson* and *Calvin H. Cobb, Jr.* for the American Chemical Society, and *Carlton S. Dargusch* for the Engineers Joint Council.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the Court of Appeals, and the orders of the Court of Appeals denying petitioner's motion for leave to amend the complaint and petition for rehearing, are vacated. The case is remanded to the Court of Appeals with instructions (1) to allow petitioner's proposed amendments to the complaint and (2) to determine, in light of the amended complaint, the issues raised by petitioner's appeal.

SEARS *v.* UNITED STATES.

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

No. 626. Decided March 3, 1958.

Certiorari granted; on consideration of record and confession of error by the Solicitor General, judgment of the Court of Appeals reversed and case remanded to the District Court to clarify the finding or grant other appropriate relief.

Reported below: 248 F. 2d 377.

Charles B. Evins for petitioner.

Solicitor General Rankin for the United States.

PER CURIAM.

The petition for writ of certiorari is granted. Upon consideration of the entire record and confession of error by the Solicitor General the judgment of the Court of Appeals for the Seventh Circuit is reversed and the case is remanded to the District Court with directions to clarify the finding or grant such other relief as may be appropriate.

TEXAS EX REL. PAN AMERICAN PRODUCTION CO. ET AL. *v.* CITY OF TEXAS CITY, TEXAS, ET AL.

APPEAL FROM THE SUPREME COURT OF TEXAS.

No. 574. Decided March 3, 1958.

Appeal dismissed for want of a substantial federal question. Reported below: 157 Tex. ——, 303 S. W. 2d 780.

Francis G. Coates for appellants.

Dow H. Heard for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

OOSTERHOUDT *v.* MORGAN ET AL., CONSTITUTING THE FLORIDA STATE BOARD OF ACCOUNTANCY.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 623. Decided March 3, 1958.

Appeal dismissed for want of a substantial federal question. Reported below: 96 So. 2d 139.

Edward McCarthy and *Elliott Adams* for appellant.

Charles E. Pledger, Jr., Justin L. Edgerton and *L. William Graham* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

ROEL *v.* NEW YORK COUNTY LAWYERS ASSOCIATION.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 627. Decided March 3, 1958.

Appeal dismissed for want of a substantial federal question. Reported below: 3 N. Y. 2d 224, 144 N. E. 2d 24.

Homer H. Breland for appellant.

Abraham N. Davis for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

BARNES *v.* NATIONAL BROADCASTING CO., INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 202, Misc. Decided March 3, 1958.

Appeal dismissed.

Appellant *pro se.*

Howard Ellis, Perry S. Patterson and *Don H. Reuben* for the National Broadcasting Co., and *Louis M. Mantynband* and *Le Roy R. Krein* for the Columbia Broadcasting Co., appellees.

PER CURIAM.

The appeal is dismissed.

MILLS MILL ET AL. *v.* HAWKINS ET AL., CONSTITUTING THE UNA WATER DISTRICT COMMISSION.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA.

No. 670. Decided March 3, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: —— S. C. ——.

L. W. Perrin, Jr., Edward P. Perrin and *J. Davis Kerr* for appellants.

Harvey W. Johnson for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

KLIG *v.* ROGERS, ATTORNEY GENERAL.

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

No. 143. Decided March 3, 1958.

Upon suggestion of mootness, judgment of Court of Appeals vacated and case remanded to District Court with directions to dismiss.
Reported below: 100 U. S. App. D. C. 294, 244 F. 2d 742.

Jack Wasserman and *David Carliner* for petitioner.

Solicitor General Rankin for respondent.

PER CURIAM.

Upon suggestion of mootness by all of 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.

438765 O—58——44

THILLENS, INC., *v.* MOREY, AUDITOR OF PUBLIC ACCOUNTS OF ILLINOIS, ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 696. Decided March 3, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: 11 Ill. 2d 579, 144 N. E. 2d 735.

Henry F. Tenney, David Jacker and *Perry S. Patterson* for appellant.

Latham Castle, Attorney General of Illinois, and *William C. Wines* and *Ben Schwartz,* Assistant Attorneys General, for the Auditor of Public Accounts of Illinois et al., and *Charles H. Thompson* and *Hirsch E. Soble* for Arnold et al., appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

ROWLAND *v.* TEXAS.

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 709. Decided March 3, 1958.

Appeal dismissed and certiorari denied.
Reported below: 165 Tex. Cr. R. —, 311 S. W. 2d 831.

Dorsey B. Hardeman for appellant.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

BENDIX AVIATION CORP. *v.* INDIANA DEPARTMENT OF STATE REVENUE, INDIANA REVENUE BOARD, INDIANA GROSS INCOME TAX DIVISION.

APPEAL FROM THE SUPREME COURT OF INDIANA.

No. 701. Decided March 3, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: — Ind. —, 143 N. E. 2d 91.

Nathan Levy, George N. Beamer, Richey W. Whitesell and *James W. Oberfell* for appellant.

Edwin K. Steers, Attorney General of Indiana, and *Lloyd C. Hutchinson,* Deputy Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

CARLSON *v.* WASHINGTON.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 286, Misc. Decided March 3, 1958.

Appeal dismissed and certiorari denied.
Reported below: 50 Wash. 2d 220, 310 P. 2d 867.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

BARNES *v.* COLUMBIA BROADCASTING SYSTEM, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 226, Misc. Decided March 3, 1958.

Appeal dismissed.

Appellant *pro se.*

Louis M. Mantynband and *Le Roy R. Krein* for appellee.

PER CURIAM.

The appeal is dismissed.

GOSTOVICH *v.* VALORE, ADJUDICATION OFFICER, VETERANS ADMINISTRATION.

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

No. 247, Misc. Decided March 3, 1958.

Appeal dismissed.
Reported below: 153 F. Supp. 826.

Louis C. Glasso for appellant.

Solicitor General Rankin, Assistant Attorney General Doub and *Samuel D. Slade* for appellee.

PER CURIAM.

The appeal is dismissed.

REPORTER'S NOTE.

The next page is purposely numbered 801. The numbers between 608 and 801 were purposely omitted, in order to make it possible to publish the *per curiam* decisions and orders in the current advance sheets or "preliminary prints" of the United States Reports with *permanent* page numbers, thus making the official citations available immediately.

ORDERS FROM END OF OCTOBER TERM, 1956, THROUGH MARCH 3, 1958.

Case Dismissed in Vacation.

No. 49. Taylor et al. *v.* United States. Certiorari, 352 U. S. 963, to the United States Court of Appeals for the Sixth Circuit. September 9, 1957. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Gordon Browning* for petitioners. *Solicitor General Rankin* for the United States. Reported below: 236 F. 2d 649.

October 8, 1957.

Certiorari Granted.

No. 231. Benanti *v.* United States. C. A. 2d Cir. Certiorari granted. *George J. Todaro* and *Jacob Kossman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 244 F. 2d 389.

October 10, 1957.

Dismissal Under Rule 60.

No. 329. United States *v.* Washington. On petition for writ of certiorari to the Court of Claims. 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 *Acting Assistant Attorney General Leonard, Paul A. Sweeney* and *William W. Ross. Samuel Green* for respondent. Reported below: 137 Ct. Cl. 344, 147 F. Supp. 284.

OCTOBER 14, 1957.

Miscellaneous Orders.

No. 36, October Term, 1956. ALLEGHANY CORPORATION ET AL. *v.* BRESWICK & CO. ET AL.; and

No. 82, October Term, 1956. BAKER, WEEKS & CO. ET AL. *v.* BRESWICK & CO. ET AL., 353 U. S. 151. The motion of appellees Breswick & Co., Myron Neisloss and Randolph Phillips to retax costs is denied. *George Brussel, Jr.* for Breswick & Co. et al., and *Randolph Phillips, pro se,* movants-appellees. *Whitney North Seymour, David Hartfield, Jr.* and *Edward K. Wheeler* filed a memorandum in opposition for the Alleghany Corporation, appellant in No. 36.

No. 32. UNITED STATES EX REL. LEE KUM HOY ET AL. *v.* SHAUGHNESSY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. Certiorari, 352 U. S. 966, to the United States Court of Appeals for the Second Circuit. The motion to substitute John L. Murff as the party respondent in the place and stead of Edward J. Shaughnessy, retired, is granted. *Edward J. Ennis* for movants-petitioners.

No. 33. WILSON ET AL. *v.* LOEW'S INCORPORATED ET AL. Certiorari, 352 U. S. 980, to the District Court of Appeal of California, Second Appellate District. The motion for leave to file brief of American Civil Liberties Union, as *amicus curiae,* is granted. *Edward J. Ennis* for movant. *Irving M. Walker* for respondents, in opposition.

No. 72. NOWAK *v.* UNITED STATES; and

No. 76. MAISENBERG *v.* UNITED STATES. Certiorari, 353 U. S. 922, to the United States Court of Appeals for the Sixth Circuit. The motions of petitioners for leave to proceed *in forma pauperis* are granted. *Ernest Goodman* for movants-petitioners.

No. 122. IVANHOE IRRIGATION DISTRICT ET AL. *v.* MCCRACKEN ET AL.;

No. 123. MADERA IRRIGATION DISTRICT ET AL. *v.* STEINER ET AL.;

No. 124. MADERA IRRIGATION DISTRICT *v.* ALBONICO ET UX.; and

No. 125. SANTA BARBARA COUNTY WATER AGENCY *v.* BALAAM ET AL. Appeals from the Supreme Court of California. Further consideration of the question of jurisdiction is postponed to the hearing of the cases on the merits. *Edmund G. Brown,* Attorney General, and *B. Abbott Goldberg* and *Adolphus Moskovitz,* Deputy Attorneys General, for the State of California et al., *Denver C. Peckinpah* for the Madera Irrigation District, and *Francis Price, Sr.* for the Santa Barbara County Water Agency, appellants. *Harry W. Horton, Reginald L. Knox, Jr., W. R. Bailey, Denslow B. Green, Sherman Anderson, Herman Phleger* and *Alvin J. Rockwell* for appellees. *Solicitor General Rankin, Assistant Attorney General Morton, David R. Warner* and *Roger P. Marquis* filed a memorandum for the United States, as *amicus curiae,* in support of jurisdiction. *Edson Abel* filed a memorandum for the California Farm Bureau Federation, as *amicus curiae,* supporting the motion to dismiss the appeal in No. 122. Reported below: 47 Cal. 2d 597, 681, 695, 699, 306 P. 2d 824, 875, 886, 894.

No. 165. LERNER *v.* CASEY ET AL., CONSTITUTING THE NEW YORK CITY TRANSIT AUTHORITY. Appeal from the Court of Appeals of New York. Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. *Leonard B. Boudin* and *Victor Rabinowitz* for appellant. *Daniel T. Scannell* and *Helen R. Cassidy* for appellees. Reported below: 2 N. Y. 2d 355, 141 N. E. 2d 533.

No. 54. MENDOZA-MARTINEZ *v.* MACKEY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION SERVICE, ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The motion to grant petition for writ of certiorari and to advance argument is denied. *John W. Willis* for movant-petitioner. Reported below: 238 F. 2d 239.

No. 73. FEDERAL MARITIME BOARD *v.* ISBRANDTSEN COMPANY, INC., ET AL.; and

No. 74. JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE ET AL. *v.* UNITED STATES ET AL. Certiorari, 353 U. S. 908, to the United States Court of Appeals for the District of Columbia Circuit. The motion for leave to file brief of Pacific American Steamship Association et al., as *amici curiae,* is granted. *John R. Mahoney, Elmer C. Maddy, Alan B. Aldwell, Walter Carroll* and *Allen E. Charles* for movants. *John J. O'Connor* and *John J. O'Connor, Jr.* filed a reply for the Isbrandtsen Company, Inc., respondent, in opposition to the motion.

No. 189. KNAPP *v.* SCHWEITZER, JUDGE, COURT OF GENERAL SESSIONS, ET AL. Appeal from the Court of Appeals of New York. The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is granted limited to question 2 presented by the jurisdictional statement which reads as follows:

"2. SELF INCRIMINATION.

"Whether an employer in an industry affecting commerce, called before a Grand Jury of the State as a witness in the course of an investigation concerning the state penal offenses of bribery, extortion and conspiracy connected with labor union operations, is privileged, by the

Fifth Amendment to the United States Constitution, to decline to answer questions of such character that affirmative answers thereto would establish the *corpus* of the federal crime of unauthorized payment of moneys to an official of the labor union representing his employees, Taft-Hartley Act, Sec. 302 (29 U. S. C. 186; 61 Stat. 157); and whether his ensuing punishment for contempt by a State Court is not barred by the Supremacy Clause, Art. VI, Cl. 2 of the United States Constitution and also by the 'Privileges and Immunities' Clause of the Fourteenth Amendment."

Bernard H. Fitzpatrick for appellant. *Frank S. Hogan* and *Charles W. Manning* for appellees. Reported below: 2 N. Y. 2d 913, 975, 141 N. E. 2d 825, 142 N. E. 2d 649.

No. 180. Ericksen *v.* Bristow et al., Justices of the Supreme Court of Illinois. Petition for writ of certiorari to the Supreme Court of Illinois and the alternative motion for leave to file petition for a writ of mandamus or a common law writ of certiorari or such other writ as may be appropriate are denied. Reported below: See 10 Ill. 2d 357, 140 N. E. 2d 825.

No. 201. MacNeil Bros. Co. et al. *v.* Justices of the Superior Court et al. Motion for leave to supplement "Reasons for Granting Writ" denied. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit denied. *Angus MacNeil* for petitioners. Reported below: 242 F. 2d 273.

No. 4, Misc. Rose *v.* Bell, Sheriff. Motion for leave to file petition for writ of habeas corpus denied. *Joseph Kadans* and *F. J. Healy* for petitioner. *W. W. Barron,* Attorney General of West Virginia, and *Fred H. Caplan,* Assistant Attorney General, for respondent.

No. 218. MASSEY-HARRIS-FERGUSON LIMITED *v.* BOYD, U. S. DISTRICT JUDGE. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit and the alternative motion for leave to file a petition for writ of mandamus or other appropriate writ denied. *John F. Sonnett* and *Cooper Turner, Jr.* for petitioner. *Lowell W. Taylor* for respondent. Reported below: 242 F. 2d 800.

No. 240. WENTZ ET AL. *v.* UNITED STATES. Application for bail referred to the entire Court by MR. JUSTICE DOUGLAS denied. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. *Joseph T. Enright* for petitioners. *Solicitor General Rankin, Assistant Attorney General Olney, John F. Davis* and *Beatrice Rosenberg* for the United States. Reported below: 244 F. 2d 172.

No. 16, Misc. FOOKS *v.* UNITED STATES. Motion to supplement granted. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. *C. Frank Reifsnyder* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 100 U. S. App. D. C. 348, 246 F. 2d 629.

No. 24, Misc. GULLAHORN ET AL. *v.* UNITED STATES. Motion of Robert Clyde Sanders to withdraw from the petition for writ of certiorari granted. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit and for other relief denied. Petitioners *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 245 F. 2d 958.

No. 38, Misc. HARRISON *v.* SETTLE, WARDEN;
No. 48, Misc. PEARSON *v.* GRAY, WARDEN;
No. 49, Misc. SMITH *v.* ILLINOIS;
No. 50, Misc. BEAVER *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY;
No. 54, Misc. HARPER *v.* MURPHY, WARDEN;
No. 56, Misc. GOSSO *v.* GLADDEN, WARDEN;
No. 58, Misc. PLATER *v.* STEINER, WARDEN;
No. 61, Misc. HILL *v.* SETTLE, WARDEN;
No. 88, Misc. WINSTON *v.* LOONEY, WARDEN;
No. 89, Misc. LEMPIA *v.* HEINZE, WARDEN, ET AL.;
No. 91, Misc. TISCIO *v.* MARTIN, WARDEN, ET AL.;
No. 122, Misc. ROBINSON *v.* BROWNELL, ATTORNEY GENERAL;
No. 123, Misc. YOST *v.* RAGEN, WARDEN;
No. 124, Misc. LUCIANO *v.* WILKINSON, WARDEN;
No. 130, Misc. MULLREED *v.* MICHIGAN ET AL.;
No. 136, Misc. LISTER *v.* MCLEOD, WARDEN; and
No. 153, Misc. PLEDGER *v.* LOWRY, MEDICAL DIRECTOR, U. S. PUBLIC HEALTH SERVICE HOSPITAL. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted. (See also No. 131, ante, p. 7; No. 116, ante, p. 8; No. 229, ante, p. 9; No. 161, ante, p. 14; No. 168, ante, p. 15; Misc. No. 6, ante, p. 17, and No. 189, supra.)

No. 322. ROMERO *v.* INTERNATIONAL TERMINAL OPERATING CO. ET AL. C. A. 2d Cir. Certiorari granted. *Silas B. Axtell* and *Charles A. Ellis* for petitioner. *John P. Smith* for the International Terminal Operating Co., *John L. Quinlan* for Compania Trasatlantica et al., and *Sidney A. Schwartz* for the Quin Lumber Co., Inc., respondents. Reported below: 244 F. 2d 409.

No. 127. LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. L., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit;

No. 273. NATIONAL LABOR RELATIONS BOARD *v.* GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL No. 886, AFL–CIO. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit; and

No. 324. LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO, *v.* NATIONAL LABOR RELATIONS BOARD. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. The petitions for writs of certiorari in these cases are severally granted and the cases are consolidated for argument. *John C. Stevenson* for petitioners in No. 127. *Plato E. Papps* and *Louis P. Poulton* for petitioner in No. 324. *Solicitor General Rankin, Jerome D. Fenton, Stephen Leonard, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board. *Herbert S. Thatcher, David Previant* and *L. N. D. Wells, Jr.* for respondent in No. 273. Reported below: No. 127, 241 F. 2d 147; Nos. 273 and 324, 101 U. S. App. D. C. 80, 247 F. 2d 71.

No. 146. UNITED STATES *v.* MCNINCH, DOING BUSINESS AS HOME COMFORT CO., ET AL. C. A. 4th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter* and *William W. Ross* for the United States. *Edward W. Mullins* for McNinch et al., and *A. C. Epps* and *Charles W. Laughlin* for Cato Bros., Inc., et al., respondents. Reported below: 242 F. 2d 359.

No. 133. SINKLER *v.* MISSOURI PACIFIC RAILROAD CO. Court of Civil Appeals of Texas, Ninth Supreme Judicial District. Certiorari granted. *Robert H. Kelley* and *J. Edwin Smith* for petitioner. *Walter F. Woodul* for respondent. Reported below: 295 S. W. 2d 508.

No. 143. KLIG *v.* BROWNELL, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Jack Wasserman* and *David Carliner* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondent. Reported below: 100 U. S. App. D. C. 294, 244 F. 2d 742.

No. 234. NATIONAL LABOR RELATIONS BOARD *v.* DUVAL JEWELRY CO. OF MIAMI, INC., ET AL. C. A. 5th Cir. Certiorari granted. *Solicitor General Rankin, Jerome D. Fenton, Stephen Leonard, Dominick L. Manoli* and *Norton J. Come* for petitioner. Reported below: 243 F. 2d 427.

No. 275. MANZANILLO *v.* UNITED STATES. Court of Claims. Certiorari granted. *John Ward Cutler* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Leonard, Melvin Richter* and *William W. Ross* for the United States. Reported below: 137 Ct. Cl. 927.

No. 287. DESSALERNOS *v.* SAVORETTI, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari granted. *David W. Walters* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondent. Reported below: 244 F. 2d 178.

No. 200. KOVACS *v.* BREWER. Supreme Court of North Carolina. Certiorari granted. *Harris B. Steinberg* for petitioner. Reported below: 245 N. C. 630, 97 S. E. 2d 96.

No. 303. ALASKA INDUSTRIAL BOARD ET AL. *v.* CHUGACH ELECTRIC ASSOCIATION, INC., ET AL. C. A. 9th Cir. Certiorari granted. *J. Gerald Williams,* Attorney General of Alaska, for the Alaska Industrial Board, and *John H. Dimond* for Jenkins, petitioners. Reported below: 245 F. 2d 855.

No. 311. COMMISSIONER OF INTERNAL REVENUE *v.* STERN, TRANSFEREE. C. A. 6th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Rice, Robert N. Anderson* and *A. F. Prescott* for petitioner. *Walter E. Barton* for respondent. Reported below: 242 F. 2d 322.

No. 331. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. *Wesley R. Asinof* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 245 F. 2d 32.

No. 251. PANAMA CANAL CO. *v.* GRACE LINE, INC., ET AL.; and

No. 252. GRACE LINE, INC., ET AL. *v.* PANAMA CANAL CO. C. A. 2d Cir. Certiorari granted. *Solicitor General Rankin* for the Panama Canal Co. With him on the petition in No. 251 were *Assistant Attorney General Doub, Paul A. Sweeney* and *Herman Marcuse. C. Dickerman Williams* for petitioners in No. 252 and respondents in No. 251. *James M. Estabrook* filed a brief for Aktieselskabet Dampskibsselskabet Svenborg et al., as *amici curiae,* in support of petitioners in No. 252. Reported below: 243 F. 2d 844.

No. 276. RAINWATER ET AL., DOING BUSINESS AS R. S. RAINWATER & SONS, ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari granted. *Leon B. Catlett* for petitioners. *Solicitor General Rankin* for the United States. Reported below: 244 F. 2d 27.

No. 289. NATIONAL LABOR RELATIONS BOARD *v.* AVONDALE MILLS. C. A. 5th Cir. Certiorari granted. *Solicitor General Rankin, Jerome D. Fenton, Stephen Leonard, Dominick L. Manoli* and *Frederick U. Reel* for petitioner. Reported below: 242 F. 2d 669.

No. 306. THE COLONY, INC., *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari granted. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application. *Bernard H. Barnett* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Robert N. Anderson* and *Grant W. Wiprud* for respondent. Reported below: 244 F. 2d 75.

No. 5, Misc. TRIPLETT *v.* IOWA. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Iowa granted. *Herbert S. French* for petitioner. *Norman A. Erbe,* Attorney General of Iowa, *Raphael R. R. Dvorak,* First Assistant Attorney General, and *Don C. Swanson,* Assistant Attorney General, for respondent. Reported below: 248 Iowa 339, 79 N. W. 2d 391.

No. 22, Misc. GIORDENELLO *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted. *William F. Walsh* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 241 F. 2d 575.

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No. 348. SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., *v.* BROWNELL, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted. Counsel are invited to discuss, among other things, the power of the District Court to dismiss, and the propriety of its dismissal of, petitioner's complaint, under Rule 37 (b)(2) of F. R. C. P., for *failure* to obey its order, for production of documents, issued under Rule 34 of F. R. C. P., in the absence of evidence and of finding that petitioner "refuses to obey" such order. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Roger J. Whiteford* and *John J. Wilson* for petitioner. *Solicitor General Rankin, Assistant Attorney General Townsend, George B. Searls, Sidney B. Jacoby* and *Ernest S. Carsten* for respondents. Reported below: 100 U. S. App. D. C. 148, 243 F. 2d 254.

No. 10, Misc. JOSEPH ET AL. *v.* INDIANA. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Supreme Court of Indiana granted limited to the question of admissibility of the confession. Petitioners *pro se*. *Edwin K. Steers,* Attorney General of Indiana, and *Robert M. O'Mahoney,* Deputy Attorney General, for respondent. Reported below: 236 Ind. 529, 141 N. E. 2d 109.

No. 40, Misc. EUBANKS *v.* LOUISIANA. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Louisiana granted. *Leopold Stahl* for petitioner. *Jack P. F. Gremillion,* Attorney General of Louisiana, *M. E. Culligan,* Assistant Attorney General, and *Leon D. Hubert, Jr.* for respondent. Reported below: 232 La. 289, 94 So. 2d 262.

Certiorari Denied. (*See also No. 134, ante, p. 11; No. 316, ante, p. 12; Misc. No. 80, ante, p. 16; Misc. No. 25, ante, p. 17; Nos. 180, 201, 218, 240 and Misc. Nos. 16 and 24, supra.*)

No. 115. TENNESSEE BURLEY TOBACCO GROWERS' ASSOCIATION ET AL. *v.* RANGE ET AL. Court of Appeals of Tennessee, Eastern Division. Certiorari denied. *Norman M. Littell* and *Frederick Bernays Wiener* for petitioners. *F. H. Parvin* for respondents. By invitation of the Court to express his views, 353 U. S. 981, *Solicitor General Rankin* filed memoranda for the United States, as *amicus curiae,* in opposition to the petition. Reported below: —— Tenn. App. ——, 298 S. W. 2d 545.

No. 120. DESSER, RAU & HOFFMAN ET AL. *v.* GOGGIN, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. *Jack L. Rau* and *Theodore E. Rein* for petitioners. *Robert H. Shutan* for respondent. Reported below: 240 F. 2d 84.

No. 129. DAYTON *v.* GILLILLAND ET AL., CONSTITUTING THE FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Paul Ackerman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *B. Jenkins Middleton* for respondents. *Philip Levy, Robert T. Reynolds* and *Paul M. Rhodes* filed a brief for Price et al., as *amici curiae,* in opposition. Reported below: 100 U. S. App. D. C. 75, 242 F. 2d 227.

No. 132. BANDEEN *v.* HOWARD ET AL., CONSTITUTING THE STATE BOARD OF HEALTH OF KENTUCKY, ET AL. Court of Appeals of Kentucky. Certiorari denied. *Blakey Helm* for petitioner. *William A. Lamkin, Jr.* for respondents. Reported below: 299 S. W. 2d 249.

No. 135. KIDD *v.* MERCK & Co., INC. C. A. 6th Cir. Certiorari denied. *Ben F. McAuley* for petitioner. *Philip Wallis* for respondent. Reported below: 242 F. 2d 592.

No. 136. BOARD OF ASSESSORS OF THE TOWN OF RIVERHEAD, NEW YORK, ET AL. *v.* GRUMMAN AIRCRAFT ENGINEERING CORP. Court of Appeals of New York. Certiorari denied. *Reginald C. Smith* and *Charles A. Ellis* for petitioners. *John P. Ohl* for respondent. Reported below: 2 N. Y. 2d 500, 1012, 141 N. E. 2d 794, 143 N. E. 2d 352.

No. 137. INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (AFL–CIO) ET AL. *v.* BENTON HARBOR MALLEABLE INDUSTRIES. C. A. 6th Cir. Certiorari denied. *Harold A. Cranefield, Kurt L. Hanslowe* and *Redmond H. Roche, Jr.* for petitioners. *Victor L. Lewis* and *Chester J. Byrns* for respondent. Reported below: 242 F. 2d 536.

No. 138. MINERAL HOLDING TRUST OF ST. PAUL, MINNESOTA, ET AL. *v.* ALUMINUM COMPANY OF AMERICA ET AL. Supreme Court of Texas. Certiorari denied. *John E. Daubney* for petitioners. *C. E. Bryson* and *David T. Searls* for the Aluminum Company of America et al., and *C. C. Carsner* for Stovall et al., respondents. Reported below: 157 Tex. ——, 299 S. W. 2d 279.

No. 140. ESTATE OF PIPE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Russell D. Morrill* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Stull, Harry Baum* and *Marvin W. Weinstein* for respondent. Reported below: 241 F. 2d 210.

No. 145. WAINER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Maurice J. Walsh* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *Carolyn R. Just* for the United States. Reported below: 240 F. 2d 595.

No. 147. WILSHIRE HOLDING CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Murray M. Chotiner* and *Russell E. Parsons* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Lee A. Jackson* and *Joseph F. Goetten* for respondent. Reported below: 244 F. 2d 904.

No. 150. CHICAGO, BURLINGTON & QUINCY RAILROAD CO. *v.* NORTHWESTERN AUTO PARTS CO.;

No. 151. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. *v.* NORTHWESTERN AUTO PARTS CO.;

No. 152. GREAT NORTHERN RAILWAY CO. *v.* NORTHWESTERN AUTO PARTS CO.; and

No. 153. MINNEAPOLIS & ST. LOUIS RAILWAY CO. *v.* NORTHWESTERN AUTO PARTS CO. C. A. 8th Cir. Certiorari denied. *William J. Quinn* for petitioners. *Harry S. Stearns, Jr.* for petitioner in No. 150. Reported below: 240 F. 2d 743.

No. 155. AMERICAN EMERY WHEEL WORKS *v.* MASON. C. A. 1st Cir. Certiorari denied. *Francis V. Reynolds* and *Richard P. McMahon* for petitioner. Reported below: 241 F. 2d 906.

No. 156. STOPPER *v.* MANHATTAN LIFE INSURANCE CO. OF NEW YORK. C. A. 3d Cir. Certiorari denied. *John M. McNally, Jr.* for petitioner. *Owen B. Rhoads* and *Robert M. Landis* for respondent. Reported below: 241 F. 2d 465.

No. 154. COLLINS *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. *Gerald Robin Griffin* for petitioner. Reported below: 297 S. W. 2d 54.

No. 160. MAY *v.* ELLIS TRUCKING CO., INC. C. A. 6th Cir. Certiorari denied. *Clarence E. Clifton* for petitioner. *L. E. Gwinn* for respondent. Reported below: 243 F. 2d 526.

No. 162. PHILLIPS PETROLEUM CO. *v.* BUSTER ET AL. C. A. 10th Cir. Certiorari denied. *Rayburn L. Foster, Harry D. Turner, R. M. Williams, Cecil C. Hamilton* and *Reford Bond* for petitioner. *V. P. Crowe* for respondents. Reported below: 241 F. 2d 178.

No. 163. RUSSO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Boris Kostelanetz* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. Reported below: 241 F. 2d 285.

No. 164. HOPPE *v.* UNITED STATES. Court of Claims. Certiorari denied. *John P. Witsil* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Melvin Richter* for the United States. Reported below: 136 Ct. Cl. 559.

No. 166. C. S. JOHNSON CO. *v.* STROMBERG, DOING BUSINESS AS CALIFORNIA BATCHING EQUIPMENT CO., ET AL. C. A. 9th Cir. Certiorari denied. *William A. Denny* for petitioner. Reported below: 242 F. 2d 793.

No. 170. ROBEY *v.* SUN RECORD CO., INC. C. A. 5th Cir. Certiorari denied. *Harry Dow* for petitioner. *Grover N. McCormick* for respondent. Reported below: 242 F. 2d 684.

No. 159. Compania Ithaca de Vapores, S. A., *v.* United States. Court of Claims. Certiorari denied. *Daniel L. Stonebridge* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 137 Ct. Cl. 860, 149 F. Supp. 257.

No. 167. Harris *v.* United States. C. A. 5th Cir. Certiorari denied. *Arthur B. Cunningham* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. Reported below: 243 F. 2d 74.

No. 171. Bryson *v.* United States. C. A. 9th Cir. Certiorari denied. *Richard Gladstein, George R. Andersen* and *Norman Leonard* for petitioner. *Solicitor General Rankin, Assistant Attorney General Tompkins, Philip R. Monahan* and *Carl G. Coben* for the United States. Reported below: 238 F. 2d 657; 243 F. 2d 837.

No. 172. Texas Company *v.* United States et al. C. A. 4th Cir. Certiorari denied. *Joseph M. Brush* and *Francis N. Crenshaw* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *William W. Ross* for the United States, and *Marvin Schwartz* for Eckert et al., respondents. Reported below: 241 F. 2d 819.

No. 174. Cosgrove *v.* New York, Chicago & St. Louis Railroad Co. Supreme Court of Illinois. Certiorari denied. *Zeno Middleton* for petitioner. *Henry Driemeyer* and *Robert L. Broderick* for respondent.

No. 175. Boston Printing Pressmen's Union No. 67 *v.* Potter Press. C. A. 1st Cir. Certiorari denied. *Herbert S. Thatcher* for petitioner. *Harold Rosenwald* for respondent. Reported below: 241 F. 2d 787.

October 14, 1957. 355 U. S.

No. 173. DUFF ET AL. *v.* BULLARD, ADMINISTRATOR, ET AL. Court of Appeals of Kentucky. Certiorari denied. *Joe Hobson* and *Weldon Shouse* for petitioners. *Leo T. Wolford* and *Eugene B. Cochran* for respondents. Reported below: 299 S. W. 2d 99.

No. 176. SUNRISE LUMBER & TRIM CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Alexander Eltman* for petitioner. *Solicitor General Rankin, Jerome D. Fenton, Stephen Leonard* and *Dominick L. Manoli* for respondent. Reported below: 241 F. 2d 620.

No. 179. EISTRAT *v.* BRUSH INDUSTRIAL LUMBER CO. ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Wendell W. Schooling* for respondents. Reported below: See 147 Cal. App. 2d 628, 305 P. 2d 715.

No. 182. LIEBERMAN-KOREN CORP. ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Kapner, petitioner, *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 243 F. 2d 567.

No. 183. ARGENTO *v.* HORN ET AL. C. A. 6th Cir. Certiorari denied. *Henry C. Lavine* for petitioner. *Solicitor General Rankin* for Horn et al., and *Robert J. Bulkley* for Zugaro, respondents. Reported below: 241 F. 2d 258.

No. 185. BROWN *v.* PANHANDLE & SANTA FE RAILWAY CO. Court of Civil Appeals of Texas, Seventh Supreme Judicial District. Certiorari denied. *Robert Lee Guthrie, Searcy L. Johnson* and *Warren E. Miller* for petitioner. *Preston Shirley* and *Charles L. Cobb* for respondent. Reported below: 294 S. W. 2d 223.

No. 187. Pan American Petroleum Corp. *v.* Seaton, Secretary of the Interior. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *W. W. Heard* and *Neil F. Stull* for petitioner. *Solicitor General Rankin, John F. Davis, Roger P. Marquis* and *George S. Swarth* for respondent. Reported below: 100 U. S. App. D. C. 50, 242 F. 2d 23.

No. 188. Pan American Casualty Co. *v.* Reed et ux. C. A. 5th Cir. Certiorari denied. *Charles S. Murphy* and *Camille F. Gravel, Jr.* for petitioner. Reported below: 240 F. 2d 336.

No. 190. Metropolitan Bag & Paper Distributors Association, Inc., et al. *v.* Federal Trade Commission. C. A. 2d Cir. Certiorari denied. *Nathan Frankel* and *Reuben Barshay* for petitioners. *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman, W. Louise Florencourt, Earl W. Kintner* and *James E. Corkey* for respondent. Reported below: 240 F. 2d 341.

No. 191. Frank *v.* United States. C. A. 3d Cir. Certiorari denied. *Robert M. Taylor* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Joseph M. Howard* and *Lawrence K. Bailey* for the United States. Reported below: 245 F. 2d 284.

No. 192. Green *v.* Baughman et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Doub* and *Paul A. Sweeney* for respondents. Reported below: 100 U. S. App. D. C. 187, 243 F. 2d 610.

No. 193. DAVIS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *John R. Snively* for petitioner. Reported below: 10 Ill. 2d 430, 140 N. E. 2d 675.

No. 194. KOSTNER *v.* CHICAGO LAND CLEARANCE COMMISSION. Supreme Court of Illinois. Certiorari denied. *William D. Saltiel* for petitioner. *William H. Dillon* for respondent. Reported below: 10 Ill. 2d 501, 140 N. E. 2d 695.

No. 195. NICHOLS ET AL. *v.* ALKER ET AL. C. A. 2d Cir. Certiorari denied. *Harold G. Aron* for petitioners. *David K. Kadane* for the Long Island Lighting Co. et al., *Charles C. Lockwood* for Vanneck, and *Percival E. Jackson, pro se,* respondents. *Peter H. Kaminer* of counsel for respondents. Reported below: 244 F. 2d 499.

No. 196. HARLEM PAPER PRODUCTS CORP. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 2d Cir. Certiorari denied. *Albert L. Solodar* for petitioners. *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman, W. Louise Florencourt, Earl W. Kintner* and *James E. Corkey* for respondent. Reported below: 240 F. 2d 341.

No. 198. CITY OF EL PASO *v.* EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 ET AL. C. A. 5th Cir. Certiorari denied. *Travis White* for petitioner. *Solicitor General Rankin* for the United States, and *Eugene T. Edwards* for the El Paso County Water Improvement District No. 1 et al., respondents. Reported below: 243 F. 2d 927.

No. 199. MISSISSIPPI VALLEY BARGE LINE CO. *v.* ESSO SHIPPING CO. C. A. 5th Cir. Certiorari denied. *Selim B. Lemle* for petitioner. *Raymond T. Greene* for respondent. Reported below: 240 F. 2d 606.

No. 202. District 50, United Mine Workers of America, *v.* Tungsten Mining Corp. C. A. 4th Cir. Certiorari denied. *Crampton Harris, Charles P. Green, Yelverton Cowherd* and *Alfred D. Treherne* for petitioner. *Whiteford S. Blakeney* for respondent. Reported below: 242 F. 2d 84.

No. 203. Patteson *v.* Devine. C. A. 6th Cir. Certiorari denied. *Bailey Brown* and *George J. Schweizer, Jr.* for petitioner. *Robert M. Murray* and *James T. Haynes* for respondent. Reported below: 242 F. 2d 828.

No. 204. Hall et al. *v.* United States. C. A. 7th Cir. Certiorari denied. *Clyde J. Cover* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, John N. Stull, Robert N. Anderson* and *Marvin W. Weinstein* for the United States. Reported below: 242 F. 2d 412.

No. 205. Borgmeier *v.* Fleming et al. C. A. 7th Cir. Certiorari denied. *Edmund J. Johnson* for petitioner. *Ray M. Stroud* for respondents. Reported below: 241 F. 2d 865.

No. 206. National Labor Relations Board *v.* Southern Silk Mills, Inc. C. A. 6th Cir. Certiorari denied. *Solicitor General Rankin, Jerome D. Fenton, Stephen Leonard* and *Dominick L. Manoli* for petitioner. *R. W. Kemmer* for respondent. Reported below: 242 F. 2d 697.

No. 207. L. C. Fuller, Jr. Lumber Co., Inc., *v.* Anglin et al. C. A. 6th Cir. Certiorari denied. *Thomas Miller Manier* for petitioner. *John J. Hooker* for respondents. Reported below: 244 F. 2d 72.

No. 208. COLUMBUS & SOUTHERN OHIO ELECTRIC CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Joseph S. Platt* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, John N. Stull, A. F. Prescott* and *Melva M. Graney* for respondent. Reported below: 244 F. 2d 79.

No. 209. MOORE-McCORMACK LINES, INC., *v.* THE ESSO CAMDEN. C. A. 2d Cir. Certiorari denied. *Adrian J. O'Kane* for petitioner. *Raymond T. Greene* and *Ira A. Campbell* for respondent. Reported below: 244 F. 2d 198.

No. 211. LANNOM MANUFACTURING CO., INC., *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 6th Cir. Certiorari denied. *Judson Harwood* for petitioner. *Solicitor General Rankin, Jerome D. Fenton, Stephen Leonard* and *Dominick L. Manoli* for the National Labor Relations Board, and *Harold I. Cammer* for the Amalgamated Meat Cutters & Butcher Workmen of North America, AFL–CIO, respondents. Reported below: 243 F. 2d 304.

No. 212. ANDERSON ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Herbert S. Thatcher* and *Donald M. Murtha* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 138 Ct. Cl. 192, 150 F. Supp. 881.

No. 213. WEBSTER MOTOR CAR CO. *v.* PACKARD MOTOR CAR CO. ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William J. Hughes, Jr.* for petitioner. *Harold L. Smith, Jerome G. Shapiro* and *Robert W. Barker* for respondents. Reported below: 100 U. S. App. D. C. 161, 243 F. 2d 418.

No. 210. Reed *v.* Federal Trade Commission. C. A. 7th Cir. Certiorari denied. *David A. Canel* for petitioner. *Solicitor General Rankin* for respondent. Reported below: 243 F. 2d 308.

No. 214. Schwing Motor Co., Inc., *v.* Hudson Sales Corp. et al. C. A. 4th Cir. Certiorari denied. *Wilson K. Barnes* for petitioner. *William L. Marbury* for the Hudson Sales Corp. et al., and *John S. Stanley* and *Roger A. Clapp* for Bankert Hudson, Inc., et al., respondents. Reported below: 239 F. 2d 176.

No. 215. Colgate-Palmolive Co. *v.* Carter Products, Inc., et al. C. A. 4th Cir. Certiorari denied. *Mathias F. Correa* for petitioner. *George B. Finnegan, Jr., William D. Denson* and *Morris Kirschstein* for respondents. Reported below: 243 F. 2d 163.

No. 216. Nuodex Products Co., Inc., *v.* W. H. Elliott & Sons Co., Inc., et al. C. A. 1st Cir. Certiorari denied. *George B. Rowell* and *Gordon M. Tiffany* for petitioner. *Stanley M. Brown* for W. H. Elliott & Sons Co., Inc., and *Robert W. Upton* for E. & F. King & Co., Inc., respondents. Reported below: 243 F. 2d 116.

No. 217. Zack et ux. *v.* Commissioner of Internal Revenue. C. A. 6th Cir. Certiorari denied. *Charles L. Levin* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, John N. Stull* and *Harry Baum* for respondent. Reported below: 245 F. 2d 235.

No. 223. Canadian Pacific Steamships, Ltd., et al. *v.* McAfoos et al. C. A. 2d Cir. Certiorari denied. *Livingston Platt* for petitioners. *Gustave G. Rosenberg* and *Benjamin Adler* for respondents. Reported below: 243 F. 2d 270.

No. 220. UNITED STATES ET AL. *v.* MERRY BROTHERS BRICK & TILE CO. ET AL. C. A. 5th Cir. Certiorari denied. *Attorney General Brownell, Acting Assistant Attorney General Stull* and *Harry Baum* for petitioners. *William M. Fulcher* for the Merry Brothers Brick & Tile Co., *Charles D. Turner* for the Reliance Clay Products Co., *William S. Pritchard* and *Winston B. McCall* for the Estate of Stephenson et al., *William A. Sutherland* for the Tupelo Brick & Tile Co. et al., *Harry C. Weeks, Benjamin L. Bird* and *Joseph B. Brennan* for the Acme Brick Co., *Franklin Spafford* for Kirby et al., *Charles J. Bloch* and *Mr. Brennan* for the Cherokee Brick & Tile Co., *Furman Smith* for the Chattahoochee Brick Co., *Allen Post* for the Atlanta Brick & Tile Co., *Wallace Miller, Jr.* for the Burns Brick Co., and *Howard P. Travis* for the Texas Vitrified Pipe Co., respondents. Reported below: 242 F. 2d 708.

No. 221. HARMAR DRIVE-IN THEATRE, INC., ET AL. *v.* WARNER BROS. PICTURES, INC., ET AL. C. A. 2d Cir. Certiorari denied. *Arnold Malkan* for petitioners. *Bruce Bromley, Louis Phillips* and *John Logan O'Donnell* for respondents. Reported below: 239 F. 2d 555; 241 F. 2d 937.

No. 224. GENERAL ELECTRIC CO. *v.* MASTERS MAIL ORDER CO. OF WASHINGTON, D. C., INC. C. A. 2d Cir. Certiorari denied. *Edgar E. Barton* and *Haliburton Fales 2nd* for petitioner. *Norman Diamond* and *Joseph F. Ruggieri* for respondent. Reported below: 244 F. 2d 681.

No. 228. FAYETTE NO. 4, INC., ET AL. *v.* LEXINGTON TOBACCO BOARD OF TRADE ET AL. Court of Appeals of Kentucky. Certiorari denied. *Weldon Shouse* for petitioners. *Clinton M. Harbison* for respondents. Reported below: 299 S. W. 2d 640.

No. 222. Citizens Bank & Trust Co., Administrator, *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Camden R. McAtee* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Paul A. Sweeney* for the United States. Reported below: 100 U. S. App. D. C. 1, 240 F. 2d 863.

No. 226. New Mexico ex rel. Grinnell Company et al. *v.* MacPherson, District Court Judge. Supreme Court of New Mexico. Certiorari denied. *Pearce C. Rodey* for petitioners. *James R. Modrall* and *James E. Sperling* for respondent. Reported below: 62 N. M. 308, 309 P. 2d 981.

No. 230. Tamarkin *v.* Selective Service System, Local Draft Board #47, Miami, Florida, et al. C. A. 5th Cir. Certiorari denied. *Leonard Edward Abel* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondents. Reported below: 243 F. 2d 108.

No. 232. Brown & Root, Inc., et al., doing business as Louisiana Bridge Co., *v.* Archer et al. C. A. 5th Cir. Certiorari denied. *Ben H. Powell, Jr., Howard W. Lenfant* and *Jerre S. Williams* for petitioners. *Horace R. Alexius, Jr.* for respondents. Reported below: 241 F. 2d 663.

No. 233. Putnam Tool Co. et al. *v.* United States. Court of Claims. Certiorari denied. *Charles D. Hamel, Lee I. Park, K. Martin Worthy* and *Fuller Holloway* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Melvin Richter* for the United States. Reported below: 137 Ct. Cl. 183, 147 F. Supp. 746.

No. 235. DONOVAN CONSTRUCTION CO. ET AL., DOING BUSINESS AS DONOVAN-JAMES COMPANY, *v.* UNITED STATES. Court of Claims. Certiorari denied. *Philip Adams* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 138 Ct. Cl. 97, 149 F. Supp. 898.

No. 236. ARP ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Norman B. Gray* for petitioners. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for the United States. Reported below: 244 F. 2d 571.

No. 237. DALY *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. *Robert A. Kahn* for petitioner. *Solicitor General Rankin* for the United States and the Federal Communications Commission, respondents.

No. 239. CHAS. KURZ & CO., INC., *v.* SOUTH CAROLINA STATE HIGHWAY DEPARTMENT. C. A. 4th Cir. Certiorari denied. *Charles W. Waring* for petitioner. Reported below: 242 F. 2d 799.

No. 243. MAJESIC *v.* UNITED STATES. Court of Claims. Certiorari denied. *Claude L. Dawson* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Melvin Richter* for the United States. Reported below: 137 Ct. Cl. 188, 147 F. Supp. 737.

No. 244. HACKENDORF, DOING BUSINESS AS SUN BEARING SUPPLY, *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *R. F. Roberts* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, John N. Stull, Robert N. Anderson* and *Fred E. Youngman* for the United States. Reported below: 243 F. 2d 760.

No. 245. KNIPP ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Carolyn E. Agger* and *Julius M. Greisman* for petitioners. *Solicitor General Rankin, Acting Assistant Attorney General Stull* and *Robert N. Anderson* for respondent. Reported below: 244 F. 2d 436.

No. 246. INTER-STATE TRUCK LINE, INC., *v.* EMILY SHOPS, INC. Court of Appeals of New York. Certiorari denied. *John M. Aherne* for petitioner. *Charles T. Weintraub* for respondent. Reported below: 2 N. Y. 2d 405, 141 N. E. 2d 560.

No. 248. FURNISH *v.* BOARD OF MEDICAL EXAMINERS OF CALIFORNIA ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Murray M. Chotiner* and *Russell E. Parsons* for petitioner. *Edmund G. Brown,* Attorney General of California, and *Howard Seymour Goldin* and *James L. Mamakos,* Deputy Attorneys General, for respondents. Reported below: 149 Cal. App. 2d 326, 308 P. 2d 924, 309 P. 2d 493.

No. 253. MILLER ET AL. *v.* JENNINGS ET AL. C. A. 5th Cir. Certiorari denied. *J. A. Rauhut* for petitioners. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for the United States et al., and *Eugene T. Edwards* for the El Paso County Water Improvement District No. 1 et al., respondents. *Will Wilson,* Attorney General, *James N. Ludlum,* First Assistant Attorney General, and *Houghton Brownlee, Jr.* and *James W. Wilson,* Assistant Attorneys General, filed a brief for the State of Texas, as *amicus curiae,* urging that the writ of certiorari be granted. Reported below: 243 F. 2d 157.

No. 249. DUTTON ET AL. *v.* CITIES SERVICE DEFENSE CORP. C. A. 8th Cir. Certiorari denied. *Cooper Jacoway* for petitioners. *Henry C. Walker, Jr.* and *Frank E. Chowning* for respondent. Reported below: 240 F. 2d 113.

No. 256. MILEY *v.* JOHN HANCOCK MUTUAL LIFE INSURANCE CO. ET AL. C. A. 1st Cir. Certiorari denied. *Leo T. Kissam* for petitioner. *Daniel J. Lyne* for the John Hancock Mutual Life Insurance Co. et al., *John L. Hall* for the Monarch Life Insurance Co. et al., *Charles B. Rugg* for the State Mutual Life Assurance Co. et al., and *Lothrop Withington* for the Columbian National Life Insurance Co. et al., respondents. Reported below: 242 F. 2d 758.

No. 257. STEELE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Ben F. Foster* for petitioner. *Solicitor General Rankin* and *Assistant Attorney General Rice* for the United States. Reported below: 243 F. 2d 712.

No. 259. WESTERN UNION TELEGRAPH CO. *v.* SPARKS. C. A. 6th Cir. Certiorari denied. *Wm. Marshall Bullitt* and *John H. Waters* for petitioner. *Robert P. Hobson* and *John P. Sandidge* for respondent. Reported below: 244 F. 2d 956.

No. 260. HUDSON ET AL. *v.* WYLIE, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. *W. Blair Gibbens* for petitioners. *Thomas S. Tobin* for respondent. Reported below: 242 F. 2d 435.

No. 262. GWINETT *v.* ASTRA STEAMSHIP CORP. C. A. 2d Cir. Certiorari denied. *Harry D. Graham* and *Charles A. Ellis* for petitioner. *J. Ward O'Neill* for respondent. Reported below: 243 F. 2d 8.

No. 264. MONTGOMERY WARD & CO., INC., *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *David L. Dickson* for petitioner. *Solicitor General Rankin, Jerome D. Fenton, Stephen Leonard* and *Dominick L. Manoli* for respondent. Reported below: 242 F. 2d 497.

No. 265. PEDONE, EXECUTRIX, ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Jerome N. Curtis* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *Carolyn R. Just* for the United States. Reported below: 138 Ct. Cl. 233, 151 F. Supp. 288.

No. 266. HUMBLE OIL & REFINING CO. *v.* ATWOOD ET AL. C. A. 5th Cir. Certiorari denied. *Felix A. Raymer* and *Nelson Jones* for petitioner. *David C. Bland, Jr.* for respondents. Reported below: 243 F. 2d 885.

No. 267. RENAIRE CORPORATION (PENNSYLVANIA) ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 3d Cir. Certiorari denied. *Edwin P. Rome* for petitioners. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Daniel M. Friedman, Earl W. Kintner* and *James E. Corkey* for respondent.

No. 268. COOPER, SURVIVING TRUSTEE, ET AL. *v.* NEW JERSEY, BY THE STATE HIGHWAY COMMISSIONER, ET AL. Supreme Court of New Jersey. Certiorari denied. *William V. Breslin* for Cooper et al., and *John Milton* for Cummins, petitioners. *John B. O'Neill* of counsel for petitioners. *John Wallace Leyden, Jr.* and *Gerald E. Monaghan* for the Borough of Fort Lee, New Jersey, respondent. Reported below: 24 N. J. 261, 131 A. 2d 756.

No. 269. GUNN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. *Louis Eisenstein* and *James D. Fellers* for petitioners. *Solicitor General Rankin, Acting Assistant Attorney General Stull, Lee A. Jackson* and *A. F. Prescott* for respondent. Reported below: 244 F. 2d 408.

No. 271. UNITED MFG. & SERVICE CO. (NOW UNILECTRIC, INC.) *v.* HOLWIN CORPORATION. C. A. 7th Cir. Certiorari denied. *Ira Milton Jones* for petitioner. *James R. McKnight* for respondent. Reported below: 243 F. 2d 393.

No. 272. HOBART *v.* O'BRIEN ET AL. C. A. 1st Cir. Certiorari denied. *Ford E. Young, Jr.* and *Josiah Lyman* for petitioner. *Irvin M. Davis* for O'Brien, respondent. Reported below: 243 F. 2d 735.

No. 277. LATENDRESSE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *William H. Krieg* and *C. Severin Buschmann, Jr.* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Stull, Lee A. Jackson* and *S. Dee Hanson* for respondent. Reported below: 243 F. 2d 577.

No. 279. DE WAGENKNECHT ET AL. *v.* STINNES ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Ralph G. Albrecht, John Geyer Tausig, Gerald J. McMahon* and *Henry F. Butler* for petitioners. *Solicitor General Rankin, Assistant Attorney General Townsend, George B. Searls* and *Irwin A. Seibel* for Attorney General Brownell, and *John W. Pehle* for Stinnes, respondents. Reported below: 100 U. S. App. D. C. 156, 243 F. 2d 413.

No. 280. STRICKLAND *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. Petitioner *pro se*. *George B. Patton,* Attorney General of North Carolina, and *Harry W. McGalliard,* Assistant Attorney General, for respondent. Reported below: 246 N. C. 120, 97 S. E. 2d 450.

No. 281. MEREDITH *v.* JOHN DEERE PLOW CO. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Raymond A. Smith* for respondent. Reported below: 244 F. 2d 9.

No. 282. APUZZO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Robert S. Buttles* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 245 F. 2d 416.

No. 284. SCHAEFER *v.* GUNZBURG ET AL. C. A. 9th Cir. Certiorari denied. *Harold J. Sherman* for petitioner. *Guy Knupp* for respondents. Reported below: 246 F. 2d 11.

No. 285. WRIGHT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Frank S. Twitty* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 243 F. 2d 569.

No. 286. PROOF COMPANY *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Martin W. Bell* and *Henry B. Keiser* for petitioner. *Solicitor General Rankin, Jerome D. Fenton, Stephen Leonard, Dominick L. Manoli* and *William W. Watson* for respondent. Reported below: 242 F. 2d 560.

No. 288. DALEY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *James R. Murphy* and *Clayton L. Burwell* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Lee A. Jackson* for the United States. Reported below: 243 F. 2d 466.

No. 291. HELMIG *v.* ROCKWELL MANUFACTURING CO. ET AL. Supreme Court of Pennsylvania, Western District. Certiorari denied. *Paul Ginsburg* for petitioner. *A. W. Henderson* for the Rockwell Manufacturing Co., and *Carl E. Glock* for the Bethlehem Steel Co., respondents. Reported below: 389 Pa. 21, 131 A. 2d 622.

No. 292. KAHLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Bernard A. Golding* for petitioner. Reported below: 243 F. 2d 128.

No. 293. NATIONAL DRYING MACHINE CO. *v.* ACKOFF ET AL. C. A. 3d Cir. Certiorari denied. *Louis Necho* for petitioner. *Nochem S. Winnet* for respondents. Reported below: 245 F. 2d 192.

No. 294. GARNER ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *C. P. J. Mooney* and *R. G. Draper* for petitioners. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 244 F. 2d 575.

No. 300. REDDICK *v.* MARYLAND EX REL. SYBERT, ATTORNEY GENERAL. Court of Appeals of Maryland. Certiorari denied. *Morgan L. Amaimo* for petitioner. *C. Ferdinand Sybert,* Attorney General of Maryland, and *James H. Norris, Jr.* and *Norman P. Ramsey,* Assistant Attorneys General, for respondent. Reported below: 213 Md. 18, 130 A. 2d 762.

No. 296. HEISELMOYER *v.* PENNSYLVANIA RAILROAD CO. C. A. 3d Cir. Certiorari denied. *B. Nathaniel Richter* for petitioner. *H. Francis DeLone* for respondent. Reported below: 243 F. 2d 773.

No. 297. MILLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston, Robert L. Farrington* and *Neil Brooks* for the United States. Reported below: 242 F. 2d 392.

No. 301. UNITED STATES *v.* DRAGON CEMENT CO., INC. C. A. 1st Cir. Certiorari denied. *Attorney General Brownell, Acting Assistant Attorney General Stull* and *Harry Baum* for the United States. *Herbert E. Locke* and *Edward C. Thayer* for respondent. Reported below: 244 F. 2d 513.

No. 302. LABORDE *v.* ANSOLABEHERE. Supreme Court of Nevada. Certiorari denied. *Eli Grubic* for petitioner. *Stanley A. Weigel* for respondent. Reported below: 73 Nev. 93, 310 P. 2d 842.

No. 304. HOEFER *v.* PARKER. Court of Appeals of New York. Certiorari denied. *Richard H. Wels* for petitioner. *Ralph Montgomery Arkush* for respondent. Reported below: 2 N. Y. 2d 612, 142 N. E. 2d 194.

No. 305. LOCAL 140 SECURITY FUND *v.* HACK, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 2d Cir. Certiorari denied. *Victor Rabinowitz* and *Leonard B. Boudin* for petitioner. *Harold L. Lipton* for Hack, and *Peter Campbell Brown* and *Stanley Buchsbaum* for the City of New York, respondents. Reported below: 242 F. 2d 375.

No. 308. KELLEY, GLOVER & VALE, INC., TRUSTEE, *v.* COFFING, TRUSTEE, ET AL. C. A. 7th Cir. Certiorari denied. *Jay E. Darlington* for petitioner. *Albert H. Gavit* for Coffing, respondent. Reported below: 243 F. 2d 566.

No. 310. ALABAMA MILLS, INC., ET AL. *v.* MITCHELL, SECRETARY OF LABOR, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Llewellyn C. Thomas* and *Whiteford S. Blakeney* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Paul A. Sweeney, Stuart Rothman* and *Bessie Margolin* for the Secretary of Labor, and *Arthur J. Goldberg, David E. Feller* and *Benjamin Wyle* for the Textile Workers Union of America, respondents. Reported below: 100 U. S. App. D. C. 257, 244 F. 2d 21.

No. 313. BINION *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Jacob Kossman* for petitioner. *Solicitor General Rankin* and *Assistant Attorney General Rice* for the United States. Reported below: 245 F. 2d 466.

No. 314. ROTONDO *v.* ISTHMIAN STEAMSHIP CO., INC. C. A. 2d Cir. Certiorari denied. *Thomas O'Rourke Gallagher* for petitioner. *Paul A. Crouch* for respondent. Reported below: 243 F. 2d 581.

No. 315. KASPER *v.* BRITTAIN ET AL. C. A. 6th Cir. Certiorari denied. *J. Benjamin Simmons* and *Herbert S. Ward* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for respondents. Reported below: 245 F. 2d 92, 97.

No. 317. ESSO STANDARD OIL CO. *v.* SECATORE'S, INC. C. A. 1st Cir. Certiorari denied. *Robert W. Meserve* for petitioner. *Joseph Auerbach* for respondent. Reported below: 246 F. 2d 17.

No. 318. LYSFJORD ET AL., DOING BUSINESS AS AABETA COMPANY, *v.* FLINTKOTE COMPANY. C. A. 9th Cir. Certiorari denied. *Alfred C. Ackerson* for petitioners. *Harold A. Black* for respondent. Reported below: 246 F. 2d 368.

No. 320. JAFFKE *v.* DUNHAM, TRUSTEE IN BANKRUPTCY. C. A. 7th Cir. Certiorari denied. *William M. Giffin* for petitioner. *G. William Horsley* for respondent. Reported below: 243 F. 2d 460.

No. 326. DOBBS *v.* LYKES BROS. STEAMSHIP CO., INC. C. A. 5th Cir. Certiorari denied. *Raymond H. Kierr* and *Samuel C. Gainsburgh* for petitioner. *Andrew R. Martinez* for respondent. Reported below: 243 F. 2d 55.

No. 327. WILSON *v.* OIL TRANSPORT CO., INC. C. A. 5th Cir. Certiorari denied. *Raymond H. Kierr* and *Samuel C. Gainsburgh* for petitioner. *Eberhard P. Deutsch* and *Brunswick G. Deutsch* for respondent. Reported below: 242 F. 2d 727.

No. 328. GOODMAN, ADMINISTRATRIX, *v.* GRANGER, COLLECTOR OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Louis Caplan* and *Charles E. Kenworthey* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Stull, Robert N. Anderson* and *L. W. Post* for respondent. Reported below: 243 F. 2d 264.

No. 330. ARKANSAS-MISSOURI POWER CORP. *v.* PASCHAL, ADMINISTRATRIX, ET AL. C. A. 8th Cir. Certiorari denied. *P. A. Lasley* and *T. S. Lovett, Jr.* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Stull, Robert N. Anderson* and *Marvin Weinstein* for respondents. Reported below: 243 F. 2d 584.

No. 333. STRATHMORE SHIPPING CO., INC., *v.* COASTAL OIL CO. C. A. 2d Cir. Certiorari denied. *John R. Sheneman* for petitioner. *Eugene Underwood* and *Hervey C. Allen* for respondent. Reported below: 243 F. 2d 97.

No. 335. SOLAR CORPORATION, NOW GAMBLE-SKOGMO, INC., *v.* BORG-WARNER CORPORATION. C. A. 7th Cir. Certiorari denied. *Andrew E. Carlsen* and *Edward C. Grelle* for petitioner. *Casper W. Ooms* for respondent. Reported below: 244 F. 2d 940.

No. 338. U. S. CHEMICAL CORP. ET AL. *v.* PLASTIC GLASS CORP. C. A. 3d Cir. Certiorari denied. *W. Brown Morton* for petitioners. Reported below: 243 F. 2d 892.

No. 341. DI PALERMO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *George J. Todaro* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 245 F. 2d 875.

No. 349. LENNON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. Reported below: 246 F. 2d 24.

No. 351. PARKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Loring B. Moore* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 244 F. 2d 943.

No. 334. PENN *v.* GRANT, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. *Jerome A. Reiner* for petitioner. Reported below: 244 F. 2d 309.

No. 353. SEAGRAM-DISTILLERS CORP. *v.* NEW CUT RATE LIQUORS, INC., ET AL. C. A. 7th Cir. Certiorari denied. *Frank D. Mayer, Louis A. Kohn* and *Robert L. Stern* for petitioner. *S. G. Lippman* for respondents. Reported below: 245 F. 2d 453.

No. 357. ROSENBERG BROS. & CO., INC., *v.* COMMODITY CREDIT CORP. C. A. 9th Cir. Certiorari denied. *Lloyd W. Dinkelspiel* and *Melville Ehrlich* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Melvin Richter* for respondent. Reported below: 243 F. 2d 504.

No. 359. MARTIN ET AL. *v.* S. BIRCH & SONS ET AL. C. A. 9th Cir. Certiorari denied. *Bailey E. Bell* for petitioners. *Edward V. Davis* for respondents. Reported below: 244 F. 2d 556.

No. 366. ILLINOIS CENTRAL RAILROAD CO. *v.* BOWMAN, CONSERVATOR. Supreme Court of Illinois. Certiorari denied. *Floyd E. Thompson, Joseph H. Wright, Herbert J. Deany* and *Robert S. Kirby* for petitioner. *James A. Dooley* for respondent. Reported below: 11 Ill. 2d 186, 142 N. E. 2d 104.

No. 369. BROKER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jesse Climenko* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 246 F. 2d 328.

No. 241. ALLEN ET AL. *v.* WILLIAMSON, TRUSTEE, ET AL.;

No. 274. WILLIAMSON, TRUSTEE, *v.* COMMISSIONER OF INTERNAL REVENUE ET AL.;

No. 325. VANSTON BONDHOLDERS PROTECTIVE COMMITTEE *v.* COLUMBIA GAS SYSTEM, INC., ET AL.;

No. 336. COMMITTEE FOR HOLDERS OF KENTUCKY FUEL GAS CORP. 6½% DEBENTURES *v.* COLUMBIA GAS SYSTEM, INC., ET AL.; and

No. 342. KERN *v.* WILLIAMSON, TRUSTEE, ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of these applications. *Robert S. Spilman, Jr.* for Allen et al., petitioners in No. 241. *Selden S. McNeer* for petitioner in No. 274. *George W. Jaques* and *E. Fontaine Broun* for petitioner in No. 325. *Harold J. Gallagher, Walter H. Brown, Jr.* and *John L. Smith* for petitioner in No. 336. *Carlos L. Israels, Leo T. Wolford, George Rosier* and *Victor Brudney* for petitioner in No. 342. *Solicitor General Rankin, Thomas G. Meeker, David Ferber* and *Aaron Levy* for the Securities and Exchange Commission, respondent in Nos. 241, 325, 336 and 342. *Mr. Rankin, Assistant Attorney General Rice, A. F. Prescott* and *Fred E. Youngman* for the Commissioner of Internal Revenue, respondent in No. 274. *Edward S. Pinney* and *Richard deY. Manning* for the Columbia Gas System, Inc., respondent in Nos. 241, 325, 336 and 342. Reported below: 241 F. 2d 374.

No. 242. BLACKWELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application. *Charles M. Metzner* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. Reported below: 244 F. 2d 423.

No. 169. FLORIDA EX REL. HAWKINS *v.* BOARD OF CONTROL ET AL. Petition for writ of certiorari to the Supreme Court of Florida denied without prejudice to the petitioner's seeking relief in an appropriate United States District Court. *Robert L. Carter* and *Thurgood Marshall* for petitioner. *Richard W. Ervin,* Attorney General of Florida, *Ralph E. Odum* and *John J. Blair,* Assistant Attorneys General, and *Wilson W. Wright,* Special Assistant Attorney General, for respondents. Reported below: 93 So. 2d 354.

No. 312. UNITED STATES *v.* WILKINSON. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Morton Hollander* for the United States. *Benjamin E. Kantrowitz* for respondent. Reported below: 242 F. 2d 735.

No. 360. MAY SEED & NURSERY CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application. *Paul Fred Ahlers* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Lee A. Jackson* and *Harry Marselli* for respondent. Reported below: 242 F. 2d 151.

No. 261. RIKER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Howard B. Crittenden, Jr.* for petitioners. *Solicitor General Rankin, Acting Assistant Attorney General Stull* and *A. F. Prescott* for respondent. Reported below: 244 F. 2d 220.

No. 250. SAVOIE, ADMINISTRATRIX, *v.* TEXAS COMPANY. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Elwood R. Clay* for petitioner. *John May* and *Ernest A. Carrere, Jr.* for respondent. Reported below: 240 F. 2d 674; 242 F. 2d 667.

No. 309. SULLIVAN *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application. *William T. Coleman, Jr.* and *Raymond Pace Alexander* for petitioner. *Stanley E. Rutkowski* for respondent. Reported below: 24 N. J. 18, 130 A. 2d 610.

No. 323. GRASS CREEK OIL & GAS CO. ET AL. *v.* MUSSELSHELL COUNTY, MONTANA, ET AL. Supreme Court of Montana. Certiorari denied. *G. J. Jeffries* and *H. Cleveland Hall* for petitioners. *Myles J. Thomas* for Freibert et al., respondents. Reported below: —— Mont. ——, 307 P. 2d 241.

No. 337. JORGENSEN *v.* UNITED STATES. Court of Claims. Certiorari denied. *Henry I. Fillman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, L. W. Post* and *David W. Morton* for the United States. Reported below: 138 Ct. Cl. 196, 152 F. Supp. 73.

No. 339. MORONEY *v.* MCKIBBEN ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Carl L. Shipley* and *Samuel Resnicoff* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for respondents. Reported below: 100 U. S. App. D. C. 257, 244 F. 2d 21.

No. 319. MILLS *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. Reported below: 148 Cal. App. 2d 392, 306 P. 2d 1005.

No. 344. ALKER *v.* HUMPHREY, SECRETARY OF THE TREASURY. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John A. Ryan* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Leonard, Samuel D. Slade* and *Morton Hollander* for respondent. Reported below: 101 U. S. App. D. C. 31, 247 F. 2d 22.

No. 345. SWORD LINE, INC., *v.* UNITED STATES. Court of Claims. Certiorari denied. *Theodore J. Breitwieser* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Leonard* and *Paul A. Sweeney* for the United States. Reported below: 138 Ct. Cl. 874.

No. 347. BERESLAVSKY *v.* UNITED STATES. Court of Claims. Certiorari denied. *W. Brown Morton, Sr.* and *W. Brown Morton, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Melvin Richter* for the United States. Reported below: 138 Ct. Cl. 434, 150 F. Supp. 797.

No. 354. HICKINBOTHAM *v.* CORDER ET AL. Supreme Court of Arkansas. Certiorari denied. *Kenneth Coffelt* for petitioner. *Eugene R. Warren* for respondents. Reported below: 227 Ark. 713, 301 S. W. 2d 30.

No. 358. SNOWDEN *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Tobias G. Klinger* for petitioner. Reported below: 149 Cal. App. 2d 552, 308 P. 2d 815.

No. 227. OEHMICHEN *v.* BROWNELL, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *John W. Pehle* for petitioner. *Solicitor General Rankin, Assistant Attorney General Townsend, George B. Searls* and *Irwin A. Seibel* for respondent. Reported below: 100 U. S. App. D. C. 214, 243 F. 2d 637.

No. 298. KAUFMAN ET AL. *v.* BROWNELL, ATTORNEY GENERAL, ET AL.; and

No. 299. ATTENHOFER ET AL. *v.* BROWNELL, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. MR. JUSTICE CLARK took no part in the consideration or decision of these applications. *Robert E. Sher, Isadore G. Alk, James H. Heller, Irving Moskovitz* and *Peter N. Schiller* for petitioners in No. 298. *Edmund L. Jones* and *C. Frank Reifsnyder* for petitioners in No. 299. *Solicitor General Rankin, Assistant Attorney General Townsend, George B. Searls, Sidney B. Jacoby* and *Ernest S. Carsten* for respondents. Reported below: 101 U. S. App. D. C. 147, 247 F. 2d 553.

No. 3, Misc. JONES *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se. John M. Dalton,* Attorney General of Missouri, and *Richard W. Dahms,* Assistant Attorney General, for respondent.

No. 14, Misc. LOWE ET AL. *v.* JACOBS. C. A. 5th Cir. Certiorari denied. *Richard E. McDaniel* for petitioners. *Major T. Bell* for respondent. Reported below: 243 F. 2d 432.

No. 7, Misc. LEE *v.* RHAY, 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. 15, Misc. PENNSYLVANIA EX REL. THOMPSON *v.* DAY, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied. *Louis C. Glasso* for petitioner.

No. 18, Misc. FREEMAN *v.* TINSLEY, WARDEN. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John W. Patterson* and *John B. Barnard, Jr.,* Assistant Attorneys General, for respondent. Reported below: 135 Colo. 62, 308 P. 2d 220.

No. 19, Misc. GEORGE, GUARDIAN, ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioners *pro se*. *Solicitor General Rankin, Acting Assistant Attorney General Leonard* and *Samuel D. Slade* for the United States. Reported below: 137 Ct. Cl. 923.

No. 20, Misc. BILLIE ET AL., GENERAL COUNCIL, MICCOSUKEE SEMINOLE NATION, *v.* SEMINOLE INDIANS OF FLORIDA. Court of Claims. Certiorari denied. *Morton H. Silver* for petitioners. *Guy Martin* for respondent. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* filed a memorandum for the United States. Reported below: 137 Ct. Cl. 161, 146 F. Supp. 459.

No. 23, Misc. LOWERY *v.* CAVELL, WARDEN. Court of Common Pleas, Westmoreland County, Pennsylvania. Certiorari denied.

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No. 26, Misc. WORLEY, ADMINISTRATRIX, ET AL. *v.* NATIONAL SPECIALTY CO., INC., ET AL. C. A. 6th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Rankin* for the United States, and *Charles C. Trabue, Jr.* for Dunn, respondents. Reported below: 243 F. 2d 165.

No. 27, Misc. BOYES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

No. 28, Misc. CITO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States. Reported below: 245 F. 2d 958.

No. 29, Misc. BANDO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Daniel H. Greenberg* for petitioners. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 244 F. 2d 833.

No. 30, Misc. PATRICK *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 31, Misc. HANSEN *v.* BURKE, WARDEN. Supreme Court of Wisconsin. Certiorari denied.

No. 32, Misc. MCBRIDE *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 34, Misc. MCGEE *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 35, Misc. MAISENHELDER *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 36, Misc. YOUNG *v.* UNITED STATES TREASURY DEPARTMENT. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

No. 37, Misc. ZIELINSKI *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 10 Ill. 2d 473, 140 N. E. 2d 722.

No. 42, Misc. HARRIS *v.* ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied.

No. 43, Misc. CLARK *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 44, Misc. HARTFIELD *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied. Reported below: 11 Ill. 2d 300, 142 N. E. 2d 696.

No. 45, Misc. CRAVENS *v.* KLINGER, SUPERINTENDENT, CALIFORNIA MEN'S COLONY. Supreme Court of California. Certiorari denied.

No. 46, Misc. CHESSER *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 51, Misc. COPELAND *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 53, Misc. ROLIE *v.* ILLINOIS. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 55, Misc. LINGHAM-PRITCHARD *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Rice, John N. Stull* and *Harry Baum* for respondent. Reported below: 242 F. 2d 750.

No. 57, Misc. WATSON *v.* TEETS, WARDEN. Supreme Court of California. Certiorari denied. Reported below: See 46 Cal. 2d 818, 299 P. 2d 243.

No. 59, Misc. GAYLORD *v.* CLEMMER, DIRECTOR, DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for respondents. Reported below: 242 F. 2d 872.

No. 63, Misc. GARBE, TRUSTEE IN BANKRUPTCY, *v.* HUMISTON, KEELING & Co. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Philip A. Rose* for respondent. Reported below: 242 F. 2d 923.

No. 64, Misc. STEVENS *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 244 F. 2d 420.

No. 67, Misc. TIPTON *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *James F. Thacher* for petitioner. Reported below: 48 Cal. 2d 389, 309 P. 2d 813.

No. 69, Misc. WILLIAMS *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 72, Misc. JONES *v.* RICHMOND, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 245 F. 2d 234.

No. 73, Misc. CEPHAS *v.* TUCKER, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 79, Misc. ROUSSEAU *v.* DISTRICT COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, ET AL. Petition for writ of certiorari to the District Court of Appeal of California, First Appellate District, denied.

No. 81, Misc. BROWNLOW *v.* FLORIDA ET AL. Supreme Court of Florida. Certiorari denied.

No. 83, Misc. MCCOY *v.* TUCKER, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 85, Misc. STRICKLAND ET AL. *v.* PERRY. C. A. 5th Cir. Certiorari denied. *J. B. Hodges* for petitioners. *J. Velma Keen* for respondent. Reported below: 244 F. 2d 24.

No. 87, Misc. SABO, ADMINISTRATOR, *v.* READING COMPANY ET AL. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Richard P. Brown, Jr.* for the Reading Company, and *T. E. Byrne, Jr.* for the Bethayres Concrete Products Co., Inc., respondents. Reported below: 244 F. 2d 692.

No. 90, Misc. MORGAN *v.* NEW YORK. County Court of Queens County, New York. Certiorari denied.

No. 92, Misc. KOWALSKI *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 94, Misc. GOINS *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. Reported below: 232 La. 238, 94 So. 2d 244.

No. 96, Misc. WETZEL *v.* HARPOLE, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. C. A. 5th Cir. Certiorari denied. *Albert Sidney Johnston, Jr.* for petitioner. Reported below: 244 F. 2d 695.

No. 97, Misc. JONES *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 99, Misc. HARRISON *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 101, Misc. SULLIVAN ET AL. *v.* UTAH. Supreme Court of Utah. Certiorari denied. Reported below: 6 Utah 2d 110, 307 P. 2d 213.

No. 102, Misc. THOMPSON *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 103, Misc. JOHNSON *v.* SCHNECKLOTH, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 104, Misc. LANCASTER *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 105, Misc. SWEET *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 106, Misc. ARNOLD *v.* TUCKER, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 109, Misc. CIEHALA *v.* NEW YORK. County Court of Richmond County, New York. Certiorari denied.

No. 110, Misc. LITTERIO *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: 244 F. 2d 956.

No. 112, Misc. PEGUESE *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied. Reported below: 3 App. Div. 2d 826, 161 N. Y. S. 2d 828.

No. 121, Misc. MULLINS *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 126, Misc. UNITED STATES EX REL. BURKE *v.* DENNO, WARDEN. C. A. 2d Cir. Certiorari denied. *Maurice Edelbaum* for petitioner. *Frank S. Hogan* for respondent. Reported below: 243 F. 2d 835.

No. 131, Misc. MOORE *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 142, Misc. BECK *v.* ILLINOIS. Circuit Court of Will County, Illinois. Certiorari denied.

No. 149, Misc. STEWART *v.* TUCKER, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 177, Misc. THOMPSON *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Western District. Certiorari denied. *Joseph H. Ridge* for petitioner. Reported below: 389 Pa. 382, 133 A. 2d 207.

No. 151, Misc. CARPENTER *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Reported below: 348 Mich. 408, 83 N. W. 2d 326.

No. 1, Misc. DICK *v.* MOORE, WARDEN. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied without prejudice to the petitioner's seeking relief in an appropriate United States District Court. Petitioner *pro se.* *Will Wilson,* Attorney General of Texas, and *L. W. Gray,* Assistant Attorney General, for respondent.

No. 75, Misc. QUATRO *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

No. 133, Misc. TOWNSEND *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion the petition should be granted. *Loring B. Moore* and *William R. Ming, Jr.* for petitioner. Reported below: 11 Ill. 2d 30, 141 N. E. 2d 729.

No. 12, Misc. WILLIAMS *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Thos. H. Dent* for petitioner. *Will Wilson,* Attorney General of Texas, and *H. Grady Chandler* and *George P. Blackburn,* Assistant Attorneys General, for respondent. Reported below: 164 Tex. Cr. R. ——, 298 S. W. 2d 590.

No. 47, Misc. JOHNSON *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se.* *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 138 Ct. Cl. 81, 149 F. Supp. 648.

No. 17, Misc. TENNESSEE EX REL. MELTON *v.* BOMAR, WARDEN. Supreme Court of Tennessee. Certiorari denied. *Louis B. Fine* for petitioner. *Allison B. Humphreys, Jr., Milton P. Rice, James M. Glasgow* and *Henry C. Foutch,* Assistant Attorneys General of Tennessee, for respondent. Reported below: 200 Tenn. ——, 300 S. W. 2d 875.

No. 52, Misc. MACKENNA *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: 164 Tex. Cr. R. ——, 301 S. W. 2d 657.

No. 70, Misc. HOLLINGSWORTH *v.* IOWA. Supreme Court of Iowa. Certiorari denied. *Herbert S. French* for petitioner. Reported below: 248 Iowa 763, 81 N. W. 2d 27.

No. 71, Misc. BARRY *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *W. J. Durham* for petitioner. Reported below: 164 Tex. Cr. R. ——, 305 S. W. 2d 580.

No. 143, Misc. SNYDER *v.* PEPERSACK, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 214 Md. 606, 133 A. 2d 924.

No. 160, Misc. BAILEY *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. Reported below: 227 Ark. 889, 302 S. W. 2d 796.

Rehearing Denied.

No. 835, October Term, 1956. ADAMS NEWARK THEATER CO. ET AL. *v.* CITY OF NEWARK ET AL., 354 U. S. 931. Rehearing denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

No. 61, October Term, 1956. ALBERTS *v.* CALIFORNIA, 354 U. S. 476;

No. 468, October Term, 1956. CARR *v.* BEVERLY HILLS CORP. ET AL., 354 U. S. 917;

No. 582, October Term, 1956. ROTH *v.* UNITED STATES, 354 U. S. 476;

No. 837, October Term, 1956. LOCAL UNION No. 698, RETAIL CLERKS' UNION (A. F. of L.) *v.* ANDERSON ET AL., DOING BUSINESS AS WEST POINT MARKET, 354 U. S. 937;

No. 938, October Term, 1956. MOCCIO *v.* UNITED STATES, 354 U. S. 913;

No. 972, October Term, 1956. MCBRIDE *v.* TOLEDO TERMINAL RAILROAD CO., 354 U. S. 517;

No. 1083, October Term, 1956. DANIELS, DOING BUSINESS AS HARRY C. DANIELS & CO., *v.* UNITED STATES ET AL., 354 U. S. 939;

No. 682, Misc., October Term, 1956. SHERMAN *v.* UNITED STATES, 354 U. S. 911; and

No. 729, Misc., October Term, 1956. ALEXANDER *v.* UNITED STATES, 354 U. S. 940. Petitions for rehearing denied.

No. 175, October Term, 1956. SWEEZY *v.* NEW HAMPSHIRE, BY WYMAN, ATTORNEY GENERAL, 354 U. S. 234; and

No. 802, Misc., October Term, 1956. STONEKING *v.* UNITED STATES, 354 U. S. 941. Petitions for rehearing denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of these applications.

No. 520, October Term, 1956. SIGNAL-STAT CORPORATION *v.* LOCAL 475, UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA (UE), 354 U. S. 911. Rehearing denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application.

OCTOBER 21, 1957.

Miscellaneous Orders.

No. 158. ASHDOWN *v.* UTAH. Certiorari, 353 U. S. 981, to the Supreme Court of Utah. It is ordered that *J. Vernon Erickson, Esquire,* of Richfield, Utah, be appointed to serve as counsel for the petitioner in this case. Reported below: 5 Utah 2d 59, 296 P. 2d 726.

No. 170, Misc. O'CON *v.* BANNAN, WARDEN; and

No. 176, Misc. MULVANEY *v.* GOODMAN, PRINCIPAL KEEPER, NEW JERSEY STATE PRISON. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted. (*See also No. 142, ante, p. 18, and No. 350, ante, p. 20.*)

No. 186. BAIRD, ADMINISTRATRIX, *v.* NEW YORK CENTRAL RAILROAD CO. C. A. 2d Cir. Certiorari granted. *William Paul Allen* for petitioner. *Gerald H. Hendley* for respondent. Reported below: 242 F. 2d 383.

No. 382. FIRST UNITARIAN CHURCH OF LOS ANGELES *v.* COUNTY OF LOS ANGELES ET AL. Supreme Court of California. Certiorari granted. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *A. L. Wirin, Fred Okrand* and *Robert L. Brock* for petitioner. *Harold W. Kennedy* for respondents. Reported below: 48 Cal. 2d 419, 311 P. 2d 508.

No. 129, Misc. CARITATIVO *v.* CALIFORNIA ET AL. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of California granted. *George T. Davis* for petitioner. *Edmund G. Brown,* Attorney General of California, *Clarence A. Linn,* Assistant Attorney General, and *Arlo E. Smith,* Deputy Attorney General, for respondents.

No. 385. PEOPLE'S CHURCH OF SAN FERNANDO VALLEY, INC., *v.* COUNTY OF LOS ANGELES ET AL. Supreme Court of California. Certiorari granted. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *A. L. Wirin* and *Fred Okrand* for petitioner. *Harold W. Kennedy* for respondents. *Charles E. Beardsley* filed a brief for the Orange Grove Monthly Meeting of Friends of Pasadena, as *amicus curiae,* in support of the petition for writ of certiorari. Reported below: 48 Cal. 2d 899, 311 P. 2d 540.

No. 181, Misc. RUPP *v.* TEETS, WARDEN. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of California granted. *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.

Certiorari Denied. (*See also No. 355, ante, p. 21.*)

No. 346. ANONYMOUS *v.* ANONYMOUS. Court of Appeals of New York. Certiorari denied. *Dora Aberlin* for petitioner. *Peter Campbell Brown, Seymour B. Quel* and *Anthony Curreri* for the City of New York, urging that the petition for writ of certiorari be denied. Reported below: 3 N. Y. 2d 750, 143 N. E. 2d 524.

No. 352. HAAS *v.* ANDERSON, SECRETARY OF THE TREASURY, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Irving R. M. Panzer* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *B. Jenkins Middleton* for respondents. Reported below: 100 U. S. App. D. C. 401, 246 F. 2d 682.

No. 340. KESHNER *v.* WICK; and

No. 403. WICK *v.* KESHNER. C. A. 8th Cir. Certiorari denied. *Wilder Lucas* and *Ralph T. Finley* for Keshner. *Schaefer O'Neill* for Wick. Reported below: 244 F. 2d 146.

No. 361. SCHOOL BOARD OF NEWPORT NEWS, VIRGINIA, ET AL. *v.* ATKINS ET AL. C. A. 4th Cir. Certiorari denied. *J. Lindsay Almond, Jr.,* then Attorney General, *Kenneth C. Patty,* now Attorney General, and *Henry T. Wickham,* Special Assistant to the Attorney General, for the Commonwealth of Virginia, *T. Justin Moore, Archibald G. Robertson, John W. Riely* and *T. Justin Moore, Jr.* for the Newport News School Authorities, and *W. R. C. Cocke* for the Norfolk School Authorities, petitioners. Reported below: 246 F. 2d 325.

No. 367. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. *v.* WILLIAMS ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application. *Alden B. Howland* and *Bennett A. Webster, Jr.* for petitioner. *John Leroy Peterson* for Williams, and *James H. Anderson* for the Union Pacific Railroad Co., respondents. Reported below: 245 F. 2d 397.

No. 370. JAMIESON ET AL. *v.* WOODWARD & LOTHROP ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Smith W. Brookhart, Ralph E. Becker, Benjamin H. Dorsey* and *Irving G. McCann* for petitioners. *Richard W. Galiher* and *William E. Stewart, Jr.* for Helena Rubinstein, Inc., respondent. Reported below: 101 U. S. App. D. C. 32, 247 F. 2d 23.

No. 368. IDEAL MERCANTILE CORP. *v.* GALLANT FABRICS, INC., ET AL. C. A. 2d Cir. Certiorari denied. *Max Schwartz* for petitioner. *Michael Berman* for respondents. Reported below: 244 F. 2d 828.

No. 374. WM. H. WISE CO., INC., ET AL. *v.* FEDERAL TRADE COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Thomas B. Scott* and *Lawrence J. Simmons* for petitioners. *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman, W. Louise Florencourt, Earl W. Kintner* and *James E. Corkey* for respondent. Reported below: 101 U. S. App. D. C. 15, 246 F. 2d 702.

No. 375. OFFUTT *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Warren E. Magee* and *Charlotte Maskey* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 101 U. S. App. D. C. 97, 247 F. 2d 88.

No. 376. O'DONNELL ET AL. *v.* CHICAGO LAND CLEARANCE COMMISSION. Supreme Court of Illinois. Certiorari denied. *John S. Boyle* for petitioners. *William H. Dillon* for respondent. Reported below: 11 Ill. 2d 111, 142 N. E. 2d 60.

No. 377. LANZA ET AL. *v.* NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON GOVERNMENT OPERATIONS ET AL. Court of Appeals of New York. Certiorari denied. *Emanuel Redfield* and *Edward H. Levine* for petitioners. *Arnold Bauman* for respondents. Reported below: 3 N. Y. 2d 92, 877, 143 N. E. 2d 772.

No. 373. ABERLIN *v.* ZISMAN ET UX. C. A. 1st Cir. Certiorari denied. *Dora Aberlin* for petitioner. Reported below: 244 F. 2d 620.

No. 379. CARROLL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *John P. McGrath* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *Meyer Rothwacks* for the United States. Reported below: 246 F. 2d 762.

No. 383. CENTER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Ben Kohler, Jr.* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter* and *Joseph Langbart* for the United States. Reported below: 244 F. 2d 207.

No. 384. LINES *v.* CALIFORNIA, DEPARTMENT OF EMPLOYMENT. C. A. 9th Cir. Certiorari denied. *Max H. Margolis* for petitioner. *Edmund G. Brown,* Attorney General of California, *James E. Sabine* and *Irving H. Perluss,* Assistant Attorneys General, and *Eugene B. Jacobs,* Deputy Attorney General, for respondent. *Charles P. Scully* filed a brief for the California State Federation of Labor, A. F. L., as *amicus curiae,* in support of the petition for a writ of certiorari. Reported below: 242 F. 2d 201.

No. 21, Misc. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 95, Misc. STRIKER *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Leo F. Lightner* for petitioner. *Newell A. Clapp* for respondent. Reported below: 166 Ohio St. 360, 142 N. E. 2d 231.

No. 98, Misc. BARTLETT *v.* WEIMER ET AL. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *William Saxbe,* Attorney General of Ohio, and *James F. De Leone* and *Thomas L. Startzman,* Assistant Attorneys General, for Patterson et al., *Ross W. Shumaker* for Weimer et al., and Obenour, *pro se,* respondents. Reported below: 244 F. 2d 955.

No. 100, Misc. BROADUS *v.* LOWRY. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondent. Reported below: 245 F. 2d 304.

No. 107, Misc. WILLIAMS *v.* GEORGIA. Supreme Court of Georgia. Certiorari denied.

No. 111, Misc. DOMINGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Eugene Stanley* for petitioner. *Solicitor General Rankin* and *Assistant Attorney General Rice* for the United States. Reported below: 245 F. 2d 284.

No. 115, Misc. CURLEY *v.* NEW YORK. Supreme Court of New York, Wyoming County. Certiorari denied.

No. 118, Misc. WATKINS *v.* MURPHY, WARDEN. Court of Appeals of New York. Certiorari denied. Reported below: 3 N. Y. 2d 163, 143 N. E. 2d 910.

No. 120, Misc. BLOCH *v.* FOXGAL, INC., ET AL. Supreme Court of Arizona. Certiorari denied. Petitioner *pro se*. *John P. Frank* for Foxgal, Inc., respondent.

No. 134, Misc. PONCE *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 157, Misc. ANGELET ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 245 F. 2d 876.

No. 174, Misc. PECKHAM *v.* DEPARTMENT OF PUBLIC SAFETY OF ILLINOIS ET AL. Supreme Court of Illinois. Certiorari denied.

No. 175, Misc. TANNER *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 192, Misc. MORGAN *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

OCTOBER 22, 1957.

Miscellaneous Order.

No. 11, Original. UNITED STATES *v.* LOUISIANA. It is ordered that the time of the United States for filing an amended or supplemental complaint pursuant to the Court's order of June 24, 1957, 354 U. S. 515, is hereby extended to November 21, 1957. THE CHIEF JUSTICE and MR. JUSTICE CLARK took no part in the consideration or decision of this case.

Dismissal Under Rule 60.

No. 17. RASMUSSEN *v.* BROWNELL, ATTORNEY GENERAL. Certiorari, 353 U. S. 907, to the United States Court of Appeals for the District of Columbia Circuit. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Jack Wasserman* for petitioner, and *Solicitor General Rankin* for respondent, were on the stipulation. Reported below: 98 U. S. App. D. C. 300, 235 F. 2d 527.

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OCTOBER 28, 1957.

Miscellaneous Orders.

An order of THE CHIEF JUSTICE designating and assigning MR. JUSTICE REED (retired) to perform judicial duties in the United States Court of Claims from November 1, 1957, to November 30, 1957, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court pursuant to 28 U. S. C. § 295.

No. 74, Misc. WILLIAMS, GOVERNOR OF MICHIGAN, ET AL. *v.* SIMONS, CHIEF JUDGE, U. S. COURT OF APPEALS FOR THE SIXTH CIRCUIT, ET AL. On motion for leave to file a petition for a writ of mandamus and/or prohibition. It is ordered that the respondents show cause on or before Tuesday, November 12, 1957, why a writ of mandamus and/or prohibition should not issue. *G. Mennen Williams,* Governor of Michigan, *Thomas M. Kavanagh,* Attorney General, *Edmund E. Shepherd,* then Solicitor General, and *Samuel J. Torina,* now Solicitor General, for petitioners.

No. 112, October Term, 1952. SOBELL *v.* UNITED STATES. The motion to vacate the orders denying petitions for writ of certiorari, 344 U. S. 838, and rehearing, 344 U. S. 889, and the request for oral hearing on motion are denied. *Frank J. Donner, Arthur Kinoy, Marshall Perlin* and *Benjamin Dreyfus* for petitioner. *Solicitor General Rankin* for the United States. Reported below: 195 F. 2d 583.

No. 91. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE *v.* ALABAMA EX REL. PATTERSON, ATTORNEY GENERAL. The motion for leave to file brief of American Jewish Congress et al., as *amici curiae,* is denied.

No. 93. McKINNEY *v.* MISSOURI - KANSAS - TEXAS RAILROAD CO. ET AL. Certiorari, 353 U. S. 948, to the United States Court of Appeals for the Tenth Circuit. The motion to remove this case from the summary calendar is granted and a total of one hour and a half allowed for oral argument. *Solicitor General Rankin* for petitioner. *Sam Elson* was on the motion for the Brotherhood of Railway Clerks, respondent. Reported below: 240 F. 2d 8.

Certiorari Granted. (*See also No. 295, ante, p. 23.*)

No. 395. UNITED STATES *v.* BESS; and

No. 410. BESS *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. *Solicitor General Rankin, Acting Assistant Attorney General Stull* and *A. F. Prescott* for the United States. *Morris J. Oppenheim* for petitioner in No. 410. Reported below: 243 F. 2d 675.

No. 396. BROWNELL, ATTORNEY GENERAL, *v.* QUAN ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for petitioner. Reported below: 101 U. S. App. D. C. 229, 248 F. 2d 89.

Certiorari Denied. (*See also No. 402, ante, p. 22.*)

No. 371. UNITED TOWING CO. ET AL. *v.* PHILLIPS, TRUSTEE. C. A. 5th Cir. Certiorari denied. *Claude T. Allen* for petitioners. Respondent *pro se.* Reported below: 242 F. 2d 627.

No. 386. WOODFORD *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se.* *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: —— Ct. Cl. ——, 151 F. Supp. 925.

No. 362. SMALLWOOD ET AL. *v.* HODSON ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Arthur J. Hilland* and *Paul M. Niebell* for petitioners. *Thomas M. Raysor* for respondents. Reported below: 101 U. S. App. D. C. 354, 249 F. 2d 110.

No. 388. MEYER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Rice* and *Lee A. Jackson* for respondent. Reported below: 243 F. 2d 262.

No. 389. ROMM ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Warren W. Grimes* and *Horace J. Donnelly, Jr.* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *I. Henry Kutz* for respondent. Reported below: 245 F. 2d 730.

No. 390. RIVERA *v.* MITCHELL, SECRETARY OF LABOR, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William C. Koplovitz* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Melvin Richter* for respondents. Reported below: 100 U. S. App. D. C. 335, 244 F. 2d 783.

No. 391. BADHWAR ET AL., DOING BUSINESS AS MULKRAJ BROTHERS & BADHWAR, *v.* COLORADO FUEL & IRON CORP. C. A. 2d Cir. Certiorari denied. *James F. Dunn* and *Morton Zuckerman* for petitioners. *Francis S. Bensel* for respondent. Reported below: 245 F. 2d 903.

No. 400. SINCLAIR PIPE LINE CO. *v.* ARCHER COUNTY, TEXAS. C. A. 5th Cir. Certiorari denied. *Howard Barker* for petitioner. Reported below: 245 F. 2d 79.

No. 392. McDonald *v.* United States. C. A. 10th Cir. Certiorari denied. *Bryant H. Croft* and *Earl P. Staten* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Stull* and *Joseph M. Howard* for the United States. Reported below: 246 F. 2d 727.

No. 393. Gomez *v.* United States. C. A. 5th Cir. Certiorari denied. *Louis A. Sabatino* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 245 F. 2d 344.

No. 394. David *v.* United States. C. A. 7th Cir. Certiorari denied. *Myer H. Gladstone* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 246 F. 2d 895.

No. 398. Clay et al. *v.* United States. C. A. 5th Cir. Certiorari denied. *Denmark Groover, Jr.* for petitioners. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 246 F. 2d 298.

No. 401. Gil *v.* Del Guercio, District Director, Immigration and Naturalization Service. C. A. 9th Cir. Certiorari denied. *Harry Wolpin* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondent. Reported below: 246 F. 2d 553.

No. 404. Brownstein *v.* Aluminum Reserve Corp. et al. C. A. 2d Cir. Certiorari denied. *Nathan B. Fogelson* for petitioner. *Samuel J. Nachwalter* for respondents. Reported below: 245 F. 2d 82.

No. 406. BETTER MONKEY GRIP CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *William L. Keller* for petitioner. *Solicitor General Rankin, Jerome D. Fenton, Stephen Leonard* and *Dominick L. Manoli* for respondent. Reported below: 243 F. 2d 836.

No. 407. STALLMAN *v.* CASEY BEARING CO., INC. C. A. 9th Cir. Certiorari denied. *George B. White* and *Albert D. Elledge* for petitioner. *Foorman L. Mueller* and *James M. Naylor* for respondent. Reported below: 244 F. 2d 905.

No. 408. KREAM *v.* PUBLIC SERVICE COORDINATED TRANSPORT. Supreme Court of New Jersey. Certiorari denied. *Aaron Gordon, John A. Hartpence* and *John W. Ockford* for petitioner. *Henry J. Sorenson* for respondent. Reported below: 24 N. J. 432, 132 A. 2d 512.

No. 381. DUGGAN, TRUSTEE IN REORGANIZATION, *v.* GREEN, SUBSTITUTE TRUSTEE UNDER TRUST No. 140. C. A. 8th Cir. Certiorari denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application. *George O. Durham* and *Eugene M. Munger* for petitioner. *Jacob M. Lashly* for respondent. Reported below: 240 F. 2d 751, 243 F. 2d 109.

No. 86, Misc. BAKER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States.

No. 235, Misc. SHAVER *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Jarrard Secret* for petitioner. Reported below: 165 Tex. Cr. R. —, 306 S. W. 2d 128.

No. 119, Misc. RANDAZZO *v.* CALIFORNIA. Petition for writ of certiorari to the Supreme Court of California and/or the alternative District Court of Appeal of California, Second Appellate District, denied. *Morris Lavine* for petitioner. Reported below: 48 Cal. 2d 484, 310 P. 2d 413; 143 Cal. App. 2d 59, 299 P. 2d 307.

Rehearing Denied.

No. 155, October Term, 1956. KLEINMAN *v.* KOBLER, DOING BUSINESS AS KOBLER SHAVING CO., 352 U. S. 830; and

No. 788, October Term, 1956. GINSBURG *v.* BLACK ET AL., 353 U. S. 911. Motions for leave to file second petitions for rehearing denied.

NOVEMBER 7, 1957.

Dismissal Under Rule 60.

No. 68. MACKEY *v.* SEARS, ROEBUCK & CO. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Edward I. Rothschild* was on the stipulation for petitioner. With him on the petition was *John Paul Stevens*. *Walter J. Rockler* for respondent. Reported below: 237 F. 2d 869.

NOVEMBER 12, 1957.

Miscellaneous Orders.

No. 380. ARGONAUT NAVIGATION CO., LTD., *v.* KOTSIFAKIS ET AL. Motion to strike portions of petition and record denied. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied. *Hugh S. Meredith* for petitioner. *Jacob L. Morewitz, pro se,* movant-respondent.

No. 231, Misc. GILLIAM *v.* MICHIGAN; and

No. 248, Misc. JAMES *v.* UNITED STATES. Motions for leave to file petitions for writs of habeas corpus denied.

No. 228, Misc. BROOKS *v.* UNITED STATES. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted.

No. 415. COUNTY OF MARIN ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of California. Probable jurisdiction noted. *Spurgeon Avakian* for appellants. *Solicitor General Rankin, Assistant Attorney General Hansen* and *Robert W. Ginnane* for the United States and the Interstate Commerce Commission, and *Allan P. Matthew* for the Golden Gate Transit Lines et al., appellees. Reported below: 150 F. Supp. 619.

No. 455. UNITED STATES *v.* CORES. Appeal from the United States District Court for the District of Connecticut. Probable jurisdiction noted. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States.

Certiorari Granted. (*See also No. 372, ante, p. 35; Misc. No. 108, ante, p. 36; and No. 453, ante, p. 39.*)

No. 137, Misc. DANDRIDGE *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. *Bernard Dunau* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 101 U. S. App. D. C. 114, 247 F. 2d 105.

No. 435. FEDERAL TRADE COMMISSION *v.* NATIONAL CASUALTY CO. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit granted; and

No. 436. FEDERAL TRADE COMMISSION *v.* AMERICAN HOSPITAL & LIFE INSURANCE CO. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted. *Solicitor General Rankin, Earl W. Kintner, James E. Corkey* and *Alvin L. Berman* for the Federal Trade Commission. *John F. Langs* for respondent in No. 435. *J. D. Wheeler* for respondent in No. 436. Reported below: No. 435, 245 F. 2d 883; No. 436, 243 F. 2d 719.

No. 456. GRIMES *v.* RAYMOND CONCRETE PILE CO. ET AL. C. A. 1st Cir. Certiorari granted. *George J. Engelman* for petitioner. *Frank L. Kozol* for respondents. Reported below: 245 F. 2d 437.

Certiorari Denied. (*See also No. 380, supra.*)

No. 411. SIDEBOTHAM *v.* ROBISON, ADMINISTRATOR, ET AL. C. A. 9th Cir. Certiorari denied. *Manuel Ruiz, Jr.* for petitioner. *Delger Trowbridge* for respondents. Reported below: 243 F. 2d 16.

No. 413. DONOHUE ET AL. *v.* VILLAGE OF FOX POINT. Supreme Court of Wisconsin. Certiorari denied. *Sydney M. Eisenberg* for petitioners. *Maxwell H. Herriott* for respondent. Reported below: 275 Wis. 182, 81 N. W. 2d 521.

No. 418. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Daniel H. Greenberg* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 247 F. 2d 5.

No. 414. WEINSTEIN, ADMINISTRATRIX, ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Milford J. Meyer* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Paul A. Sweeney* and *Herman Marcuse* for the United States. Reported below: 244 F. 2d 68.

No. 417. EPSTEIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Abe Fortas, Louis Eisenstein, William Gerber* and *Hal Gerber* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph F. Goetten* for the United States. Reported below: 246 F. 2d 563.

No. 420. SAWYER ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Keith L. Seegmiller* and *Irving Wilner* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 138 Ct. Cl. 152.

No. 421. TEXAS & PACIFIC RAILWAY CO. *v.* WATKINS, NATURAL TUTRIX. C. A. 5th Cir. Certiorari denied. *Ashton Phelps* for petitioner. *Thompson L. Clarke* for respondent. Reported below: 243 F. 2d 171.

No. 422. ENNIS *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. Reported below: 95 So. 2d 20.

No. 425. CITY OF DALLAS, TEXAS, *v.* TUBBS MANUFACTURING CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. *H. P. Kucera* and *Ted P. MacMaster* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *Fred E. Youngman* for the United States, respondent. Reported below: 246 F. 2d 141.

No. 424. BOURGEOIS *v.* MERCANTILE NATIONAL BANK OF MIAMI BEACH, FLORIDA. Supreme Court of Florida. Certiorari denied. *Jacob Rassner* for petitioner. *Lewis Horwitz* and *L. J. Cushman* for respondent. Reported below: 95 So. 2d 918.

No. 427. NORTH CENTRAL PUBLIC SERVICE CO. ET AL. *v.* NORTHERN NATURAL GAS CO. ET AL. C. A. 8th Cir. Certiorari denied. *Raymond A. Smith* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter, Willard W. Gatchell* and *Howard E. Wahrenbrock* for the Federal Power Commission, respondent. Reported below: 245 F. 2d 447.

No. 428. LITMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Jacob Kossman* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Stull* and *Joseph M. Howard* for the United States. Reported below: 246 F. 2d 206.

No. 429. BENTON COUNTY, OREGON, ET AL. *v.* LAFFERTY ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Paul R. Connolly* for petitioners. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *Harold S. Harrison* for the Secretary of the Treasury et al., *A. W. Lafferty, pro se,* and *James P. Kem, Byron N. Scott, Monte Appel* and *Donald C. Walker* for Merrick et al., respondents. Reported below: 101 U. S. App. D. C. 222, 248 F. 2d 82.

No. 431. W. T. GRANT CO. *v.* JOSEPH, COMPTROLLER OF THE CITY OF NEW YORK. Court of Appeals of New York. Certiorari denied. *Sol Charles Levine* for petitioner. *Peter Campbell Brown, Stanley Buchsbaum* and *Leroy Mandle* for respondent. Reported below: 2 N. Y. 2d 196, 992, 140 N. E. 2d 244, 143 N. E. 2d 342.

No. 433. NANI *v.* BROWNELL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William H. Collins* and *Samuel Paige* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondent. Reported below: 101 U. S. App. D. C. 112, 247 F. 2d 103.

No. 434. WILSON *v.* CIVIL AERONAUTICS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *F. Harold Bennett, George F. Archer* and *Lloyd Fletcher* for petitioner. *Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston, Franklin M. Stone, O. D. Ozment* and *Robert L. Toomey* for respondent. Reported below: 100 U. S. App. D. C. 325, 244 F. 2d 773.

No. 439. CHIN BICK WAH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Alvin Landis* and *Robert B. McMillan* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 245 F. 2d 274.

No. 443. STATE BOARD OF NATUROPATHIC EXAMINERS ET AL. *v.* WILSON, ATTORNEY GENERAL, ET AL. Supreme Court of Texas. Certiorari denied. *Benedict F. Fitz-Gerald, Jr.* and *John B. Olverson* for petitioners. *Will Wilson,* Attorney General of Texas, *James N. Ludlum,* First Assistant Attorney General, and *C. K. Richards* and *John Reeves,* Assistant Attorneys General, for respondents.

No. 444. MARTIN-LEBRETON INSURANCE AGENCY *v.* MANUFACTURERS CASUALTY INSURANCE CO. C. A. 5th Cir. Certiorari denied. *Frank S. Normann* for petitioner. Reported below: 242 F. 2d 951.

No. 446. Mississippi Valley Barge Line Co. *v.* T. L. James & Co., Inc., et al. C. A. 5th Cir. Certiorari denied. *Selim B. Lemle* and *Charles Kohlmeyer, Jr.* for petitioner. *John W. Sims* for respondents. Reported below: 244 F. 2d 263.

No. 454. Green et al. *v.* United States. C. A. 7th Cir. Certiorari denied. *Edward Bennett Williams, Fred P. Schuman, Schaefer O'Neill* and *William P. Roberts* for petitioners. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 246 F. 2d 155.

No. 457. First Iowa Hydro Electric Cooperative et al. *v.* Iowa-Illinois Gas & Electric Co. et al. C. A. 8th Cir. Certiorari denied. *J. Roger Wollenberg* for petitioners. *James J. Lamb* for the Iowa-Illinois Gas & Electric Co., *Harris M. Coggeshall* for the Iowa Power & Light Co., *Maxwell A. O'Brien* for the Iowa Southern Utilities Co., *Clement F. Springer* and *E. Marshall Thomas* for the Interstate Power Co., *Robert H. Walker* for the Union Electric Power Co., *V. Craven Shuttleworth, Tyrrell M. Ingersoll* and *Harry E. Wilmarth* for the Iowa Electric Light & Power Co. et al., and *Byron Spencer, Joseph J. Kelly, Jr.* and *Earl Smith* for the Kansas City Power & Light Co., respondents. Reported below: 245 F. 2d 613.

No. 458. Scott Paper Co. *v.* McAllister Lighterage Line, Inc., et al. C. A. 2d Cir. Certiorari denied. *Edmund F. Lamb* for petitioner. *Christopher E. Heckman* for McAllister Lighterage Line, Inc., and *Thomas F. Mount* for the Insurance Company of North America, respondents. Reported below: 244 F. 2d 867.

No. 447. BLASKI ET AL. *v.* DAVIDSON, U. S. DISTRICT JUDGE, ET AL. C. A. 5th Cir. Certiorari denied. *Lloyd C. Root, Daniel V. O'Keeffe* and *John O'C. FitzGerald* for petitioners. *Maurice E. Purnell* for Howell et al., respondents. Reported below: 245 F. 2d 737.

No. 461. MCALLISTER LIGHTERAGE LINE, INC., *v.* INSURANCE COMPANY OF NORTH AMERICA ET AL. C. A. 2d Cir. Certiorari denied. *Christopher E. Heckman* for petitioner. *Thomas F. Mount, George M. Brodhead* and *J. Welles Henderson, Jr.* for the Insurance Company of North America, respondent. Reported below: 244 F. 2d 867.

No. 423. GREAT NORTHERN RAILWAY CO. *v.* HYDE ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application. *Edwin C. Matthias* and *Anthony Kane* for petitioner. *Harry H. Peterson* for respondents. Reported below: 245 F. 2d 537.

No. 426. NAKASHIMA, EXECUTOR, *v.* BROWNELL, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN. C. A. 9th Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *L. Nelson Hayhurst* for petitioner. *Solicitor General Rankin, Assistant Attorney General Townsend* and *George B. Searls* for respondent. Reported below: 243 F. 2d 787.

No. 66, Misc. MONTGOMERY *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Edmund G. Brown,* Attorney General of California, *Frank J. Mackin,* Assistant Attorney General, and *Norman H. Sokolow,* Deputy Attorney General, for respondent.

Nos. 440 and 441. SOBELL *v.* UNITED STATES. C. A. 2d Cir. Motion for leave to file brief of Dr. Harold C. Urey et al., as *amici curiae,* granted. Certiorari denied. *Frank J. Donner, Arthur Kinoy, Marshall Perlin* and *Benjamin Dreyfus* for petitioner. *Solicitor General Rankin, Assistant Attorney General Tompkins, Philip R. Monahan* and *Carl G. Coben* for the United States. *Daniel G. Marshall* filed a brief for Urey et al., as *amici curiae,* urging that a writ of certiorari be granted. Reported below: 244 F. 2d 520.

No. 445. MCCORKLE, PRINCIPAL KEEPER, NEW JERSEY STATE PRISON, *v.* DEVITA. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application. *Grover C. Richman,* Attorney General of New Jersey, *Charles V. Webb, Jr.* and *C. William Caruso* for petitioner. *Harold Alper* and *Isadore Glauberman* for respondent. Reported below: 248 F. 2d 1.

No. 68, Misc. MACKROW *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se. Latham Castle,* Attorney General of Illinois, for respondent.

No. 78, Misc. CHERPAKOV *v.* UNITED STATES; and

No. 125, Misc. DARNEILLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Gordon G. Dale* for petitioner in No. 78, Misc. Petitioner *pro se* in No. 125, Misc. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 244 F. 2d 132.

No. 93, Misc. GERSHON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 243 F. 2d 527.

No. 114, Misc. LEE *v.* GOUGH, WARDEN. Supreme Court of Rhode Island. Certiorari denied.

No. 145, Misc. RUSSO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 245 F. 2d 781.

No. 154, Misc. LATHMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 155, Misc. NEW YORK EX REL. JIMENEZ *v.* MURPHY, WARDEN. Supreme Court of New York, Cayuga County. Certiorari denied.

No. 158, Misc. HICKMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 246 F. 2d 178.

No. 163, Misc. DEVIVO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Bernard Tompkins* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 246 F. 2d 773.

No. 166, Misc. BLANC *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Doub* and *Melvin Richter* for the United States. Reported below: 244 F. 2d 708.

No. 188, Misc. DICANIO *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: 245 F. 2d 713.

No. 189, Misc. HOLLIS *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 193, Misc. DUNCAN ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James J. Laughlin* and *Albert J. Ahern, Jr.* for petitioners. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 101 U. S. App. D. C. 304, 248 F. 2d 626.

No. 217, Misc. WYERS *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

Rehearing Denied.

No. 257. STEELE *v.* UNITED STATES, *ante*, p. 828. Rehearing denied.

No. 929, October Term, 1955. GINSBURG *v.* GREGG ET AL., 351 U. S. 979; and

No. 246, October Term, 1956. MONROE ET AL. *v.* UNITED STATES, 352 U. S. 873. Motions for leave to file second petitions for rehearing denied.

NOVEMBER 18, 1957.

Miscellaneous Orders.

No. 549. GIORDENELLO *v.* UNITED STATES. Certiorari, 355 U. S. 811, to the United States Court of Appeals for the Fifth Circuit. It is ordered that *William F. Walsh, Esquire,* of Houston, Texas, a member of the Bar of this Court be, and he is hereby, appointed to serve as counsel for petitioner in this case. Reported below: 241 F. 2d 575.

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No. 11, Original. UNITED STATES *v.* LOUISIANA ET AL. The defendant States are directed to answer to the amended complaint within 45 days from this date. THE CHIEF JUSTICE and MR. JUSTICE CLARK took no part in the consideration or decision of this matter. *Solicitor General Rankin* filed the amended complaint for the United States. *Jack P. F. Gremillion,* Attorney General, for the State of Louisiana, *John Patterson,* Attorney General, *William G. O'Rear* and *Gordon Madison,* Assistant Attorneys General, and *E. K. Hanby,* Special Assistant Attorney General, for the State of Alabama, *Richard W. Ervin,* Attorney General, for the State of Florida, *Joe T. Patterson,* Attorney General, for the State of Mississippi, and *Will Wilson,* Attorney General, for the State of Texas, defendants.

No. 567. MISSISSIPPI RIVER FUEL CORP. *v.* FEDERAL POWER COMMISSION. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. The motion of United Gas Pipe Line Company to correct and amend the title and caption is granted and the United Gas Pipe Line Company is designated as a party respondent. *Thomas Fletcher* and *C. Huffman Lewis* for movant-respondent. Reported below: 102 U. S. App. D. C. 238, 252 F. 2d 619.

Certiorari Granted. (*See Misc. No. 268, ante, p. 60; No. 442, ante, p. 62; and No. 477, ante, p. 64.*)

Certiorari Denied. (*See also Misc. No. 275, ante, p. 59.*)

No. 460. PASTER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *David Previant* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *Carolyn R. Just* for respondent. Reported below: 245 F. 2d 381.

No. 452. Brotherhood of Railroad Trainmen et al. *v.* New York Central Railroad Co. C. A. 6th Cir. Certiorari denied. *Joseph A. Robie* and *Edward J. Hickey, Jr.* for petitioners. *Harold Heiss* for the Brotherhood of Locomotive Firemen & Enginemen, and *Wayland K. Sullivan* for the Brotherhood of Railroad Trainmen, petitioners. *Milo J. Warner* and *Wesley A. Wilkinson* for respondent. Reported below: 246 F. 2d 114.

No. 471. Stevenson et al. *v.* Reed et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *F. R. Cook, Jr.* for petitioners. *Barrington D. Parker* and *James M. Leak* for respondents. Reported below: 101 U. S. App. D. C. 97, 247 F. 2d 88.

No. 472. United States *v.* Fehlhaber Corporation. Court of Claims. Certiorari denied. *Solicitor General Rankin, Assistant Attorney General Doub, Paul A. Sweeney* and *Morton Hollander* for the United States. *John W. Gaskins* for respondent. Reported below: 138 Ct. Cl. 571, 151 F. Supp. 817.

No. 475. Schultz, Administratrix, *v.* Home Oil Co. Supreme Court of New Jersey. Certiorari denied. *Jacob Rassner* for petitioner. *Philip M. Lustbader* and *George H. Harbaugh* for respondent. Reported below: 24 N. J. 547, 133 A. 2d 395.

No. 478. Federal Deposit Insurance Corp. *v.* Continental Illinois National Bank & Trust Co. of Chicago. C. A. 7th Cir. Certiorari denied. *Royal L. Coburn, John H. Bishop* and *Orrin G. Judd* for petitioner. *Frank D. Mayer, Louis A. Kohn* and *Robert L. Stern* for respondent. Reported below: 245 F. 2d 567.

No. 474. YOUNG *v.* HUGHES, DISTRICT JUDGE. Supreme Court of Oklahoma. Certiorari denied. *John G. Hervey* and *Glenn O. Young* for petitioner.

No. 476. VON OPEL *v.* BROWNELL, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Edward J. Ennis* for petitioner. *Solicitor General Rankin, Assistant Attorney General Townsend, George B. Searls* and *Myron C. Baum* for respondent. Reported below: 100 U. S. App. D. C. 341, 244 F. 2d 789.

No. 128, Misc. BOIDAKOWSKI *v.* GOODMAN, WARDEN, ET AL. Supreme Court of New Jersey. Certiorari denied.

No. 144, Misc. HORNE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Walter A. Harris* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 246 F. 2d 83.

No. 156, Misc. HILL, ADMINISTRATRIX, *v.* MISSISSIPPI VALLEY BARGE LINE CO. C. A. 3d Cir. Certiorari denied. *Louis C. Glasso* for petitioner. Reported below: 244 F. 2d 310.

No. 173, Misc. LONG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 245 F. 2d 871.

No. 180, Misc. LEGG *v.* MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION OF OMAHA. Supreme Court of California. Certiorari denied.

No. 184, Misc. HSUAN WEI *v.* ROBINSON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for respondent. Reported below: 246 F. 2d 739.

No. 269, Misc. PORET ET AL. *v.* SIGLER, WARDEN. Supreme Court of Louisiana. Certiorari denied. *G. W. Gill* and *Gerard H. Schreiber* for petitioners.

No. 270, Misc. PORET ET AL. *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *G. W. Gill* and *Gerard H. Schreiber* for petitioners.

Rehearing Denied.

No. 147. WILSHIRE HOLDING CORP. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 815;

No. 171. BRYSON *v.* UNITED STATES, *ante*, p. 817;

No. 248. FURNISH *v.* BOARD OF MEDICAL EXAMINERS OF CALIFORNIA ET AL., *ante*, p. 827;

No. 272. HOBART *v.* O'BRIEN ET AL., *ante*, p. 830;

No. 19, Misc. GEORGE, GUARDIAN, ET AL. *v.* UNITED STATES, *ante*, p. 843; and

No. 80, Misc. LEWIS *v.* FLORIDA, *ante*, p. 16. Petitions for rehearing denied.

No. 342. KERN *v.* WILLIAMSON, TRUSTEE, ET AL., *ante*, p. 838. Rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

Dismissal Under Rule 60.

No. 513. HUGH BREEDING, INC., *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. On petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Peyton Ford* and *Gus Rinehart* for petitioner. *John A. Johnson* and *Robert E. Shelton* for respondent. Reported below: 247 F. 2d 217.

NOVEMBER 25, 1957.

Miscellaneous Orders.

An order of THE CHIEF JUSTICE designating and assigning MR. JUSTICE MINTON (retired) to perform judicial duties in the United States Court of Claims beginning December 2, 1957, and ending December 31, 1957, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

No. 12, Original. VIRGINIA *v.* MARYLAND. This case is set for oral argument on Monday, December 9th, next, on the motion for leave to file the bill of complaint and answer. Two hours allowed for argument.

No. 30. RATHBUN *v.* UNITED STATES. Certiorari, 352 U. S. 965, to the United States Court of Appeals for the Tenth Circuit. The motion for leave to withdraw the appearance of *E. F. Conly,* as counsel for the petitioner, is granted. Reported below: 236 F. 2d 514.

Probable Jurisdiction Noted.

No. 483. SPEISER *v.* RANDALL, ASSESSOR OF CONTRA COSTA COUNTY, CALIFORNIA; and

No. 484. PRINCE *v.* CITY AND COUNTY OF SAN FRANCISCO. Appeals from the Supreme Court of California.

Probable jurisdiction noted. THE CHIEF JUSTICE took no part in the consideration or decision of these applications. *Franklin H. Williams* for appellants. *Dion R. Holm* for appellees. Reported below: No. 483, 48 Cal. 2d 903, 311 P. 2d 546; No. 484, 48 Cal. 2d 472, 311 P. 2d 544.

Certiorari Granted. (*See also No. 451, ante, p. 80.*)

No. 481. KENT ET AL. *v.* DULLES, SECRETARY OF STATE. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Leonard B. Boudin, Victor Rabinowitz* and *David Rein* for petitioners. *Daniel G. Marshall* for Briehl, petitioner. *Solicitor General Rankin* for respondent. Reported below: 101 U. S. App. D. C. 278, 239, 248 F. 2d 600, 561.

No. 492. FLORA *v.* UNITED STATES. C. A. 10th Cir. Certiorari granted. *A. G. McClintock* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott* for the United States. Reported below: 246 F. 2d 929.

Certiorari Denied. (*See also Misc. No. 147, ante, p. 82.*)

No. 448. MASSACHUSETTS COMPANY ET AL. *v.* FLORIDA, BY ERVIN, ATTORNEY GENERAL, ET AL. Supreme Court of Florida. Certiorari denied. *J. McHenry Jones* for petitioners. *Richard W. Ervin,* Attorney General of Florida, *Ralph M. McLane,* Assistant Attorney General, and *H. Rex Owen,* Special Assistant Attorney General, for respondents. Reported below: 95 So. 2d 902.

No. 479. MERCHANTS NATIONAL BANK & TRUST CO. OF INDIANAPOLIS *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. *Ralph B. Gregg* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *Carolyn R. Just* for respondents. Reported below: 246 F. 2d 410.

No. 480. MOORE ET AL. *v.* BROWN, EXECUTRIX. C. A. 3d Cir. Certiorari denied. *Milton W. Lamproplos* for petitioners. *Melvin M. Belli* for respondent. Reported below: 247 F. 2d 711.

No. 486. YOKNAPATAWPHA DRAINAGE DISTRICT No. 2, LAFAYETTE COUNTY, MISSISSIPPI, *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Phil Stone* for petitioner. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *Elizabeth Dudley* for the United States. Reported below: 242 F. 2d 925.

No. 487. NORTH COUNTIES HYDRO-ELECTRIC CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *John W. Day* and *Howard J. Trienans* for petitioner. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for the United States. Reported below: 138 Ct. Cl. 380, 151 F. Supp. 322.

No. 488. FRANTUM ET UX. *v.* DEPARTMENT OF PUBLIC WELFARE OF BALTIMORE CITY. Court of Appeals of Maryland. Certiorari denied. *Moses Davis* for petitioners. *Thomas N. Biddison, Hugo A. Ricciuti* and *Carl H. Lehmann, Jr.* for respondent. Reported below: 214 Md. 100, 133 A. 2d 408.

No. 489. WILSON *v.* MUENCH-KREUZER CANDLE CO., INC. C. A. 9th Cir. Certiorari denied. *Edward B. Gregg* for petitioner. *Leonard S. Lyon* for respondent. Reported below: 246 F. 2d 624.

No. 490. QUALITY COAL CORP. *v.* LEWIS ET AL., TRUSTEES FOR UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND. C. A. 7th Cir. Certiorari denied. *Harold H. Bacon* for respondents. Reported below: 243 F. 2d 769.

No. 493. American Bitumuls & Asphalt Co. et al. *v.* United States. Court of Customs and Patent Appeals. Certiorari denied. *Grace M. Stewart* for the American Bitumuls & Asphalt Co., petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Herman Marcuse* for the United States. Reported below: 44 C. C. P. A. (Cust.) 199, 246 F. 2d 270.

No. 495. Daly *v.* Finnegan, Director, Federal Mediation and Conciliation Service, et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Rees B. Gillespie* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for respondents. Reported below: 101 U. S. App. D. C. 227, 248 F. 2d 87.

No. 496. Galgano *v.* United States; and

No. 497. Carminati et al. *v.* United States. C. A. 2d Cir. Certiorari denied. *Henry A. Lowenberg* for petitioner in No. 496. *Jacob W. Friedman* for petitioners in No. 497. *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for the United States. Reported below: 247 F. 2d 640.

No. 498. Brooklyn Eagle, Inc., *v.* Potoker. Court of Appeals of New York and Supreme Court of New York, New York County. Certiorari denied. *Henry H. Nordlinger* and *Oscar A. Lewis* for petitioner. *Herman E. Cooper* and *H. Howard Ostrin* for respondent. Reported below: 2 N. Y. 2d 553, 141 N. E. 2d 841; 141 N. Y. S. 2d 719.

No. 499. Ohio Farmers Insurance Co. et al. *v.* Lantz et al. C. A. 7th Cir. Certiorari denied. *Roland Obenchain* and *Roland Obenchain, Jr.* for petitioners. *George L. Pepple* for respondents. Reported below: 246 F. 2d 182.

No. 500. EISENBERG *v.* CENTRAL ZONE PROPERTY CORP. ET AL. Court of Appeals of New York and Supreme Court of New York, New York County. Certiorari denied. *Emil K. Ellis* for petitioner. *Simon H. Rifkind* for the Central Zone Property Corporation, respondent. Reported below: 3 N. Y. 2d 729, 143 N. E. 2d 516.

No. 502. AMERICAN & EUROPEAN AGENCIES, INC., *v.* GILLILLAND ET AL., CONSTITUTING THE FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Paul Ackerman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *B. Jenkins Middleton* for respondents. *Philip Levy* filed a brief for the American Yugoslav Electric Co., Inc., et al., as *amici curiae*, in opposition to the petition for writ of certiorari. Reported below: 101 U. S. App. D. C. 104, 247 F. 2d 95.

No. 505. INSTITUTO CUBANO DE ESTABILIZACION DEL AZUCAR *v.* T/V GOLDEN WEST ET AL. C. A. 2d Cir. Certiorari denied. *John C. Crawley* for petitioner. *Dudley C. Smith* for Skibs A/S Golden West, respondent. Reported below: 246 F. 2d 802.

No. 491. P. & D. MANUFACTURING CO., INC., *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application. *Harold T. Halfpenny* for petitioner. *Solicitor General Rankin* for respondent. Reported below: 245 F. 2d 281.

No. 178, Misc. NAUS *v.* RIGG, WARDEN. Supreme Court of Minnesota. Certiorari denied. Reported below: 250 Minn. 365, 84 N. W. 2d 698.

No. 501. WOOD ET AL. *v.* GAS SERVICE CO. C. A. 8th Cir. Certiorari denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application. *William S. Hogsett* and *Hale Houts* for petitioners. *Charles M. Miller* and *Jerry T. Duggan* for respondent. Reported below: 245 F. 2d 653.

No. 179, Misc. REYNOLDS *v.* MARTIN, WARDEN. Court of Appeals of New York. Certiorari denied. Reported below: 3 N. Y. 2d 217, 144 N. E. 2d 20.

No. 183, Misc. HENDERSON *v.* CAVELL, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 236, Misc. PATREK *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 3 N. Y. 2d 803, 144 N. E. 2d 645.

Rehearing Denied.

No. 136. BOARD OF ASSESSORS OF THE TOWN OF RIVERHEAD, NEW YORK, ET AL. *v.* GRUMMAN AIRCRAFT ENGINEERING CORP., *ante*, p. 814;

No. 183. ARGENTO *v.* HORN ET AL., *ante*, p. 818;

No. 222. CITIZENS BANK & TRUST CO., ADMINISTRATOR, *v.* UNITED STATES, *ante*, p. 825;

No. 229. FEDERAL TRADE COMMISSION *v.* CRAFTS, *ante*, p. 9;

No. 237. DALY *v.* UNITED STATES ET AL., *ante*, p. 826;

No. 250. SAVOIE, ADMINISTRATRIX, *v.* TEXAS COMPANY, *ante*, p. 840;

No. 253. MILLER ET AL. *v.* JENNINGS ET AL., *ante*, p. 827;

No. 291. HELMIG *v.* ROCKWELL MANUFACTURING CO. ET AL., *ante*, p. 832. Petitions for rehearing denied.

No. 315. KASPER *v.* BRITTAIN ET AL., *ante*, p. 834;

No. 319. MILLS *v.* CALIFORNIA, *ante*, p. 841;

No. 320. JAFFKE *v.* DUNHAM, TRUSTEE IN BANKRUPTCY, *ante*, p. 835;

No. 339. MORONEY *v.* MCKIBBEN ET AL., *ante*, p. 840;

No. 350. PALERMO *v.* LUCKENBACH STEAMSHIP CO., INC., *ante*, p. 20;

No. 26, Misc. WORLEY, ADMINISTRATRIX, ET AL. *v.* NATIONAL SPECIALTY CO., INC., ET AL., *ante*, p. 844;

No. 52, Misc. MACKENNA *v.* TEXAS, *ante*, p. 851;

No. 55, Misc. LINGHAM-PRITCHARD *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 846;

No. 70, Misc. HOLLINGSWORTH *v.* IOWA, *ante*, p. 851;

No. 86, Misc. BAKER *v.* UNITED STATES, *ante*, p. 864; and

No. 133, Misc. TOWNSEND *v.* ILLINOIS, *ante*, p. 850. Petitions for rehearing denied.

DECEMBER 3, 1957.

Dismissal Under Rule 60.

No. 22. STRAND, SHERIFF, *v.* SCHMITTROTH. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Dismissed on motion of petitioner pursuant to Rule 60 of the Rules of this Court. *Edmund G. Brown,* Attorney General of California, *Clarence A. Linn,* Assistant Attorney General, and *Arlo E. Smith,* Deputy Attorney General, for petitioner. Reported below: 233 F. 2d 598, 235 F. 2d 756.

DECEMBER 9, 1957.

Miscellaneous Orders.

An order of THE CHIEF JUSTICE designating and assigning MR. JUSTICE REED (retired) to perform judicial duties in the United States Court of Claims beginning December 4, 1957, and ending December 31, 1957, and for

such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

No. 455. UNITED STATES *v.* CORES. Appeal from the United States District Court for the District of Connecticut. *Clark M. Clifford, Esquire,* of Washington, D. C., a member of the Bar of this Court, is invited to appear and present oral argument, as *amicus curiae,* in support of the judgment below.

No. 29. UNITED STATES *v.* CENTRAL EUREKA MINING CO. ET AL. Certiorari, 352 U. S. 964, to the Court of Claims. The motion to remove this case from the summary calendar is granted. Reported below: 134 Ct. Cl. 1, 130, 138 F. Supp. 281, 146 F. Supp. 476.

No. 165. LERNER *v.* CASEY ET AL., CONSTITUTING THE NEW YORK CITY TRANSIT AUTHORITY. Appeal from the Court of Appeals of New York. The motion of appellant for leave to proceed *in forma pauperis* is granted. *Leonard B. Boudin* was on the motion for appellant. Reported below: 2 N. Y. 2d 355, 141 N. E. 2d 533.

No. 322. ROMERO *v.* INTERNATIONAL TERMINAL OPERATING CO. ET AL. Certiorari, 355 U. S. 807, to the United States Court of Appeals for the Second Circuit. The motion to dispense with printing of the record is granted. *Silas B. Axtell* was on the motion for petitioner. Reported below: 244 F. 2d 409.

No. 194, Misc. HUBBARD ET UX. *v.* BROOKS, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. Petitioners *pro se. Solicitor General Rankin* for respondent.

No. 385. PEOPLE'S CHURCH OF SAN FERNANDO VALLEY, INC., *v.* COUNTY OF LOS ANGELES ET AL. Certiorari, 355 U. S. 854, to the Supreme Court of California. The motion to print record at public expense and to dispense with payment of Clerk's fees is granted. The motion to substitute Valley Unitarian-Universalist Church, Inc., as the party petitioner in the place and stead of People's Church of San Fernando Valley, Inc., is granted. THE CHIEF JUSTICE took no part in the consideration or decision of these motions. *A. L. Wirin* and *Fred Okrand* were on the motions for petitioner. Reported below: 48 Cal. 2d 899, 311 P. 2d 540.

No. 164, Misc. POWELL *v.* BURFORD, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se*. *John Patterson*, Attorney General of Alabama, and *Edmon L. Rinehart*, Assistant Attorney General, for respondent.

No. 284, Misc. COLLINS *v.* NEW YORK ET AL.; and

No. 301, Misc. ANDERSON *v.* CALIFORNIA ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted. (*See also Nos. 409 and 542, ante, pp. 171, 180.*)

No. 509. CITY OF TACOMA *v.* TAXPAYERS OF TACOMA, WASHINGTON, ET AL. Supreme Court of Washington. Certiorari granted. *Northcutt Ely, Marshall McCormick, Frank L. Bannon* and *Robert L. McCarty* for petitioner. *John J. O'Connell*, Attorney General, *E. P. Donnelly*, Assistant Attorney General, and *Joseph T. Mijich*, Special Assistant Attorney General, for the State of Washington et al., respondents. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter, Willard W. Gatchell, Howard E. Wahrenbrock*

and *Joseph B. Hobbs* filed a brief for the Federal Power Commission, as *amicus curiae*, urging that the petition for writ of certiorari be granted. Reported below: 49 Wash. 2d 781, 307 P. 2d 567.

Certiorari Denied. (*See also Nos. 538, 543, 546 and 553, ante, pp. 182, 183.*)

No. 283. CHOW BING KEW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Archibald M. Mull, Jr., Forrest E. Macomber* and *Kenneth G. McGilvray* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 248 F. 2d 466.

No. 397. LOVE *v.* NEWBURY. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Charles F. O'Neall* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Paul A. Sweeney* and *Joseph Langbart* for respondent. Reported below: 100 U. S. App. D. C. 79, 242 F. 2d 372.

No. 503. UNITED STATES *v.* BOYD ET AL. C. A. 5th Cir. Certiorari denied. *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott* for the United States. *Thomas J. Tubb* for the Bradley Lumber Co., respondent. Reported below: 246 F. 2d 477.

No. 507. AMERICAN TRANSIT LINES *v.* SMITH. C. A. 6th Cir. Certiorari denied. *Robert G. Seaks* for petitioner. *H. Guy Hardy* for respondent. Reported below: 246 F. 2d 86.

No. 508. S. H. KRESS & Co. *v.* AGHNIDES ET AL. C. A. 4th Cir. Certiorari denied. *Will Freeman* for petitioner. *Albert L. Ely* for respondents. Reported below: 246 F. 2d 718.

No. 512. De Casaus *v.* California. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Morris Lavine* for petitioner. Reported below: 150 Cal. App. 2d 274, 309 P. 2d 835.

No. 514. Stokes *v.* Continental Assurance Co. C. A. 5th Cir. Certiorari denied. *Neal P. Rutledge* for petitioner. *Edwin A. Swingle* and *Allan C. Swingle* for respondent. Reported below: 242 F. 2d 893.

No. 515. Hartwig et al. *v.* United States. C. A. 9th Cir. Certiorari denied. *Sterling M. Wood* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 244 F. 2d 849.

No. 516. Latrobe Construction Co. et al. *v.* United States. C. A. 8th Cir. Certiorari denied. *A. L. Barber, W. D. Murphy, Jr.* and *Leon Catlett* for petitioners. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *Harold S. Harrison* for the United States. Reported below: 246 F. 2d 357.

No. 511. Barras et al. *v.* Salt River Valley Water Users' Association. C. A. 9th Cir. Certiorari denied. *Mitchell J. Cooper* for petitioners. *Irving A. Jennings* and *J. A. Riggins, Jr.* for respondent. Reported below: 249 F. 2d 952.

No. 518. Brennan, Treasurer of Cuyahoga County, Ohio, *v.* United States et al. Court of Claims. Certiorari denied. *John T. Corrigan, Saul S. Danaceau* and *Frederick W. Frey* for petitioner. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for the United States, respondent. Reported below: 139 Ct. Cl. ——, 153 F. Supp. 377.

No. 517. VOELKEL ET AL. *v.* TOHULKA ET AL. Supreme Court of Indiana. Certiorari denied. *Roger F. Gay* for petitioners. *S. J. Crumpacker* for respondents. Reported below: 236 Ind. 588, 141 N. E. 2d 344.

No. 521. MURTHA *v.* MONAGHAN, COMMISSIONER OF HARNESS RACING OF NEW YORK. Court of Appeals of New York. Certiorari denied. *David M. Markowitz* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *John R. Davison,* Solicitor General, and *Daniel M. Cohen,* Assistant Attorney General, for respondent. Reported below: 2 N. Y. 2d 819, 3 N. Y. 2d 880, 140 N. E. 2d 746, 145 N. E. 2d 181.

No. 524. D'ESPINAY-DURTAL *v.* HARRIS ET AL. Court of Appeals of New York. Certiorari denied. *George A. Spiegelberg* and *Laurence Rosenthal* for petitioner. *William T. Griffin* and *Herbert Burstein* for Harris et al., respondents. Reported below: 3 N. Y. 2d 70, 879, 143 N. E. 2d 505, 145 N. E. 2d 180.

No. 525. AMES ET AL. *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Murray M. Chotiner, Russell E. Parsons, A. L. Wirin* and *Fred Okrand* for Ames et al., petitioners. Reported below: 151 Cal. App. 2d 714, 312 P. 2d 1111.

No. 526. GENERAL OUTDOOR ADVERTISING CO., INC., *v.* UNITED STATES. Court of Claims. Certiorari denied. *Spaulding Glass* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Baum* for the United States. Reported below: 137 Ct. Cl. 607, 149 F. Supp. 163.

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No. 527. UNITED STATES *v.* CITIZENS UTILITIES CO. ET AL.; and

No. 528. CITY OF LOS ANGELES *v.* CITIZENS UTILITIES CO. ET AL. Court of Claims. Certiorari denied. *Solicitor General Rankin, Assistant Attorney General Doub* and *Melvin Richter* for the United States. *Roger Arnebergh, Northcutt Ely* and *Robert L. McCarty* for petitioner in No. 528. *Jesse Climenko* for the Citizens Utilities Co., and *Ezekiel G. Stoddard* for the California-Pacific Utilities Co., respondents. Reported below: 137 Ct. Cl. 547, 149 F. Supp. 158.

No. 529. KELLY *v.* PENNSYLVANIA RAILROAD CO. C. A. 3d Cir. Certiorari denied. *B. Nathaniel Richter* for petitioner. *Philip Price* for respondent. Reported below: 245 F. 2d 408.

No. 530. TSEUNG CHU, ALIAS BOW QUONG CHEW, TSEUNG BOWQUONG CHEW AND THOMAS BOWQUONG CHEW, *v.* CORNELL, ACTING OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Frank Wickhem* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for respondent. Reported below: 247 F. 2d 929.

No. 531. SEABOARD AIR LINE RAILROAD CO. *v.* BRADDOCK ET AL. Supreme Court of Florida. Certiorari denied. *Charles R. Scott, John S. Cox* and *David W. Dyer* for petitioner. *William S. Frates* and *Walter H. Beckham, Jr.* for respondents. Reported below: 96 So. 2d 127.

No. 532. CAMPISI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Peter J. Donoghue* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 248 F. 2d 102.

No. 533. PARKS-CRAMER CO. *v.* AMERICAN MONORAIL CO. C. A. 4th Cir. Certiorari denied. *Joseph W. Grier, Jr.* and *Cedric W. Porter* for petitioner. *F. O. Richey* and *B. D. Watts* for respondent. Reported below: 245 F. 2d 739.

No. 536. OLIPHANT ET AL. *v.* BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN ET AL. C. A. 6th Cir. Certiorari denied. *Joseph L. Rauh, Jr.* and *John Silard* for petitioners. *Harold C. Heiss, Russell B. Day* and *Milton Kramer* for respondents.

No. 537. STANDARD-VACUUM OIL CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *George S. Collins* and *Warrack Wallace* for petitioner. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *S. Billingsley Hill* for the United States. Reported below: 139 Ct. Cl. —, 153 F. Supp. 465.

No. 535. R. J. REYNOLDS TOBACCO CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Marion N. Fisher, Leon L. Rice, Jr.* and *W. P. Sandridge* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott* for the United States. Reported below: 138 Ct. Cl. 1, 149 F. Supp. 889.

No. 539. UNITED STATES OVERSEAS AIRLINES, INC., ET AL. *v.* COMPANIA AEREA VIAJES EXPRESOS DE VENEZUELA, S. A., ET AL. C. A. 2d Cir. Certiorari denied. *David I. Shapiro* for petitioners. *Eugene H. Nickerson* for respondents. Reported below: 246 F. 2d 951.

No. 540. HAILE ET AL. *v.* EASTERN BAND OF CHEROKEE INDIANS. C. A. 4th Cir. Certiorari denied. *W. Neil Thomas, Jr.* for petitioners. Reported below: 246 F. 2d 293.

No. 541. MICHIGAN CONSOLIDATED GAS CO. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. *Donald R. Richberg, Arthur R. Seder* and *Charles V. Shannon* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Paul A. Sweeney, Willard W. Gatchell, Howard E. Wahrenbrock* and *Edwin M. Miller* for the Federal Power Commission, *William E. Miller* for the Panhandle Eastern Pipe Line Co., and *Jerome Ackerman* and *David Shapiro* for the Union Gas Co. of Canada, Ltd., respondents. Reported below: 246 F. 2d 904.

No. 544. SEARS, ROEBUCK & CO. ET AL. *v.* ALL STATES LIFE INSURANCE CO. C. A. 5th Cir. Certiorari denied. *Milton Handler* for petitioners. *Paul Carrington* and *Otis B. Gary* for respondent. Reported below: 246 F. 2d 161.

No. 545. SWOPE ET AL. *v.* EMERSON ELECTRIC MFG. CO. Supreme Court of Missouri. Certiorari denied. *Gordon Neilson* for petitioners. Reported below: 303 S. W. 2d 35.

No. 551. SEGAL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Max M. Kampelman* and *Sydney W. Goff* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for the United States. Reported below: 246 F. 2d 814.

No. 555. NORTHERN INDIANA PUBLIC SERVICE CO. *v.* HERLIHY MID-CONTINENT CO. C. A. 7th Cir. Certiorari denied. *John C. Lawyer, R. Stanley Anderson* and *Edmund A. Schroer* for petitioner. *Thomas D. Nash, Jr.* for respondent. Reported below: 245 F. 2d 440.

No. 552. Associated Third Class Mail Users, Inc., et al. *v.* United States et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John R. Fitzpatrick* and *Edward J. Lynch* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for respondents.

No. 554. Chain Institute, Inc., et al. *v.* Federal Trade Commission. C. A. 8th Cir. Certiorari denied. *Sumner S. Kittelle, Mark F. Hughes, Allan Trumbull, Stephen H. Beach, Milton Weiss, Charles Denby, Paul J. Winschel, James E. S. Baker, Norman K. Parsells, Elmer E. Finck, Harold T. Halfpenny* and *Charles Fay* for petitioners. *Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston, Earl W. Kintner* and *James E. Corkey* for respondent. Reported below: 246 F. 2d 231.

No. 520. United Gas Pipe Line Co. *v.* Tyler Gas Service Co. et al. United States Court of Appeals for the District of Columbia Circuit. Motion for leave to file brief of McMurrey Refining Co., as *amicus curiae*, denied. Certiorari denied. *Thomas Fletcher* and *C. Huffman Lewis* for petitioner. *Bryce Rea, Jr., Thomas B. Ramey* and *Troy Smith* for respondents. Reported below: 101 U. S. App. D. C. 184, 247 F. 2d 590.

No. 560. Easter *v.* Gates, Secretary of the Navy. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Geo. Washington Williams* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Paul A. Sweeney* for respondent. Reported below: 101 U. S. App. D. C. 87, 247 F. 2d 78.

No. 559. BANDY *v.* MUNICIPAL COURT OF SAN ANTONIO JUDICIAL DISTRICT, LOS ANGELES COUNTY, CALIFORNIA, ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Wendell W. Schooling* for petitioner. Reported below: 151 Cal. App. 2d 736, 312 P. 2d 274.

No. 563. DEVIDAYAL (SALES) LTD. *v.* IIDA & Co., NEW YORK, INC. Court of Appeals of New York. Certiorari denied. *Peter Belsito* for petitioner. *Alfred Rathheim* for respondent. Reported below: 3 N. Y. 2d 814, 144 N. E. 2d 650.

No. 564. OLESEN *v.* TRUST COMPANY OF CHICAGO, TRUSTEE, ET AL. C. A. 7th Cir. Certiorari denied. *David B. Perley* for petitioner. Reported below: 245 F. 2d 522.

No. 116, Misc. ROGERS *v.* TEETS, WARDEN. C. A. 9th Cir. 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. Reported below: 245 F. 2d 154.

No. 117, Misc. BURWELL *v.* TEETS, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Edmund G. Brown,* Attorney General of Califoria, *Clarence A. Linn,* Assistant Attorney General, and *Arlo E. Smith,* Deputy Attorney General, for respondent. Reported below: 245 F. 2d 154.

No. 140, Misc. LIEBLICH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Daniel H. Greenberg* for petitioner. *Solicitor General Rankin, Warren Olney, III,* then Assistant Attorney General, and *Beatrice Rosenberg* for the United States. Reported below: 246 F. 2d 890.

No. 565. Elgin, Joliet & Eastern Railway Co. *v.* Gibson. C. A. 7th Cir. Certiorari denied. *Harlan L. Hackbert* for petitioner. *Justin Waitkus* for respondent. Reported below: 246 F. 2d 834.

Memorandum of Mr. Justice Frankfurter, in which Mr. Justice Harlan joins.

Although the Court has definitively decided that a denial of a petition for certiorari carries no legal significance, *Brown* v. *Allen,* 344 U. S. 443, 489–497, the bar, in briefs, and lower courts, in their opinions, continue to note such denials by way of reinforcing the authority of cited lower court decisions. It has therefore seemed to me appropriate from time to time to emphasize through concrete illustrations that a denial of certiorari does not imply approval of the decision for which review is sought or of its supporting opinion. This case presents another instance for underlining this nonsignificance of the denial of certiorari. Not until this Court explicitly holds that "in F. E. L. A. cases, speculation, conjecture and possibilities suffice to support a jury verdict," which is the holding of the Court of Appeals in this case, 246 F. 2d 834, 837, is that to be assumed to be the law of this Court.

No. 60, Misc. Elbert *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *George C. Dreos* for petitioner. *Solicitor General Rankin, Warren Olney, III,* then Assistant Attorney General, *Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 100 U. S. App. D. C. 244, 243 F. 2d 667.

No. 162, Misc. Pierce *v.* Pennsylvania. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 165, Misc. WILLIAMS *v.* JACKSON, WARDEN, ET AL. Supreme Court of New York, Clinton County. Certiorari denied.

No. 168, Misc. SLUSSER *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM. Court of Criminal Appeals of Texas. Certiorari denied.

No. 169, Misc. GLENN *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 172, Misc. AUSTIN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John Bodner, Jr.* for petitioner. *Solicitor General Rankin, Warren Olney, III,* then Assistant Attorney General, *Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 101 U. S. App. D. C. 129, 247 F. 2d 535.

No. 182, Misc. SHIVELY *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Reported below: —— Ind. ——, 141 N. E. 2d 921.

No. 195, Misc. RHEIM *v.* MURPHY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 196, Misc. ACCARDO *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Warren Olney, III,* then Assistant Attorney General, and *Beatrice Rosenberg* for the United States. Reported below: 101 U. S. App. D. C. 162, 247 F. 2d 568.

No. 211, Misc. ANDREWS *v.* RHODE ISLAND. Supreme Court of Rhode Island. Certiorari denied. Reported below: 85 R. I. ——, 134 A. 2d 425.

No. 207, Misc. ATCHLEY *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 209, Misc. LONG *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 216, Misc. IN RE CULVER. C. A. 3d Cir. Certiorari denied.

No. 218, Misc. DION *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 220, Misc. JONES *v.* MOORE, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 224, Misc. CROSS *v.* TUSTIN ET AL. District Court of Appeal of California, Third Appellate District. Certiorari denied.

No. 232, Misc. PUNGRATZ *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Reported below: 348 Mich. 293, 82 N. W. 2d 869.

No. 233, Misc. BRYANT *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 234, Misc. COUNT *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 238, Misc. GAY ET AL. *v.* UTAH. Supreme Court of Utah. Certiorari denied. Reported below: 6 Utah 2d 122, 307 P. 2d 885.

No. 239, Misc. BLOUNT *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied.

No. 243, Misc. RAMIREZ *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 285, Misc. LAMBERT *v.* BANNAN, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 295, Misc. WARNER *v.* BANNAN, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 296, Misc. WHITCOMB *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 297, Misc. SIEG *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 247 F. 2d 638.

No. 312, Misc. SMITH *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

Rehearing Denied.

No. 142. GIBSON *v.* THOMPSON, TRUSTEE, *ante*, p. 18;

No. 213. WEBSTER MOTOR CAR CO. *v.* PACKARD MOTOR CAR CO. ET AL., *ante*, p. 822;

No. 393. GOMEZ *v.* UNITED STATES, *ante*, p. 863;

No. 402. HURT *v.* OKLAHOMA, *ante*, p. 22;

No. 406. BETTER MONKEY GRIP CO. *v.* NATIONAL LABOR RELATIONS BOARD, *ante*, p. 864; and

No. 96, Misc. WETZEL *v.* HARPOLE, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL., *ante*, p. 848. Petitions for rehearing denied.

No. 355, October Term, 1956. MELROSE REALTY CO., INC., *v.* LOEW'S INCORPORATED ET AL., 352 U. S. 890. Motion for leave to file petition for rehearing denied.

DECEMBER 16, 1957.

Miscellaneous Orders.

No. 11, October Term, 1956. UNITED STATES GYPSUM CO. *v.* NATIONAL GYPSUM CO. ET AL., 352 U. S. 457. The motion of appellant for recall and modification of the judgment is denied without prejudice to the Solicitor General moving to dissolve the three-judge district court. MR. JUSTICE CLARK took no part in the consideration or decision of this motion. *Bruce Bromley, Cranston Spray, Robert C. Keck, John D. Calhoun* and *Hugh Lynch, Jr.* for appellant-movant. *Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston* and *Edward Knuff* for the United States, and *Samuel I. Rosenman, Elmer E. Finck, Seymour D. Lewis, Malcolm A. Hoffmann and Seymour Krieger* for the National Gypsum Co., appellees.

No. 254. COMFY MANUFACTURING CO. ET AL. *v.* UNITED STATES, 355 U. S. 5. The motion of appellants for modification of the judgment is denied. Petition for rehearing denied. *Robert L. Wright* and *Milton M. Gottesman* for appellants-movants. *Solicitor General Rankin* for the United States.

No. 283. CHOW BING KEW *v.* UNITED STATES, 355 U. S. 889. The motion to stay the issuance of the order denying certiorari is denied. *Archibald M. Mull, Jr., Forrest E. Macomber* and *Kenneth G. McGilvray* for petitioner-movant.

Certiorari Granted.

No. 94. BONETTI *v.* BROWNELL, ATTORNEY GENERAL, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *David Rein* and *Joseph Forer* for petitioner. *Solicitor General Ran-*

kin, Warren Olney, III, then Assistant Attorney General, *Beatrice Rosenberg* and *J. F. Bishop* for respondents. Reported below: 99 U. S. App. D. C. 386, 240 F. 2d 624.

No. 363. HOTEL EMPLOYEES UNION, LOCAL No. 255, ET AL. *v.* SAX ENTERPRISES, INC., ET AL.; and

No. 364. HOTEL EMPLOYEES UNION, LOCAL No. 255, ET AL. *v.* LEVY ET AL., DOING BUSINESS AS SHERRY FRONTENAC HOTEL, ET AL. Supreme Court of Florida. Certiorari granted. *Arthur J. Goldberg* and *David E. Feller* for petitioners. Reported below: 93 So. 2d 591, 598.

No. 534. ABBATE ET AL. *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted limited to question 2 presented by the petition for the writ which reads as follows:

"Whether the petitioners were twice placed in jeopardy in violation of the Fifth Amendment to the Constitution of the United States, where the evidence shows that they had been previously convicted in the Courts of the State of Illinois of the crime of conspiracy to destroy the property of the Southern Bell Telephone Company, upon the same facts as were presented in the Courts of the United States, and upon which they were convicted of conspiracy to destroy a communications line operated or controlled by the United States."

Charles A. Bellows for petitioners. *Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 247 F. 2d 410.

No. 221, Misc. KERMAREC *v.* COMPAGNIE GENERALE TRANSATLANTIQUE. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted. *William L. Standard* for petitioner. *George A. Garvey* for respondent. Reported below: 245 F. 2d 175.

No. 76, Misc. GORE *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. Petitioner *pro se*. *Solicitor General Rankin, Warren Olney, III,* then Assistant Attorney General, *Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 100 U. S. App. D. C. 315, 244 F. 2d 763.

Certiorari Denied. (*See also No. 583, ante, p. 270.*)

No. 25. JIMENEZ *v.* BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Lloyd E. McMurray* for petitioner. *Solicitor General Rankin, Warren Olney, III,* then Assistant Attorney General, *Beatrice Rosenberg* and *Isabelle R. Cappello* for respondent. Reported below: 235 F. 2d 922.

No. 569. BLUMENTHAL *v.* REINER ET UX. C. A. 4th Cir. Certiorari denied. *Maurice A. Weinstein* for petitioner. *Francis E. Winslow, Harold D. Cooley* and *Hubert E. May* for respondents. Reported below: 247 F. 2d 461.

No. 570. BIRMINGHAM FIRE INSURANCE CO. OF PENNSYLVANIA *v.* TROPICAL MARINE PRODUCTS, INC. C. A. 5th Cir. Certiorari denied. *Douglas D. Batchelor* and *David W. Dyer* for petitioner. *Wilbur E. Dow, Jr.* for respondent. Reported below: 247 F. 2d 116.

No. 571. MARCELLO *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, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *J. F. Bishop* for respondent.

No. 321. BARBERS UNION OF MEMPHIS, LOCAL No. 36, ET AL. *v.* FLATT. Supreme Court of Tennessee, Middle District. Certiorari denied. *Cecil D. Branstetter* for petitioners. *Robert L. Taylor* and *Newell N. Fowler* for respondent. Reported below: —— Tenn. ——, 304 S. W. 2d 329.

No. 567. MISSISSIPPI RIVER FUEL CORP. *v.* FEDERAL POWER COMMISSION ET AL.; and

No. 568. UNITED GAS PIPE LINE CO. *v.* MISSISSIPPI RIVER FUEL CORP. ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William A. Dougherty, Spencer W. Reeder* and *James Lawrence White* for the Mississippi River Fuel Corporation. *Thomas Fletcher, C. Huffman Lewis* and *Ralph M. Carson* for the United Gas Pipe Line Co., petitioner in No. 568 and respondent in No. 567. *Solicitor General Rankin, Assistant Attorney General Doub, Paul A. Sweeney, Bernard Cedarbaum, Willard W. Gatchell* and *Howard E. Wahrenbrock* for the Federal Power Commission, respondent. Reported below: 102 U. S. App. D. C. 238, 252 F. 2d 619.

No. 573. NEW YORK MAIL & NEWSPAPER TRANSPORTATION CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *John Lord O'Brian* and *Robert L. Randall* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for the United States. Reported below: 139 Ct. Cl. ——, 154 F. Supp. 271.

No. 556. SHEBA BRACELETS, INC., ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Archibald Palmer* for petitioners. *Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 248 F. 2d 134.

No. 65. UNITED STATES EX REL. AVRAMOVICH *v.* LEHMANN, OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari denied. *Henry C. Lavine* for petitioner. *Solicitor General Rankin, Warren Olney, III,* then Assistant Attorney General, *Beatrice Rosenberg* and *Felicia Dubrovsky* for respondent. Reported below: 235 F. 2d 260.

No. 121. NIUKKANEN, ALIAS MACKIE, *v.* BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. C. A. 9th Cir. Certiorari denied. *Reuben Lenske* for petitioner. *Solicitor General Rankin, Warren Olney, III,* then Assistant Attorney General, and *Beatrice Rosenberg* for respondents. Reported below: 241 F. 2d 938.

No. 572. KRANTMAN *v.* LIBERTY LOAN CORP. ET AL. C. A. 7th Cir. Certiorari denied. *Irwin J. Askow* for petitioner. *Frank F. Fowle* for Levy, *Thomas D. Nash, Jr.* for Lichtenstein et al., and *Andrew J. Dallstream, Frederic H. Stafford* and *Albert E. Hallett* for Harris et al., respondents. Reported below: 246 F. 2d 581.

No. 575. L. L. CONSTANTIN & CO. *v.* ARIZONA WESTERN INSURANCE CO. ET AL. C. A. 3d Cir. Certiorari denied. *Myron S. Lehman* and *William A. Consodine* for petitioner. *William Rossmoore* for the Arizona Western Insurance Co., respondent. Reported below: 247 F. 2d 388.

No. 581. MILLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *N. LeVan Haver* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for the United States. Reported below: 246 F. 2d 486.

No. 576. LEONARDO ET UX. *v.* BOARD OF COUNTY COMMISSIONERS OF ST. MARY'S COUNTY, MARYLAND, ET AL. Court of Appeals of Maryland. Certiorari denied. *Hyman Ginsberg* for petitioners. *H. Warren Buckler, Jr.* for respondents. Reported below: 214 Md. 287, 134 A. 2d 284.

No. 580. HARTFORD ACCIDENT & INDEMNITY CO. *v.* LIZZA & SONS, INC., ET AL. C. A. 1st Cir. Certiorari denied. *Frederick M. Kingsbury* for petitioner. *Frank E. A. Sander* for Lizza & Sons, Inc., respondent. Reported below: 247 F. 2d 262.

No. 582. ARTHUR WALTER SEED CO. *v.* MCCLURE, TREASURER OF KNOX COUNTY, INDIANA. Supreme Court of Indiana. Certiorari denied. *James J. Costello, Jr.* for petitioner. *James J. Lewis* and *James W. Funk* for respondent. Reported below: —— Ind. ——, 141 N. E. 2d 847.

No. 584. SMITH *v.* INDEMNITY INSURANCE CO. OF NORTH AMERICA. C. A. 5th Cir. Certiorari denied. *Otis W. Bullock* for petitioner. *Richard H. Switzer* for respondent. Reported below: 245 F. 2d 464.

No. 585. BONNEY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *John J. Nicit* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Melva M. Graney* and *L. W. Post* for respondent. Reported below: 247 F. 2d 237.

No. 590. AMERICAN PIPE & STEEL CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Peyton Ford* and *Alan Y. Cole* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *I. Henry Kutz* for respondent. Reported below: 243 F. 2d 125.

No. 595. Lewis et al., trading as M. G. Lewis & Sons Garage, et al. *v.* State Road Department of Florida et al. Supreme Court of Florida. Certiorari denied. *Claude Pepper* for petitioners. *Ford L. Thompson,* for the Apalachicola-Northern Railroad et al., and *Bryan W. Henry* for the State Road Department of Florida, respondents. Reported below: 95 So. 2d 248.

No. 596. Emerling *v.* United States. C. A. 8th Cir. Certiorari denied. *Michael J. Eberling* and *Ted A. Bollinger, Jr.* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for the United States. Reported below: 248 F. 2d 429.

No. 598. Greenshields et al. *v.* Warren Petroleum Corp. et al. C. A. 10th Cir. Certiorari denied. *Duke Duvall* for petitioners. *Reford Bond, Jr.* for the Great Western Drilling Co. et al., and *Warren M. Sparks* for the Warren Petroleum Corporation, respondents. Reported below: 248 F. 2d 61.

No. 599. Eisenschiml *v.* Fawcett Publications, Inc. C. A. 7th Cir. Certiorari denied. *Elmer Gertz* and *Irwin S. Baskes* for petitioner. *Howard Ellis* and *Don H. Reuben* for respondent. Reported below: 246 F. 2d 598.

No. 600. Noel et al., Executors, *v.* Linea Aeropostal Venezolana. C. A. 2d Cir. Certiorari denied. *Harry Norman Ball* and *Joseph G. Feldman* for petitioners. *William J. Junkerman* for respondent. Reported below: 247 F. 2d 677.

No. 8, Misc. Bush *v.* Ellis, General Manager, Texas Prison System, et al. Court of Criminal Appeals

of Texas. Certiorari denied. Petitioner *pro se*. *Will Wilson*, Attorney General of Texas, and *W. V. Geppert* and *George P. Blackburn*, Assistant Attorneys General, for respondents.

Rehearing Denied. (*See also No. 254, supra.*)

No. 238. KRASNOV ET AL. *v.* UNITED STATES, *ante*, p. 5;

No. 399. NEW ORLEANS INSURANCE EXCHANGE *v.* UNITED STATES, *ante*, p. 22; and

No. 66, Misc. MONTGOMERY *v.* CALIFORNIA, *ante*, p. 872. Petitions for rehearing denied.

No. 445. MCCORKLE, PRINCIPAL KEEPER, NEW JERSEY STATE PRISON, *v.* DEVITA, *ante*, p. 873. Rehearing denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

No. 275, Misc. IN RE LAMKIN, *ante*, p. 59. Rehearing denied. The stay of execution heretofore entered is continued to and including January 20, 1958.

DECEMBER 27, 1957.

Dismissal Under Rule 60.

No. 613. MOON *v.* PENNSYLVANIA. On petition for writ of certiorari to the Supreme Court of Pennsylvania, Eastern District. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Louis C. Glasso* was on the stipulation for petitioner. With him on the petition was *Edward Dumbauld*. *Thomas D. McBride*, Attorney General of Pennsylvania, and *Harry J. Rubin*, Deputy Attorney General, were on the stipulation for respondent. Reported below: 389 Pa. 304, 132 A. 2d 224.

JANUARY 6, 1958.

Miscellaneous Orders.

No. 668. GORE *v.* UNITED STATES. Certiorari, 355 U. S. 903, to the United States Court of Appeals for the District of Columbia Circuit. It is ordered that *Joseph L. Rauh, Jr., Esquire,* of Washington, D. C., a member of the Bar of this Court, be appointed to serve as counsel for the petitioner in this case. It is further ordered that *James H. Heller, Esquire,* of Washington, D. C., a member of the Bar of this Court, be appointed to serve as associate counsel for the petitioner in this case.

No. 2, Original. WISCONSIN ET AL. *v.* ILLINOIS ET AL.;
No. 3, Original. MICHIGAN *v.* ILLINOIS ET AL.; and
No. 4, Original. NEW YORK *v.* ILLINOIS ET AL. Applications having been made for a reopening and amendment or modification of the decree of April 21, 1930 [281 U. S. 696], it is ordered that the defendants be allowed 45 days from the date of filing said applications in which to file a response or responses. *Stewart G. Honeck,* Attorney General, and *Roy G. Tulane,* Assistant Attorney General, for the State of Wisconsin, *Miles Lord,* Attorney General, and *Melvin J. Peterson,* Deputy Attorney General, for the State of Minnesota, *William Saxbe,* Attorney General, and *Robert E. Boyd,* Assistant Attorney General, for the State of Ohio, *Thomas D. McBride,* Attorney General, and *Lois G. Forer,* Deputy Attorney General, for the State of Pennsylvania, *Thomas M. Kavanagh,* Attorney General, *Samuel J. Torina,* Solicitor General, and *Nicholas V. Olds,* Assistant Attorney General, for the State of Michigan, and *Louis J. Lefkowitz,* Attorney General, and *John R. Davison,* Solicitor General, for the State of New York, applicants-complainants.

No. 972, October Term, 1956. McBride *v.* Toledo Terminal Railroad Co., 354 U. S. 517. The motion to recall and clarify the mandate is denied. *C. Richard Grieser* for movant-petitioner. *Robert B. Gosline,* for respondent, opposed the motion.

No. 94. Bonetti *v.* Brownell, Attorney General, et al. Certiorari, 355 U. S. 901, to the United States Court of Appeals for the District of Columbia Circuit; and

No. 348. Societe Internationale Pour Participations Industrielles et Commerciales, S. A., *v.* Brownell, Attorney General, Successor to the Alien Property Custodian, et al. Certiorari, 355 U. S. 812, to the United States Court of Appeals for the District of Columbia Circuit. The motions to substitute William P. Rogers, Attorney General of the United States, as parties respondent in the place and stead of Herbert Brownell, Jr., resigned, are granted.

No. 350. Palermo *v.* Luckenbach Steamship Co., Inc. The motion of respondent to recall and amend the judgment of this Court in this case is granted. It is ordered that the certified copy of the judgment sent to the District Court be recalled and that the order entered in this case on October 21, 1957 [355 U. S. 20], is amended to provide for a remand of the case to the United States Court of Appeals for the Second Circuit.

No. 442. Stinson, Administratrix, *v.* Atlantic Coast Line Railroad Co., *ante,* p. 62. Rehearing denied. Motion of petitioner for modification of judgment also denied. *Joseph S. Lord, III* for petitioner. *Peyton D. Bibb* and *Norman C. Shepard* for respondent. Reported below: 266 Ala. 244, 96 So. 2d 305.

No. 39, Misc. PRITCHARD *v.* GLADDEN, WARDEN; and No. 201, Misc. GILPIN *v.* UNITED STATES. Motions for leave to file petitions for writs of habeas corpus denied.

No. 146, Misc. DANIEL *v.* HALL, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus and prohibition denied.

Probable Jurisdiction Noted.

No. 588. YOUNGSTOWN SHEET & TUBE CO. *v.* BOWERS, TAX COMMISSIONER OF OHIO; and

No. 589. ALLIED STORES OF OHIO, INC., *v.* BOWERS, TAX COMMISSIONER OF OHIO. Appeals from the Supreme Court of Ohio. Probable jurisdiction noted. *Carlton S. Dargusch, Sr.* for appellants. *William Saxbe,* Attorney General of Ohio, and *John M. Tobin,* Assistant Attorney General, for appellee. Reported below: 166 Ohio St. 122, 140 N. E. 2d 313.

No. 606. NORTHWESTERN STATES PORTLAND CEMENT CO. *v.* MINNESOTA. Appeal from the Supreme Court of Minnesota. Probable jurisdiction noted. *Joseph A. Maun* and *Earl Smith* for appellant. *Miles Lord,* Attorney General of Minnesota, *Perry Voldness,* Assistant Attorney General, and *Arthur C. Roemer,* Special Assistant Attorney General, for respondent. Reported below: 250 Minn. 32, 84 N. W. 2d 373.

Certiorari Granted.

No. 621. DAYTON *v.* DULLES, SECRETARY OF STATE. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Harry I. Rand* for petitioner. *Solicitor General Rankin* for respondent. Reported below: 102 U. S. App. D. C. 372, 254 F. 2d 71.

Certiorari Denied. (*See also No. 578 and No. 262, Misc., ante, p. 285.*)

No. 432. EATON *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se. John M. Dalton,* Attorney General of Missouri, and *Aubrey R. Hammett, Jr.,* Assistant Attorney General, for respondent. Reported below: 302 S. W. 2d 866.

No. 586. RYSTAD *v.* BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Norman Leonard* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *Felicia Dubrovsky* for respondent. Reported below: 246 F. 2d 246.

No. 597. BALLF *v.* PUBLIC WELFARE DEPARTMENT OF THE CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL. District Court of Appeal of California, First Appellate District. Certiorari denied. Petitioner *pro se. Dion R. Holm* for respondents. Reported below: 151 Cal. App. 2d 784, 312 P. 2d 360.

No. 602. CITIES SERVICE CO. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. *Bruce Bromley, Joseph L. Weiner, John D. Calhoun* and *Richard DeY. Manning* for petitioner. *Solicitor General Rankin, Thomas G. Meeker, Joseph B. Levin* and *Soloman Freedman* for the Securities and Exchange Commission, *Percival E. Jackson* for the Pennroad Corporation et al., and *Gerald May* for Hearn et al., respondents. Reported below: 247 F. 2d 646.

No. 607. MILLER, ADMINISTRATRIX, *v.* FARRELL LINES, INC. C. A. 2d Cir. Certiorari denied. *Herbert J. Kaplow* for petitioner. *George W. Sullivan* for respondent. Reported below: 247 F. 2d 503.

No. 603. PURDOM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Joseph P. Jenkins* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for the United States. Reported below: 249 F. 2d 822.

No. 608. ROPER ET UX. *v.* SOUTH CAROLINA TAX COMMISSION ET AL. Supreme Court of South Carolina. Certiorari denied. *J. D. Todd, Jr.* for petitioners. *T. C. Callison,* Attorney General of South Carolina, and *James M. Windham,* Assistant Attorney General, for respondents. Reported below: 231 S. C. 587, 99 S. E. 2d 377.

No. 630. CENTRAL TRANSPORTATION CO. *v.* ATKINS, COMMISSIONER OF FINANCE AND TAXATION OF TENNESSEE. Supreme Court of Tennessee, Middle Division. Certiorari denied. *D. L. Lansden* for petitioner. *George F. McCanless,* Attorney General of Tennessee, *Allison B. Humphreys,* Solicitor General, and *Milton P. Rice,* Assistant Attorney General, for respondent. Reported below: —— Tenn. ——, 305 S. W. 2d 940.

No. 659. DAIGLE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William H. Collins* for petitioner. *Solicitor General Rankin* for the United States. Reported below: 101 U. S. App. D. C. 286, 248 F. 2d 608.

No. 159, Misc. SAUNDERS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *J. Emmett McKenzie* for petitioner. *Solicitor General Rankin, Warren Olney, III,* then Assistant Attorney General, and *Beatrice Rosenberg* for the United States. Reported below: 101 U. S. App. D. C. 98, 247 F. 2d 89.

No. 601. North American Aviation, Inc., *v.* Hughes et al. C. A. 9th Cir. Certiorari denied. *Joe Crider, Jr.* for petitioner. *Albert Lee Stephens, Jr.* and *Glendon Tremaine* for respondents. Reported below: 247 F. 2d 517.

No. 605. Gould, doing business as Stay-Rite Supply Co., et al. *v.* Fisch et al. C. A. 3d Cir. Certiorari denied. *Ralph M. Watson* for petitioners. *George B. Finnegan, Jr.* for respondents. Reported below: 246 F. 2d 5.

No. 622. Brotherhood of Railroad Trainmen, Lodge No. 514, et al. *v.* Norfolk & Portsmouth Belt Line Railroad Co. C. A. 4th Cir. Certiorari denied. *Robert R. MacMillan, Wayland K. Sullivan, Russell B. Day* and *Harold C. Heiss* for petitioners. *Thomas H. Willcox* for respondent. Reported below: 248 F. 2d 34.

No. 624. Towers et al. *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. *Sydney R. Rubin* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, I. Henry Kutz* and *L. W. Post* for respondent. Reported below: 247 F. 2d 233, 237.

No. 638. Afro-American Company *v.* Owen. Supreme Court of Appeals of Virginia. Certiorari denied. *Harry O. Levin, Marshall A. Levin, James A. Cobb* and *George E. C. Hayes* for petitioner. *Geo. E. Allen* for respondent.

No. 640. Briggs & Stratton Corp. *v.* Clinton Machine Co., Inc. C. A. 8th Cir. Certiorari denied. *Ira Milton Jones* for petitioner. *Edwin J. Balluff* for respondent. Reported below: 247 F. 2d 397.

No. 615. Nishida et al., doing business as Hilo Dairy Company of Kauai, et al. *v.* E. I. du Pont de Nemours & Co. C. A. 5th Cir. Certiorari denied. Mr. Justice Harlan took no part in the consideration or decision of this application. *Roger E. Brooks* and *C. Nils Tavares* for petitioners. *Earl T. Thomas* and *Carl E. Geuther* for respondent. Reported below: 245 F. 2d 768.

No. 612. Fay, Warden, *v.* United States ex rel. Marcial, alias Johnson. Motion of respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Louis J. Lefkowitz,* Attorney General of New York, *John R. Davison,* Solicitor General, *Samuel A. Hirshowitz,* First Assistant Attorney General, *Michael Freyberg,* Assistant Attorney General, and *George K. Bernstein,* Deputy Assistant Attorney General, for petitioner. Respondent *pro se.* Reported below: 247 F. 2d 662.

No. 127, Misc. Frost *v.* U. S. Marshal for Southern District of California. C. A. 9th Cir. Certiorari denied. *Rayfield Lundy* for petitioner. *Solicitor General Rankin, Warren Olney, III,* then Assistant Attorney General, and *Beatrice Rosenberg* for respondent.

No. 132, Misc. Hicks *v.* Mayo, Prison Custodian. Supreme Court of Florida. Certiorari denied. Petitioner *pro se. Richard W. Ervin,* Attorney General of Florida, and *Odis M. Henderson,* Special Assistant Attorney General, for respondent.

No. 135, Misc. Goodchild *v.* Burke, Warden. C. A. 7th Cir. Certiorari denied. *Harold C. Havighurst* for petitioner. *Stewart G. Honeck,* Attorney General of Wisconsin, and *William A. Platz,* Assistant Attorney General, for respondent. Reported below: 245 F. 2d 88.

No. 138, Misc. CHAPMAN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 139, Misc. DANIELS *v.* TUCKER, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 141, Misc. MCALLISTER *v.* PINTO, SUPERINTENDENT, NEW JERSEY STATE PRISON FARM. C. A. 3d Cir. Certiorari denied.

No. 150, Misc. HULLOM *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 152, Misc. HYDE *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied. Petitioner *pro se*. *Edward S. Silver* and *William I. Siegel* for respondent. Reported below: 3 App. Div. 2d 854, 161 N. Y. S. 2d 808.

No. 171, Misc. RODRIGUEZ *v.* JACKSON, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 246 F. 2d 730.

No. 185, Misc. WOOD *v.* GRAHAM, WARDEN. Supreme Court of Utah. Certiorari denied.

No. 187, Misc. AMAYA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioner. *Solicitor General Rankin, Warren Olney, III,* then Assistant Attorney General, and *Beatrice Rosenberg* for the United States. Reported below: 247 F. 2d 947.

No. 191, Misc. WILSON *v.* HAND, WARDEN. Supreme Court of Kansas. Certiorari denied. Reported below: 181 Kan. 483, 311 P. 2d 1009.

No. 198, Misc. MILLWOOD *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 204, Misc. DILLARD *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 206, Misc. DUNKLE *v.* CAVELL, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 208, Misc. CAMERON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 247 F. 2d 775.

No. 210, Misc. DE NORMAND *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for the United States. Reported below: 245 F. 2d 876.

No. 213, Misc. YOUNG ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioners *pro se.* *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for the United States. Reported below: 246 F. 2d 901.

No. 222, Misc. MICHEL *v.* INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se.* *Everett A. Corten* for the Industrial Accident Commission of California, and *Loton Wells* for the State Compensation Insurance Fund, respondents.

No. 245, Misc. COAKLEY *v.* TEXAS ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 229, Misc. PETTWAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 245 F. 2d 240.

No. 244, Misc. SAVAGE *v.* MINNESOTA. Supreme Court of Minnesota. Certiorari denied. Reported below: 250 Minn. 370, 84 N. W. 2d 640.

No. 246, Misc. KOFFEL *v.* MYERS, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 250, Misc. WILBURN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Benj. J. Jacobson* for respondent.

No. 253, Misc. DICKENSON *v.* DAVIS, COMMANDANT, U. S. DISCIPLINARY BARRACKS. C. A. 10th Cir. Certiorari denied. *Guy Emery* and *Harry E. Wood* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg, Cecil L. Forinash* and *Peter S. Wondolowski* for respondent. Reported below: 245 F. 2d 317.

No. 255, Misc. CHERNICK *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Reported below: 303 S. W. 2d 595.

No. 291, Misc. AGNEW *v.* GORDON ET AL. Appellate Department of the Superior Court of California, Los Angeles County. Certiorari denied.

No. 289, Misc. LANZETTA *v.* BUCHKOE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 258, Misc. ETHERTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for the United States. Reported below: 249 F. 2d 410.

No. 260, Misc. GIROUX *v.* PROVIDENCE SUPERIOR COURT. Supreme Court of Rhode Island. Certiorari denied. Reported below: 85 R. I. —, 133 A. 2d 636.

No. 264, Misc. MAYS *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Reported below: — Ind. —, 143 N. E. 2d 568.

No. 265, Misc. ANDERSON *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Reported below: — Ind. —, 143 N. E. 2d 568.

No. 288, Misc. AGNEW *v.* SHAIN, DOING BUSINESS AS CREDITORS COLLECTION SERVICE OF LOS ANGELES. Appellate Department of the Superior Court of California, Los Angeles County. Certiorari denied.

No. 292, Misc. SOVIERO *v.* KENTON, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 294, Misc. JOHNSON *v.* CAVELL, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 377, Misc. BAILEY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for the United States. Reported below: 101 U. S. App. D. C. 236, 248 F. 2d 558.

No. 397, Misc. La Marca *v.* New York. Court of Appeals of New York. Certiorari denied. *Joseph Lonardo* and *Philip Huntington* for petitioner. Reported below: 3 N. Y. 2d 452, 933, 144 N. E. 2d 420, 145 N. E. 2d 892.

No. 406, Misc. Meade *v.* Florida. Supreme Court of Florida. Certiorari denied. Reported below: 96 So. 2d 776.

No. 241, Misc. House *v.* Mayo, Prison Custodian. C. A. 10th Cir. Certiorari denied.

Rehearing Denied. (*See also No. 442, ante, p. 910.*)

No. 413. Donohue et al. *v.* Village of Fox Point, *ante*, p. 867;

No. 424. Bourgeois *v.* Mercantile National Bank of Miami Beach, Florida, *ante*, p. 869;

No. 425. City of Dallas, Texas, *v.* Tubbs Manufacturing Co., Inc., et al., *ante*, p. 868;

Nos. 440 and 441. Sobell *v.* United States, *ante*, p. 873;

No. 443. State Board of Naturopathic Examiners et al. *v.* Wilson, Attorney General, et al., *ante*, p. 870;

No. 479. Merchants National Bank & Trust Co. of Indianapolis *v.* United States et al., *ante*, p. 881; and

No. 499. Ohio Farmers Insurance Co. et al. *v.* Lantz et al., *ante*, p. 883. Petitions for rehearing denied.

No. 501. Wood et al. *v.* Gas Service Co., *ante*, p. 885. Rehearing denied. Mr. Justice Whittaker took no part in the consideration or decision of this application.

No. 457. First Iowa Hydro Electric Cooperative et al. *v.* Iowa-Illinois Gas & Electric Co. et al., *ante*, p. 871. Motion to dispense with printing of the petition for rehearing granted. Rehearing denied.

January 7, 1958.

Order.

The Court appoints Mr. Warren Olney, III, of California, to be Director of the Administrative Office of the United States Courts, pursuant to the provisions of § 601 of Title 28 of the United States Code.

January 13, 1958.

Miscellaneous Orders.

No. 105. Leng May Ma *v.* Barber, District Director, Immigration and Naturalization Service. Certiorari, 353 U. S. 981, to the United States Court of Appeals for the Ninth Circuit;

No. 396. Brownell, Attorney General, *v.* Quan et al. Certiorari, 355 U. S. 861, to the United States Court of Appeals for the District of Columbia Circuit; and

No. 655. Dong Wing Ott et al. *v.* Shaughnessy, District Director, Immigration and Naturalization Service. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. The motion to hold in abeyance the filing of briefs in these cases is granted. *Solicitor General Rankin* for petitioner in No. 396 and respondents in Nos. 105 and 655. Reported below: No. 105, 241 F. 2d 85; No. 396, 101 U. S. App. D. C. 229, 248 F. 2d 89; No. 655, 245 F. 2d 875, 247 F. 2d 769.

No. 331, Misc. PINATARO *v.* APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT; and

No. 351, Misc. PINATARO *v.* APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FOURTH JUDICIAL DEPARTMENT. Motions for leave to file petitions for writs of mandamus denied.

Certiorari Granted. (*See also Nos. 290 and 587, ante, pp. 371, 372.*)

No. 633. LEEDOM ET AL., CONSTITUTING THE NATIONAL LABOR RELATIONS BOARD, *v.* KYNE. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Rankin, Jerome D. Fenton, Stephen Leonard, Dominick L. Manoli* and *Norton J. Come* for petitioners. *Bernard Dunau* for respondent. Reported below: 101 U. S. App. D. C. 398, 249 F. 2d 490.

Certiorari Denied.

No. 469. MACRIS *v.* SOCIEDAD MARITIMA SAN NICHOLAS, S. A., ET AL. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *John H. Dougherty* for respondents. *Solicitor General Rankin, Assistant Attorney General Doub, Paul A. Sweeney, Leavenworth Colby* and *Robert S. Green* filed a memorandum for the United States, as *amicus curiae,* suggesting that the petition for writ of certiorari be denied. Reported below: 245 F. 2d 708.

No. 523. BIGGS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Paul W. Walter* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph F. Goetten* for the United States. Reported below: 246 F. 2d 40.

No. 604. RIETMANN *v.* BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Joseph S. Hertogs* and *Arthur J. Phelan* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for respondent. Reported below: 248 F. 2d 118.

No. 625. ESTATE OF MCINTOSH ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Robert M. Benjamin* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *Morton K. Rothschild* for respondent. Reported below: 248 F. 2d 181.

No. 635. UNITED STATES EX REL. SHOSHONE INDIAN TRIBE ET AL. *v.* SEATON, SECRETARY OF THE INTERIOR. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Marvin J. Sonosky* for the Shoshone Indian Tribe et al., and *Glen A. Wilkinson* for the Arapahoe Indian Tribe et al., petitioners. With them on the petition was *John W. Cragun* of counsel. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for respondent. Reported below: 101 U. S. App. D. C. 234, 248 F. 2d 154.

No. 646. MOYLAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Thomas J. Gately* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 247 F. 2d 623.

No. 648. PAYNE ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Claude I. Bakewell* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *Davis W. Morton, Jr.* for the United States. Reported below: 247 F. 2d 481.

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No. 656. Sheet Metal Workers International Association et al. *v.* Sheet Metal Contractors Association of San Francisco et al. C. A. 9th Cir. Certiorari denied. *Clarence M. Mulholland* for petitioners. *George O. Bahrs* for respondents. Reported below: 248 F. 2d 307.

No. 577. Carmen *v.* Dickson, Warden. Petition for writ of certiorari to the Supreme Court of California denied without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court. *Mason A. Bailey* and *George T. Davis* for petitioner. Reported below: 48 Cal. 2d 851, 313 P. 2d 817.

No. 592. Klein *v.* United States;

No. 593. Haas *v.* United States; and

No. 594. Alprin *v.* United States. C. A. 2d Cir. Certiorari denied. Mr. Justice Harlan took no part in the consideration or decision of these applications. *Theodore Kiendl, William R. Meagher, John A. Reed* and *Philip C. Potter, Jr.* for petitioner in No. 592. *Louis Bender* for petitioner in No. 593. *F. Joseph Donohue, Abraham S. Goldstein* and *Michael Kaminsky* for petitioner in No. 594. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph F. Goetten* for the United States. Reported below: 247 F. 2d 908.

No. 212, Misc. Roker *v.* United States. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for the United States.

No. 240, Misc. Luzzi *v.* Banmiller, Warden. C. A. 3d Cir. Certiorari denied. Reported below: 248 F. 2d 303.

No. 82, Misc. McBride *v.* Culver, State Prison Custodian. Supreme Court of Florida. Certiorari denied. Petitioner *pro se*. *Richard W. Ervin,* Attorney General of Florida, *David U. Tumin,* Assistant Attorney General, and *Edward S. Jaffry,* Special Assistant Attorney General, for respondent.

No. 266, Misc. Kimbrough *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

Rehearing Denied.

No. 30. Rathbun *v.* United States, *ante,* p. 107;

No. 65. United States ex rel. Avramovich *v.* Lehmann, Officer in Charge, Immigration and Naturalization Service, *ante,* p. 905. Petitions for rehearing denied.

January 20, 1958.

Certiorari Granted. (*See also No. 65, Misc., and No. 462, ante, pp. 392, 393.*)

No. 645. Eagle Lion Studios, Inc., et al. *v.* Loew's Inc. et al. C. A. 2d Cir. Certiorari granted. *William L. McGovern, Norman Diamond, Robert L. Wright* and *Seymour Krieger* for petitioners. *S. Hazard Gillespie, Jr.* for Loew's Incorporated, and *Arthur F. Driscoll, Edward C. Raftery* and *George A. Raftery* for RKO Theatres, Inc., et al., respondents. Reported below: 248 F. 2d 438.

No. 652. Hawkins *v.* United States. C. A. 10th Cir. Certiorari granted. *Kenneth R. King* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 249 F. 2d 735.

Certiorari Denied.

No. 620. UNITED STATES *v.* SUTER. Court of Claims. Certiorari denied. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Sondra K. Slade* for the United States. *Guy Emery* and *Harry Wood* for respondent. Reported below: 139 Ct. Cl. —, 153 F. Supp. 367.

No. 632. TOLL *v.* GWYNNE ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Oliver W. Toll, pro se. Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for respondents. Reported below: 101 U. S. App. D. C. 175, 247 F. 2d 581.

No. 653. EDGEWOOD AMERICAN LEGION POST #448, INC., *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *John J. Rochford* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Lee A. Jackson* for the United States. Reported below: 246 F. 2d 1.

No. 654. HOLLIDAY ET AL. *v.* LONG MANUFACTURING CO., INC., ET AL. C. A. 4th Cir. Certiorari denied. *Robert F. Davis* and *John H. Lewis, Jr.* for petitioners. *A. Yates Dowell* and *A. Yates Dowell, Jr.* for respondents. Reported below: 246 F. 2d 95.

No. 658. PARIS *v.* MURFF, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. *Abraham Kaufman* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for respondent. Reported below: 247 F. 2d 1.

No. 647. Las Palmas Food Co., Inc., et al. *v.* Ramirez & Feraud Chili Co. C. A. 9th Cir. Certiorari denied. *Bernard Kriegel* for petitioners. *Ford W. Harris, Jr.* for respondent. Reported below: 245 F. 2d 874.

No. 663. Colonial Life & Accident Insurance Co. *v.* Wilson. C. A. 5th Cir. Certiorari denied. *Sam Rice Baker* and *S. Augustus Black* for petitioner. *Truman Hobbs* for respondent. Reported below: 246 F. 2d 922.

No. 62, Misc. Barnes *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Warren Olney, III,* then Assistant Attorney General, *Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

No. 113, Misc. Wyatt *v.* Smyth, Superintendent, Virginia State Penitentiary. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se*. *Kenneth C. Patty,* Attorney General of Virginia, and *Thomas M. Miller,* Assistant Attorney General, for respondent.

No. 372, Misc. Thomas *v.* Davis, Commandant, U. S. Disciplinary Barracks. C. A. 10th Cir. Certiorari denied. *Thomas Homer Davis* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for respondent. Reported below: 249 F. 2d 232.

Rehearing Denied.

No. 117, Misc. Burwell *v.* Teets, Warden, *ante,* p. 896. Petition for rehearing as amended by letter of December 30, 1957, denied.

No. 397. LOVE *v.* NEWBURY, *ante,* p. 889;

No. 447. BLASKI ET AL. *v.* DAVIDSON, U. S. DISTRICT JUDGE, ET AL., *ante,* p. 872;

No. 560. EASTER *v.* GATES, SECRETARY OF THE NAVY, *ante,* p. 895;

No. 116, Misc. ROGERS *v.* TEETS, WARDEN, *ante,* p. 896; and

No. 195, Misc. RHEIM *v.* MURPHY, WARDEN, *ante,* p. 898. Petitions for rehearing denied.

JANUARY 27, 1958.

Miscellaneous Orders.

No. 655. DONG WING OTT ET AL. *v.* SHAUGHNESSY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. The motion to substitute John L. Murff as party respondent in the place and stead of Edward J. Shaughnessy, retired, is granted. *Elmer Fried* was on the motion for petitioners. Reported below: 245 F. 2d 875, 247 F. 2d 769.

No. 84, Misc. LOWERY *v.* MURPHY, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se. Louis J. Lefkowitz,* Attorney General of New York, and *William C. Robbins,* Assistant Attorney General, for respondent.

No. 314, Misc. HENRY *v.* ELLIS, DIRECTOR, TEXAS PRISON SYSTEM;

No. 316, Misc. FRIERSON *v.* LOONEY, WARDEN;

No. 317, Misc. JACKSON *v.* STEINER, WARDEN; and

No. 321, Misc. CAMMARATA *v.* BANNAN, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 230, Misc. CHEEKS *v.* MARYLAND. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se.* *C. Ferdinand Sybert,* Attorney General of Maryland, and *James H. Norris, Jr.,* Special Assistant Attorney General, for respondent.

No. 475, Misc. REESE *v.* DICKSON, WARDEN. On petition for writ of certiorari to the Supreme Court of California. Application for stay referred to the entire Court by MR. JUSTICE DOUGLAS denied. Petition for writ of certiorari also denied.

Probable Jurisdiction Noted.

No. 628. FEDERAL HOUSING ADMINISTRATION *v.* THE DARLINGTON, INC. Appeal from the United States District Court for the Eastern District of South Carolina. Probable jurisdiction noted. *Solicitor General Rankin, Assistant Attorney General Doub, Paul A. Sweeney* and *Herman Marcuse* for appellant. *J. C. Long, W. Turner Logan* and *Herman H. Higgins, Jr.* for appellee. Reported below: 154 F. Supp. 411.

Certiorari Granted. (*See also No. 639, ante, p. 424.*)

No. 684. LEWIS ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari granted. *William M. Farrer* for Lewis et al., and *Alva C. Baird* for Loera et al., petitioners. *Solicitor General Rankin* and *Jerome D. Fenton* for respondent. Reported below: 249 F. 2d 832.

Certiorari Denied. (*See also Misc. Nos. 230 and 475, supra.*)

No. 674. KREGGER *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 449. SHELL OIL CO. *v.* FEDERAL POWER COMMISSION. C. A. 5th Cir. Certiorari denied. *William F. Kenney, R. H. Whilden* and *David T. Searls* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter, Willard W. Gatchell, Howard E. Wahrenbrock* and *Robert L. Russell* for respondent. Reported below: 247 F. 2d 900.

No. 459. HUMBLE OIL & REFINING CO. *v.* FEDERAL POWER COMMISSION. C. A. 5th Cir. Certiorari denied. *Carl Illig, William H. Holloway, William J. Merrill, Bernard A. Foster, Jr.* and *Nelson Jones* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter, Willard W. Gatchell, Howard E. Wahrenbrock* and *Robert L. Russell* for respondent. Reported below: 247 F. 2d 903.

No. 642. CINCINNATI GAS & ELECTRIC CO. *v.* FEDERAL POWER COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Walter E. Beckjord* for petitioner. *Solicitor General Rankin, Asistant Attorney General Doub, Paul A. Sweeney, Robert S. Green, Willard W. Gatchell* and *Howard E. Wahrenbrock* for the Federal Power Commission, *E. H. Laylin* and *John Peyton Randolph* for the Ohio Fuel Gas Co., and *Robert U. Hastings, Jr., Julian de Bruyn Kops* and *Roy D. Boucher* for the City of Lancaster, Ohio, respondents. Reported below: 101 U. S. App. D. C. 150, 247 F. 2d 556.

No. 657. BEDDOW *v.* ALABAMA. Court of Appeals of Alabama. Certiorari denied. *George Trawick* for petitioner. *John Patterson,* Attorney General of Alabama, and *Edmon L. Rinehart,* Assistant Attorney General, for respondent. Reported below: 39 Ala. App. ——, 96 So. 2d 175.

No. 644. SKENDER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for the United States. Reported below: 248 F. 2d 92.

No. 661. MAROY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Charles B. Evins* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 248 F. 2d 663.

No. 666. HEIDMAN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Julius L. Sherwin* and *Theodore R. Sherwin* for petitioner. Reported below: 11 Ill. 2d 501, 144 N. E. 2d 580.

No. 667. LITITZ MUTUAL INSURANCE CO. ET AL. *v.* BARNES. C. A. 5th Cir. Certiorari denied. *Hugh A. Locke* for petitioners. *Hugh A. Lloyd* and *W. W. Dinning* for respondent. Reported below: 248 F. 2d 241.

No. 671. SCHNEIDER, DOING BUSINESS AS DAVE SCHNEIDER WHOLESALE JEWELRY, *v.* CENTENNIAL INSURANCE CO. C. A. 9th Cir. Certiorari denied. *Forrest A. Betts* and *John A. Loomis* for petitioner. *George H. Hauerken* for respondent. Reported below: 247 F. 2d 491.

No. 672. MAGNESS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Jas. W. Arnold* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott* for respondent. Reported below: 247 F. 2d 740.

No. 665. A. H. BULL STEAMSHIP CO. *v.* SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, AFL–CIO, ET AL. C. A. 2d Cir. Certiorari denied. *James V. Hayes, Theodore S. Hope* and *Sidney P. Howell, Jr.* for petitioner. *Seymour W. Miller* for the Seafarers' International Union of North America, Atlantic and Gulf District, AFL–CIO, *Lee Pressman* for the National Marine Engineers' Beneficial Association, AFL–CIO, and *Marvin Schwartz* for the International Organization of Masters, Mates and Pilots, Inc., AFL–CIO, respondents. Reported below: 250 F. 2d 326.

No. 673. MINNESOTA MINING & MANUFACTURING CO. *v.* SEARS, ROEBUCK & CO. ET AL. C. A. 4th Cir. Certiorari denied. *Lawrence C. Kingsland, Estill E. Ezell, Harold J. Kinney, M. K. Hobbs* and *Welch Jordan* for petitioner. *Thornton H. Brooks* and *Hector M. Holmes* for respondents. Reported below: 249 F. 2d 66.

No. 687. MURPHY AUTO PARTS CO., INC., *v.* BALL ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *R. Sidney Johnson* for petitioner. *Albert J. Ahern, Jr.* and *James J. Laughlin* for respondents. Reported below: 101 U. S. App. D. C. 416, 249 F. 2d 508.

No. 724. LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS ET AL. *v.* MCCARROLL ET AL., DOING BUSINESS AS MCCARROLL & HALL CONSTRUCTION CO. Supreme Court of California. Certiorari denied. *Charles P. Scully* for petitioners. *William M. Farrer* for respondents. Reported below: 49 Cal. 2d 45, 315 P. 2d 322.

No. 302, Misc. MURPHY *v.* NEW YORK. County Court of Kings County, New York. Certiorari denied.

No. 148, Misc. SMITH *v.* STEELE ET AL. Court of Appeals of Tennessee and Supreme Court of Tennessee, Western District. Certiorari denied. *Nell Sanders Aspero* for petitioner. *Roane Waring* for respondents.

No. 167, Misc. PENNSYLVANIA EX REL. SIMCOX *v.* JOHNSTON, WARDEN. Superior Court of Pennsylvania. Certiorari denied. Reported below: 182 Pa. Super. 407, 127 A. 2d 790.

No. 203, Misc. LINDQUIST *v.* TOWLE ET AL. Supreme Court of Nebraska. Certiorari denied. Reported below: 164 Neb. 524, 82 N. W. 2d 631.

No. 205, Misc. SWAIN, ADMINISTRATRIX, *v.* MISSISSIPPI VALLEY BARGE LINE CO. C. A. 3d Cir. Certiorari denied. *Louis C. Glasso* for petitioner. Reported below: 244 F. 2d 821.

No. 214, Misc. DUSHON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *George B. Grigsby* and *Harold J. Butcher* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Paul A. Sweeney* and *Herman Marcuse* for the United States. Reported below: 243 F. 2d 451.

No. 215, Misc. MACCURDY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *J. B. Hodges* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Paul A. Sweeney* for the United States. Reported below: 246 F. 2d 67.

No. 227, Misc. COBB *v.* CAVELL, WARDEN. Superior Court of Pennsylvania. Certiorari denied. Petitioner *pro se. Victor H. Blanc* and *James N. Lafferty* for respondent.

No. 237, Misc. CONNELLY *v.* BALKCOM, WARDEN. Supreme Court of Georgia. Certiorari denied. Petitioner *pro se.* *Eugene Cook,* Attorney General of Georgia, and *E. Freeman Leverett,* Assistant Attorney General, for respondent. Reported below: 213 Ga. 491, 99 S. E. 2d 817.

No. 257, Misc. GAMEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 263, Misc. SHEPHERD *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 298, Misc. HERGE *v.* BANMILLER, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 310, Misc. COLLINS *v.* KING, SUPERINTENDENT, CALIFORNIA MEDICAL FACILITY. C. A. 9th Cir. Certiorari denied.

No. 319, Misc. BOWLAND *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. *John H. Gately* for petitioner. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John W. Patterson* and *John B. Barnard, Jr.,* Assistant Attorneys General, for respondent. Reported below: 136 Colo. —, 314 P. 2d 685.

No. 466, Misc. TIPTON *v.* DICKSON, WARDEN, ET AL. Supreme Court of California. Certiorari denied. Reported below: 48 Cal. 2d 389, 309 P. 2d 813.

No. 303, Misc. Di Silvestro *v.* United States Veterans Administration. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for respondent.

No. 306, Misc. Tubbs *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 249 F. 2d 37.

No. 313, Misc. Dunbar *v.* McNeill, Superintendent, Matteawan State Hospital. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 318, Misc. Ryan *v.* Randolph, Warden. Circuit Court of Saline County, Illinois. Certiorari denied.

No. 320, Misc. McIntosh *v.* Looney, Warden. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *Julia P. Cooper* for respondent. Reported below: 249 F. 2d 62.

No. 322, Misc. Harris *v.* Buchkoe, Warden. Supreme Court of Michigan. Certiorari denied.

No. 323, Misc. Boyd *v.* Murphy, Warden. C. A. 2d Cir. Certiorari denied.

No. 324, Misc. Shannon *v.* Michigan. Supreme Court of Michigan. Certiorari denied.

No. 326, Misc. Kivette *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 327, Misc. Sabo *v.* Department of Public Safety of Illinois et al. Supreme Court of Illinois. Certiorari denied.

No. 328, Misc. McKeag *v.* Illinois. Circuit Court of Will County, Illinois. Certiorari denied.

No. 329, Misc. Jones *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 332, Misc. Atkins *v.* Ellis, Director, Texas Department of Corrections. Court of Criminal Appeals of Texas. Certiorari denied.

No. 333, Misc. Collinge *v.* New York. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Reported below: 4 App. Div. 2d 827, 164 N. Y. S. 2d 990.

No. 337, Misc. Collins *v.* Pennsylvania ex rel. Williams. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *David H. Kubert* for petitioner.

No. 340, Misc. Thomas *v.* United States. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 249 F. 2d 429.

No. 486, Misc. White *v.* Texas. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: 165 Tex. Cr. R. —, 306 S. W. 2d 903.

Rehearing Denied.

No. 336, October Term, 1950. Dennis et al. *v.* United States, 341 U. S. 494. The motion of Henry Winston and Gilbert Green for leave to file a second petition for rehearing is denied. Mr. Justice Clark took no part in the consideration or decision of this motion.

No. 47. LAMBERT *v.* CALIFORNIA, *ante*, p. 225. Petition for rehearing and/or modification of the opinion denied.

FEBRUARY 3, 1958.

Miscellaneous Orders.

No. 143. KLIG *v.* BROWNELL, ATTORNEY GENERAL. Certiorari, 355 U. S. 809, to the United States Court of Appeals for the District of Columbia Circuit. The motion to substitute William P. Rogers, present Attorney General of the United States, as the party respondent in the place and stead of Herbert Brownell, Jr., resigned, is granted. *Jack Wasserman* and *David Carliner* were on the motion for petitioner. Reported below: 100 U. S. App. D. C. 294, 244 F. 2d 742.

No. 396. BROWNELL, ATTORNEY GENERAL, *v.* QUAN ET AL. Certiorari, 355 U. S. 861, to the United States Court of Appeals for the District of Columbia Circuit. The motion to substitute William P. Rogers, present Attorney General of the United States, as the party petitioner in the place and stead of Herbert Brownell, Jr., resigned, is granted. *Solicitor General Rankin* was on the motion for petitioner. Reported below: 101 U. S. App. D. C. 229, 248 F. 2d 89.

Probable Jurisdiction Noted.

No. 692. GUERLAIN, INC., *v.* UNITED STATES. Appeal from the United States District Court for the Southern District of New York. Probable jurisdiction noted. *Chauncey B. Garver* and *Charles C. Parlin, Jr.* for appellant. *Solicitor General Rankin* for the United States. Reported below: 155 F. Supp. 77.

No. 636. American Trucking Associations, Inc., et al. *v.* Frisco Transportation Co.;

No. 637. Railway Labor Executives' Association et al. *v.* Frisco Transportation Co.; and

No. 651. Interstate Commerce Commission *v.* Frisco Transportation Co. Appeals from the United States District Court for the Eastern District of Missouri. Probable jurisdiction noted. *Gregory M. Rebman, B. W. LaTourette, Wentworth E. Griffin, Peter T. Beardsley* and *William J. O'Brien, Jr.* for appellants in No. 636. *Carroll J. Donohue, Clarence M. Mulholland, Edward J. Hickey, Jr.* and *James L. Highsaw, Jr.* for the Railway Labor Executives' Association et al., appellants in No. 637. *Robert W. Ginnane* and *Charlie H. Johns, Jr.* for appellant in No. 651. *James L. Homire, John E. McCullough, Alvin J. Baumann, Ernest D. Grinnell, Jr.* and *Bernard G. Ostmann* for appellee. Reported below: 153 F. Supp. 572.

Certiorari Granted.

No. 691. United Gas Pipe Line Co. *v.* Memphis Light, Gas and Water Division et al.;

No. 694. Federal Power Commission *v.* Memphis Light, Gas and Water Division et al.; and

No. 695. Texas Gas Transmission Corp. et al. *v.* Memphis Light, Gas and Water Division et al. Motion in Nos. 691, 694 and 695 for leave to file brief of the Ohio Fuel Gas Co. et al., as *amici curiae,* denied. Motions in No. 694 for leave to file brief and reply brief of Natural Gas Pipeline Co. of America et al., as *amici curiae,* denied. Petitions for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted. *Ralph M. Carson, Thomas Fletcher* and *C. Huffman Lewis* for petitioner in No. 691. *Solicitor General Rankin, Assistant Attorney General Doub,*

Paul A. Sweeney, Bernard Cedarbaum and *Willard W. Gatchell* for petitioner in No. 694. *John T. Cahill* for the Texas Gas Transmission Corporation, and *William S. Tarver* for the Southern Natural Gas Co., petitioners in No. 695. With them on the petition in No. 695 were *Richard J. Connor* and *Daniel James*. *Reuben Goldberg* for the Memphis Light, Gas and Water Division et al., respondents. *Roger Arnebergh, John C. Banks, Peter Campbell Brown, E. R. Christensen, J. Elliott Drinard, Marshall F. Hurley, J. Frank McKenna, John C. Melaniphy, Charles S. Rhyne* and *J. Parker Connor* filed a brief for the Member Municipalities of the National Institute of Municipal Law Officers, as *amici curiae*, in opposition to the petitions for writs of certiorari. Reported below: 102 U. S. App. D. C. 77, 250 F. 2d 402.

Certiorari Denied.

No. 660. KOPPERS CO., INC., ET AL. *v.* OTTO. C. A. 4th Cir. Certiorari denied. *Jo. Baily Brown, John M. Crimmins* and *Wright Hugus* for petitioners. *W. Brown Morton, Jr.* for respondent. Reported below: 246 F. 2d 789.

No. 675. MILLER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *John J. Dillon* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Baum* for respondent. Reported below: 247 F. 2d 206.

No. 676. SCHLESINGER *v.* GATES, SECRETARY OF THE NAVY. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Osmond K. Fraenkel* and *Burton R. Thorman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Paul A. Sweeney* for respondent. Reported below: 101 U. S. App. D. C. 355, 249 F. 2d 111.

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No. 679. RIPPERGER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph F. Goetten* for the United States. Reported below: 248 F. 2d 944.

No. 680. COLD METAL PRODUCTS CO. *v.* CRUCIBLE STEEL CO. OF AMERICA. C. A. 3d Cir. Certiorari denied. *William H. Webb* for petitioner. *Charles H. Walker* and *Charles E. Kenworthey* for respondent. Reported below: 247 F. 2d 241.

No. 681. HECHT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Sanford H. Cohen* and *Daniel H. Greenberg* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 248 F. 2d 544.

No. 682. ALONZO ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Paul A. Porter, Walton Hamilton* and *R. F. Deacon Arledge* for petitioners. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for the United States. Briefs of *amici curiae* in support of the petition for writ of certiorari were filed by *Fred M. Standley,* Attorney General, for the State of New Mexico, and *Robert Morrison,* Attorney General, for the State of Arizona. Reported below: 249 F. 2d 189.

No. 683. SCIENTIFIC LIVING, INC., *v.* FEDERAL TRADE COMMISSION. C. A. 3d Cir. Certiorari denied. *Frank R. Cook* for petitioner. *Solicitor General Rankin, Assistant Attorney General Hansen, Earl W. Kintner* and *James E. Corkey* for respondent.

No. 686. PAISNER ET AL., DOING BUSINESS AS QUALITY MANUFACTURING CO., *v.* UNITED STATES. Court of Claims. Certiorari denied. *Harry Rosenblatt* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for the United States. Reported below: 138 Ct. Cl. 420, 150 F. Supp. 835.

No. 706. MEADE *v.* GOLDBERG ET AL. C. A. 6th Cir. Certiorari denied. *Edward F. Prichard, Jr.* for petitioner. *Jerome J. Dick* for respondents. Reported below: 249 F. 2d 957.

No. 101. E. EDELMANN & CO. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application. *Will Freeman* and *W. M. Van Sciver* for petitioner. *Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston, Earl W. Kintner* and *Robert B. Dawkins* for respondent. Reported below: 239 F. 2d 152.

No. 225. C. E. NIEHOFF & CO. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application. *Charles R. Sprowl* for petitioner. *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman, Earl W. Kintner* and *James E. Corkey* for respondent. Reported below: 241 F. 2d 37.

No. 489, Misc. EVERETT *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. *Earl R. Duncan* for petitioner. Reported below: 97 So. 2d 241.

No. 343, Misc. CARUSO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 643. UNITED STATES *v.* SILVERMAN, ALIAS TAYLOR, ET AL. Motion of the respondents for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Solicitor General Rankin* and *Assistant Attorney General Tompkins* for the United States. *Frank J. Donner* for Dimow et al., respondents. With him on the brief in opposition were *Thomas I. Emerson* and *Joseph Mitchell Kaye*. Reported below: 248 F. 2d 671.

No. 242, Misc. BRAMBLE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 342, Misc. PETROLIA *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application. Reported below: 25 N. J. 43, 134 A. 2d 539.

Rehearing Denied.

No. 578. GROSSMAN *v.* UNITED STATES ET AL., *ante*, p. 285. Rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 127, Misc. FROST *v.* U. S. MARSHAL FOR SOUTHERN DISTRICT OF CALIFORNIA, *ante*, p. 915;

No. 198, Misc. MILLWOOD *v.* HEINZE, WARDEN, *ante*, p. 917; and

No. 210, Misc. DE NORMAND *v.* UNITED STATES, *ante*, p. 917. Petitions for rehearing denied.

FEBRUARY 4, 1958.

Dismissal Under Rule 60.

No. 690. TIPPET *v.* THOMPSON, TRUSTEE, ET AL. On petition for writ of certiorari to the Court of Civil Appeals of Texas, First Supreme Judicial District. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Leland B. Kee* for petitioner. *Walter F. Woodul* for the Missouri Pacific Railroad Co., respondent. Reported below: 300 S. W. 2d 351.

FEBRUARY 5, 1958.

Dismissal Under Rule 60.

No. 186. BAIRD, ADMINISTRATRIX, *v.* NEW YORK CENTRAL RAILROAD CO. Certiorari, 355 U. S. 853, to the United States Court of Appeals for the Second Circuit. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *William Paul Allen* for petitioner. *Gerald H. Hendley* for respondent. Reported below: 242 F. 2d 383.

FEBRUARY 10, 1958.

Miscellaneous Order.

No. ——. JIMENEZ *v.* BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. Application for stay of deportation referred to the entire Court by MR. JUSTICE DOUGLAS denied. *Joseph Forer* and *David Rein* for petitioner.

FEBRUARY 25, 1958.

Dismissal Under Rule 60.

No. 707. WARREN PETROLEUM CORP. ET AL. *v.* INTERNATIONAL INDUSTRIES, INC. On petition for writ of certiorari to the United States Court of Appeals for the

Third Circuit. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Dean Acheson* was on the stipulation for petitioners. With him on the petition were *Stanley L. Temko* and *Warren M. Sparks*. *John H. Poe* was on the stipulation for respondent. With him on a brief in opposition was *David F. Anderson*. Reported below: 248 F. 2d 696.

MARCH 3, 1958.

Miscellaneous Orders.

An order of THE CHIEF JUSTICE designating and assigning MR. JUSTICE REED (retired) to perform judicial duties in the United States Court of Appeals for the District of Columbia Circuit beginning February 6, 1958, and ending June 30, 1958, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

No. 2, Original. WISCONSIN ET AL. *v.* ILLINOIS ET AL.;
No. 3, Original. MICHIGAN *v.* ILLINOIS ET AL.; and
No. 4, Original. NEW YORK *v.* ILLINOIS ET AL. The application and motion herein are denied, with leave to renew the application and motion with allegations made more definite and certain as a basis for the relief sought. *Stewart G. Honeck,* Attorney General, and *Roy G. Tulane,* Assistant Attorney General, for the State of Wisconsin; *Miles Lord,* Attorney General, and *Melvin J. Peterson,* Deputy Attorney General, for the State of Minnesota; *William Saxbe,* Attorney General, and *Robert E. Boyd,* Assistant Attorney General, for the State of Ohio; *Thomas D. McBride,* Attorney General, and *Lois G. Forer,* Deputy Attorney General, for the State of Pennsylvania; *Thomas M. Kavanagh,* Attorney General, *Samuel J. Torina,* Solicitor General, and *Nicholas V.*

Olds, Assistant Attorney General, for the State of Michigan; and *Louis J. Lefkowitz,* Attorney General, and *John R. Davison,* Solicitor General, for the State of New York, applicants-complainants. *Latham Castle,* Attorney General of Illinois, *William C. Wines,* Assistant Attorney General, *Russell W. Root, Lawrence J. Fenlon, Joseph B. Fleming* and *Thomas M. Thomas* for defendants. *Frederick M. Rowe* entered an appearance for the State of Illinois and the Metropolitan Sanitary District of Greater Chicago, defendants. *Solicitor General Rankin, John F. Davis* and *David R. Warner* filed a memorandum for the United States, as *amicus curiae,* at the invitation of the Court to express the views of the Government with respect to the application and motion. For previous order see 355 U. S. 909.

No. 11, Original. UNITED STATES *v.* LOUISIANA ET AL. This case is set for argument on Monday, October 13, 1958, on the motion of the United States for judgment, the answers thereto, and on the motion to dismiss the cross-bill of the State of Alabama. Counsel are directed to submit a proposed schedule within thirty days for the filing of briefs, and the order of an allotment of time for oral argument. Such schedule shall provide that the briefs of all of the parties be on file on or before September 15, 1958. THE CHIEF JUSTICE and MR. JUSTICE CLARK took no part in the consideration or decision of these applications. *Solicitor General Rankin* for the United States. *Jack P. F. Gremillion,* Attorney General, *W. Scott Wilkinson, Edward M. Carmouche, John L. Madden, Bailey Walsh,* Special Assistant Attorneys General, *Hugh M. Wilkinson, Victor A. Sachse* and *Marc Dupuy, Jr.* for the State of Louisiana; *Price Daniel,* Governor, *Will Wilson,* Attorney General, *James N. Ludlum,* First Assistant Attorney General, *James H. Rogers,* Assistant Attorney General, *James P. Hart* and *J. Chrys Dougherty*

for the State of Texas; *Joe T. Patterson,* Attorney General, and *John H. Price, Jr.,* Assistant Attorney General, for the State of Mississippi; *John Patterson,* Attorney General, *William G. O'Rear, Gordon Madison,* Assistant Attorneys General, and *E. K. Hanby,* Special Assistant Attorney General, for the State of Alabama; and *Spessard L. Holland,* United States Senator, *Richard W. Ervin,* Attorney General, *J. Robert McClure,* First Assistant Attorney General, *Fred M. Burns,* Assistant Attorney General, and *Robert J. Kelly,* Special Assistant Attorney General, for the State of Florida, defendants. For previous order see 355 U. S. 876.

No. 12, Original. VIRGINIA *v.* MARYLAND. It is ordered that MR. JUSTICE REED (retired) be, and he is hereby, appointed Special Master in this cause, with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to hold hearings with all convenient speed, and to submit a report with recommendations relative to the disposition of the questions raised by the pleadings.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his stenographic and clerical assistants, and the cost of printing his report shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct.

C. Ferdinand Sybert, Attorney General, *Joseph S. Kaufman,* Assistant Attorney General, and *Edward S. Digges,* Special Assistant Attorney General, filed an answer to the Bill of Complaint for the State of Maryland, defendant. For previous decision of the Court, see 355 U. S. 269.

No. 96. ESKRIDGE *v.* SCHNECKLOTH, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Certiorari, 353 U. S. 922, to the Supreme Court of Washington. The joint motion to substitute Washington State Board of Prison Terms and Paroles as the party respondent in the place and stead of Merle E. Schneckloth, Superintendent of the Washington State Penitentiary, is granted. *Robert W. Graham,* acting under appointment by the Court, 354 U. S. 936, for petitioner. *John J. O'Connell,* Attorney General of Washington, and *Michael R. Alfieri,* Assistant Attorney General, for respondent.

No. 561. CARITATIVO *v.* CALIFORNIA ET AL. Certiorari, 355 U. S. 853, to the Supreme Court of California. The motion to substitute Fred R. Dickson, Acting Warden of the California State Prison at San Quentin as a party respondent in the place and stead of Harley O. Teets, deceased, is granted. *George T. Davis* for movant-petitioner.

No. 385. VALLEY UNITARIAN-UNIVERSALIST CHURCH, INC., *v.* COUNTY OF LOS ANGELES ET AL. Certiorari, 355 U. S. 854, to the Supreme Court of California. The motion for leave to file brief of Philadelphia Yearly Meeting of the Religious Society of Friends, and American Friends Service Committee, Inc., as *amici curiae,* is granted. THE CHIEF JUSTICE took no part in the consideration or decision of this motion. *Harold Evans* and *Allen S. Olmsted, 2d,* for the Philadelphia Yearly Meeting of the Religious Society of Friends, and *Claude C. Smith* for the American Friends Service Committee, Inc., movants. *Harold W. Kennedy* for respondents in opposition to the motion. Reported below: 48 Cal. 2d 899, 311 P. 2d 540.

No. 562. RUPP *v.* TEETS, WARDEN. Certiorari, 355 U. S. 854, to the Supreme Court of California. The motion to substitute Fred R. Dickson, Acting Warden of the California State Prison at San Quentin as the party respondent in the place and stead of Harley O. Teets, deceased, is granted. *A. J. Zirpoli* for movant-petitioner.

No. 382. FIRST UNITARIAN CHURCH OF LOS ANGELES *v.* COUNTY OF LOS ANGELES ET AL.; and

No. 385. VALLEY UNITARIAN-UNIVERSALIST CHURCH, INC., *v.* COUNTY OF LOS ANGELES ET AL. Certiorari, 355 U. S. 853, 854, to the Supreme Court of California. The motion for leave to file brief of American Civil Liberties Union, as *amicus curiae,* is granted. THE CHIEF JUSTICE took no part in the consideration or decision of this motion. *Kenneth W. Greenawalt* for the American Civil Liberties Union, movant, urging reversal. *Harold W. Kennedy* for respondents in opposition to the motion. Reported below: No. 382, 48 Cal. 2d 419, 311 P. 2d 508; No. 385, 48 Cal. 2d 899, 311 P. 2d 540.

No. 146. UNITED STATES *v.* MCNINCH, DOING BUSINESS AS HOME COMFORT CO., ET AL. Certiorari, 355 U. S. 808, to the United States Court of Appeals for the Fourth Circuit. The motion to remove this case from the summary calendar is granted and a total of one hour and a half allowed for oral argument. *A. C. Epps* and *Charles W. Laughlin* for Cato Bros., Inc., et al., respondents. Reported below: 242 F. 2d 359.

No. 548. JOSEPH ET AL. *v.* INDIANA. Certiorari, 355 U. S. 812, to the Supreme Court of Indiana. It is ordered that *William S. Isham, Esquire,* of Fowler, Indiana, a member of the Bar of this Court, be appointed to serve as counsel for the petitioners in this case. Reported below: 236 Ind. 529, 141 N. E. 2d 109.

No. 69. SAFEWAY STORES, INC., *v.* VANCE, TRUSTEE IN BANKRUPTCY, *ante,* p. 389. The motion for leave to withdraw the appearance of *Douglas Stripp* as counsel for the petitioner is granted.

No. 691. UNITED GAS PIPE LINE CO. *v.* MEMPHIS LIGHT, GAS AND WATER DIVISION ET AL.;

No. 694. FEDERAL POWER COMMISSION *v.* MEMPHIS LIGHT, GAS AND WATER DIVISION ET AL.; and

No. 695. TEXAS GAS TRANSMISSION CORP. ET AL. *v.* MEMPHIS LIGHT, GAS AND WATER DIVISION ET AL. Certiorari, 355 U. S. 938, to the United States Court of Appeals for the District of Columbia Circuit. The motion to advance is denied. *Solicitor General Rankin* for the Federal Power Commission. Reported below: 102 U. S. App. D. C. 77, 250 F. 2d 402.

No. 764, October Term, 1954. HUPMAN *v.* UNITED STATES. The motion to vacate orders denying petition for writ of certiorari, 349 U. S. 953, and petition for rehearing, 350 U. S. 855, is denied. *Frank J. Donner, Arthur Kinoy* and *Marshall Perlin* for movant-petitioner. *Solicitor General Rankin* filed a memorandum for the United States in opposition.

No. 444, October Term, 1956. TATKO BROTHERS SLATE CO., INC., *v.* VERMONT STRUCTURAL SLATE CO., INC. The motion to recall order denying certiorari, 352 U. S. 917, and to enter order granting certiorari and summarily vacating the judgment of the United States Court of Appeals for the Second Circuit and remanding to that court for reconsideration is denied. *W. Brown Morton, Jr., Maxwell E. Sparrow* and *J. Preston Swecker* for movant-petitioner. *John C. Blair* and *Richard P. Schulze* for respondent in opposition.

No. 57. Byrd *v.* Blue Ridge Rural Electric Cooperative, Inc. Certiorari, 352 U. S. 999, to the United States Court of Appeals for the Fourth Circuit. Argued January 28, 1958. This case is restored to the calendar for reargument. Counsel are asked to brief and argue the application of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, in connection with question II of the questions presented in respondent's brief, and point III of the points in petitioner's reply brief. *Henry Hammer, Henry H. Edens* and *William E. Chandler, Jr.* for petitioner. *Wesley M. Walker* and *Ray R. Williams* for respondent. Reported below: 238 F. 2d 346.

No. 300, Misc. Barnes *v.* Columbia Broadcasting System, Inc.; and

No. 315, Misc. Barnes *v.* National Broadcasting Co., Inc., et al. Motions for leave to file petitions for writs of certiorari denied.

No. 365, Misc. El Paso Natural Gas Co. et al. *v.* United States. Motion for leave to file petition for writ of certiorari denied. *Arthur H. Dean* and *Dennis McCarthy* for the El Paso Natural Gas Co., and *Robert F. Campbell* and *Paul H. Ray* for the Pacific Northwest Pipeline Corporation, petitioners. *Solicitor General Rankin, Assistant Attorney General Hansen* and *Daniel M. Friedman* for the United States.

No. 361, Misc. Patterson *v.* Rood, Superintendent, Atascadero State Hospital;

No. 363, Misc. Lee *v.* Jackson, Warden, et al.;

No. 379, Misc. Richardson *v.* Hand, Warden; and

No. 385, Misc. Tiscio *v.* Martin, Warden, et al. Motions for leave to file petitions for writs of habeas corpus denied.

No. 277, Misc. ROMANO *v.* MURPHY, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

No. 430, Misc. IN RE BIRRELL. Motion for leave to file petition for writ of prohibition and mandamus denied. *Richard H. Wels* for petitioner. *Solicitor General Rankin, Thomas G. Meeker* and *David Ferber* filed a brief in opposition.

No. 275. MANZANILLO *v.* UNITED STATES. Certiorari, 355 U. S. 809, to the Court of Claims. The writ of certiorari is dismissed for failure to comply with paragraph 1 of Rule 36 of the Rules of this Court. Reported below: 137 Ct. Cl. 927.

Probable Jurisdiction Noted.

No. 751. PARFUMS CORDAY, INC., *v.* UNITED STATES; and

No. 752. LANVIN PARFUMS, INC., *v.* UNITED STATES. Appeals from the United States District Court for the Southern District of New York. Probable jurisdiction noted. *Samuel I. Rosenman, Seymour D. Lewis* and *Joseph Hochman* for appellant in No. 751. *Simon H. Rifkind* and *Walter J. Derenberg* for appellant in No. 752. *Solicitor General Rankin* for the United States. Reported below: 155 F. Supp. 77.

Certiorari Granted. (*See also Nos. 626 and 641, ante, pp. 602, 601.*)

No. 662. HOTEL EMPLOYEES LOCAL NO. 255, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, ET AL. *v.* LEEDOM, CHAIRMAN, NATIONAL LABOR RELATIONS BOARD, ET AL. United States

Court of Appeals for the District of Columbia Circuit. Certiorari granted. *J. W. Brown* for petitioners. *Solicitor General Rankin, Jerome D. Fenton* and *Dominick L. Manoli* for the National Labor Relations Board, respondent. Reported below: 101 U. S. App. D. C. 414, 249 F. 2d 506.

No. 718. CAMMARANO ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *Frederick Bernays Wiener* and *Clinton M. Hester* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *Myron C. Baum* for the United States. Reported below: 246 F. 2d 751.

Certiorari Denied. (See also No. 709, ante, p. 606; No. 286, Misc., ante, p. 607; and Misc. Nos. 277, 300, 315, 365, supra.)

No. 629. LAKE CHARLES STEVEDORES, INC., ET AL. *v.* RICHARD ET AL. Court of Appeal of Louisiana, First Circuit. Certiorari denied. *John A. Hickman* for petitioners. *Russell T. Tritico* for respondents. Reported below: 95 So. 2d 830.

No. 677. GOODY *v.* SHAPIRO, BERNSTEIN & CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. *Abraham M. Lowenthal* and *Leon G. Telsey* for petitioner. *Harold Berkowitz* for respondents. Reported below: 248 F. 2d 260.

No. 678. TECHNICAL TAPE CORP. *v.* MINNESOTA MINING & MANUFACTURING CO. C. A. 2d Cir. Certiorari denied. *Daniel L. Morris* and *Simon H. Rifkind* for petitioner. *Edward A. Haight, H. H. Hamilton, M. K. Hobbs* and *Harold J. Kinney* for respondent. Reported below: 247 F. 2d 343.

No. 685. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Henry C. Clausen* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for the United States. Reported below: 248 F. 2d 492.

No. 688. MILOM *v.* NEW YORK CENTRAL RAILROAD CO. C. A. 7th Cir. Certiorari denied. *E. M. Burke* for petitioner. *Marvin A. Jersild* for respondent. Reported below: 248 F. 2d 52.

No. 689. BOLINDERS CO., INC., *v.* UNITED STATES. Court of Claims. Certiorari denied. *Copal Mintz* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 139 Ct. Cl. ——, 153 F. Supp. 381.

No. 704. RUTH ELKHORN COALS, INC., ET AL. *v.* MITCHELL, SECRETARY OF LABOR. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Wallace M. Cohen, James M. Landis* and *Fred B. Greear* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Paul A. Sweeney, Stuart Rothman* and *Bessie Margolin* for respondent. Reported below: 101 U. S. App. D. C. 313, 248 F. 2d 635.

No. 698. COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL. *v.* ALLEN ET AL. C. A. 4th Cir. Certiorari denied. *Kenneth C. Patty,* then Attorney General, and *Henry T. Wickham,* Special Assistant Attorney General, for the State of Virginia, and *T. Justin Moore, Archibald G. Robertson, John W. Riely* and *T. Justin Moore, Jr.* for the Prince Edward County School Authorities, petitioners. Reported below: 249 F. 2d 462.

No. 699. SING KEE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Menahem Stim* and *Allen S. Stim* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 250 F. 2d 236.

No. 700. DEAN ET AL. *v.* JELSMA. Supreme Court of Oklahoma. Certiorari denied. *Richard J. Spooner* for petitioners. *Charles Hill Johns* for respondent. Reported below: 316 P. 2d 599.

No. 702. RANDALL *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Herbert Fishbone* for petitioner.

No. 705. RIGGALL *v.* WASHINGTON COUNTY MEDICAL SOCIETY ET AL. C. A. 8th Cir. Certiorari denied. *James R. Hale* for petitioner. *Eugene R. Warren* for respondents. Reported below: 249 F. 2d 266.

No. 708. SNIDER *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied. *O. P. Easterwood, Jr.* for petitioner. *A. S. Harrison, Jr.,* Attorney General of Virginia, and *C. F. Hicks,* Assistant Attorney General, for respondent.

No. 710. RUCKER ET AL. *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Monroe G. Marks* for petitioners. *John T. Corrigan* for respondent. Reported below: 167 Ohio St. 17, 145 N. E. 2d 537.

No. 715. WALKER *v.* BROWN, TRIAL JUSTICE. Supreme Court of Appeals of Virginia. Certiorari denied. *George C. Rawlings, Jr.* for petitioner.

No. 711. PETROCARBON LIMITED *v.* WATSON, COMMISSIONER OF PATENTS. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Ralph H. Hudson, Harold J. Kinney* and *M. K. Hobbs* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for respondent. Reported below: 101 U. S. App. D. C. 214, 247 F. 2d 800.

No. 712. STONE ET AL. *v.* MCFARLIN ET AL. C. A. 10th Cir. Certiorari denied. *Neal E. McNeill* for petitioners. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for the United States, and *Lynn Adams* for Morgan et al., respondents. Reported below: 249 F. 2d 54.

No. 713. ESTATE OF HASKINS, HARBER, EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *H. Keith Harber* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Robert N. Anderson* and *Joseph Kovner* for respondent. Reported below: 249 F. 2d 143.

No. 719. LEE ET AL. *v.* CITY OF COLORADO SPRINGS. Supreme Court of Colorado. Certiorari denied. *John H. Gately* for petitioners. *Louis Johnson* and *Charles S. Rhyne* for respondent. Reported below: 136 Colo. —, 315 P. 2d 822.

No. 720. COWLITZ TRIBE OF INDIANS *v.* CITY OF TACOMA. C. A. 9th Cir. Certiorari denied. *Malcolm S. McLeod* for petitioner. *Marshall McCormick* for respondent. Reported below: 253 F. 2d 625.

No. 725. BILLS *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *George S. McCarthy* for petitioner. Reported below: 165 Tex. Cr. R. —, 305 S. W. 2d 614.

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No. 716. Sucher Packing Co. *v.* Manufacturers Casualty Insurance Co. C. A. 6th Cir. Certiorari denied. *Jerome Goldman* for petitioner. *William H. Selva* for respondent. Reported below: 245 F. 2d 513.

No. 721. Barry *v.* California. District Court of Appeal of California, Second Appellate District. Certiorari denied. *D. Wendell Reid* for petitioner. *Edmund G. Brown,* Attorney General of California, and *Herschel Elkins,* Deputy Attorney General, for respondent. Reported below: 153 Cal. App. 2d 193, 314 P. 2d 531.

No. 722. Akin et al. *v.* United States. C. A. 10th Cir. Certiorari denied. *Muriel S. Paul, Leonard E. Ackermann* and *Bennett Boskey* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Robert N. Anderson* and *Carolyn R. Just* for the United States. Reported below: 248 F. 2d 742.

No. 723. Franken *v.* United States. C. A. 4th Cir. Certiorari denied. *C. Lee Spillers, Thomas A. Goodwin, Lawrence Bloomenthal* and *Gilbert S. Bachmann* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for the United States. Reported below: 248 F. 2d 789.

No. 728. Saturn Oil & Gas Co., Inc., *v.* Federal Power Commission. C. A. 10th Cir. Certiorari denied. *William H. Chamberlain* and *Chisman Hanes* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Paul A. Sweeney, Robert S. Green* and *Willard W. Gatchell* for respondent. Reported below: 250 F. 2d 61.

No. 727. PRIVATE BRANDS, INC., ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Archibald Palmer* for petitioners. *Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States. Reported below: 250 F. 2d 554.

No. 729. CITY OF CHICAGO ET AL. *v.* THIELE ET AL., DOING BUSINESS AS TWIN TOWERS COMMISSARY. Supreme Court of Illinois. Certiorari denied. *John C. Melaniphy* and *Sydney R. Drebin* for petitioners. *Sidney M. Davis* for respondents. Reported below: 12 Ill. 2d 218, 145 N. E. 2d 637.

No. 731. WAGS TRANSPORTATION SYSTEM, INC., ET AL. *v.* PREVATT, ANCILLARY ADMINISTRATOR, ET AL. Supreme Court of Florida. Certiorari denied. *Thomas H. Barkdull, Jr.* for petitioners. *Carl T. Hoffman, G. Kenneth Kemper* and *Wyatt Johnson* for respondents. Reported below: 97 So. 2d 473.

No. 732. UNITED STATES EX REL. WISCONSIN *v.* FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION ET AL. C. A. 7th Cir. Certiorari denied. *Stewart G. Honeck,* Attorney General of Wisconsin, *John D. Winner,* Deputy Attorney General, and *Roy G. Tulane,* Assistant Attorney General, for petitioner. *Solicitor General Rankin* and *Morton Hollander* for the Federal Home Loan Bank Board, respondent. Reported below: 248 F. 2d 804.

No. 737. SHERMAN *v.* SHERMAN ET AL. Surrogate's Court, County of New York, New York. Certiorari denied. *Samuel A. Spiegel* for petitioner. *Abraham N. Davis* for Sherman, and *Samuel Ecker* for Siegel, respondents.

No. 733. Police Pension and Relief Board et al. *v.* Behnke et al. Supreme Court of Colorado. Certiorari denied. *John C. Banks* and *Horace N. Hawkins, Jr.* for petitioners. *E. F. Conly* for respondents. Reported below: 136 Colo. ——, 316 P. 2d 1025.

No. 735. FitzGerald *v.* Cassidy. C. A. 4th Cir. Certiorari denied. *Albert J. Ahern, Jr.* and *James J. Laughlin* for petitioner. *John R. Willett* for respondent. Reported below: 249 F. 2d 91.

No. 736. Truck Drivers and Helpers Local Union 728 (formerly Local Union 859), International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL–CIO, *v.* National Labor Relations Board. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Herbert S. Thatcher, David Previant* and *Edwin Pearce* for petitioner. *Solicitor General Rankin, Jerome D. Fenton, Thomas J. McDermott, Dominick L. Manoli* and *William J. Avrutis* for respondent. Reported below: 101 U. S. App. D. C. 420, 249 F. 2d 512.

No. 741. Murphy, Director of Alcoholic Beverage Control, et al. *v.* Love, doing business as the Love Transfer Co. C. A. 10th Cir. Certiorari denied. *John Anderson, Jr.*, Attorney General of Kansas, for petitioners. *Homer Davis* for respondent. Reported below: 249 F. 2d 783.

No. 773. Vargas et al. *v.* A. H. Bull Steamship Co. et al. Supreme Court of New Jersey. Certiorari denied. *Samuel M. Cole* for petitioners. *Conover English* and *Nicholas Conover English* for respondents. Reported below: 25 N. J. 293, 135 A. 2d 857.

No. 742. FRANKLIN *v.* SHELTON ET AL. C. A. 10th Cir. Certiorari denied. *John B. Ogden* and *Josh Lee* for petitioner. *R. M. Mountcastle* for respondents. Reported below: 250 F. 2d 92.

No. 775. MARTIN, TRUSTEE, *v.* TINDELL. Supreme Court of Florida. Certiorari denied. *George F. Gilleland* for petitioner. *William S. Frates* and *Walter H. Beckham, Jr.* for respondent. Reported below: 98 So. 2d 473.

No. 634. A. MASCHMEIJER, JR., INC., *v.* EASTERN MOTOR EXPRESS, INC. The motions for leave to file briefs of the National Industrial Traffic League; the Manufacturing Chemists' Association, Inc.; and Southern Textile Chemical Manufacturers' Association, as *amici curiae,* are granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Jerome G. Greenspan* for petitioner. *Herbert Burstein* for respondent. Briefs of *amici curiae* urging that the petition for writ of certiorari be granted were filed by *Morris Hershson* for the National Barrel & Drum Association, Inc., *Robert N. Burchmore* and *John S. Burchmore* for the National Industrial Traffic League, *Nuel D. Belnap* for the Manufacturing Chemists' Association, Inc., and *James B. Craighill* for the Southern Textile Chemical Manufacturers' Association. *Louis Silver* filed a brief for the National Freight Claim Council of the American Trucking Associations, Inc., urging that the petition be denied. Reported below: 247 F. 2d 826.

No. 693. LOUISIANA & ARKANSAS RAILWAY CO. *v.* ROBINSON. The motion to adjudge damages to respondent for delay is denied. Petition for writ of certiorari to the Supreme Court of Texas denied. *A. L. Burford* for petitioner. *Franklin Jones, Sr.* and *C. A. Brian* for respondent.

No. 734. HARD *v.* CIVIL AERONAUTICS BOARD. The motion for leave to file brief of Air Line Pilots Association, International, as *amicus curiae,* is granted. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied. *George F. Archer* for petitioner. *Solicitor General Rankin* for respondent. *Lloyd Fletcher* filed a brief for the Air Line Pilots Association, International, in support of the petition for a writ of certiorari. Reported below: 248 F. 2d 761.

No. 9, Misc. MCKINLEY *v.* RAGEN, WARDEN. Circuit Court of DuPage County, Illinois. Certiorari denied. Petitioner *pro se. Latham Castle,* Attorney General of Illinois, for respondent.

No. 11, Misc. ORTEGA *v.* OLSEN, CLERK, CRIMINAL COURT OF COOK COUNTY, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Petitioner *pro se. Benjamin S. Adamowski* for respondents. Reported below: 241 F. 2d 464.

No. 197, Misc. CARROLL *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se. Edmund G. Brown,* Attorney General of California, and *Doris M. Maier,* Deputy Attorney General, for respondent.

No. 219, Misc. RICHARDSON *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 251, Misc. KIEVER *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 252, Misc. WALKER *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 254, Misc. WILLIAMS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 256, Misc. MCGHEE *v.* BANNAN, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 259, Misc. IRBY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 101 U. S. App. D. C. 19, 246 F. 2d 706.

No. 261, Misc. NETHERY *v.* MAYO, PRISON CUSTODIAN. Supreme Court of Florida. Certiorari denied.

No. 267, Misc. SAVAIANO *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 271, Misc. MCGEE *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 272, Misc. MOHLER *v.* MICHIGAN ET AL. Supreme Court of Michigan. Certiorari denied.

No. 273, Misc. MULHERN *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 274, Misc. KIRSCH *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 278, Misc. SUPERO *v.* ILLINOIS. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 282, Misc. BLACKMON *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 279, Misc. SHEPHERD *v.* TUCKER, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 280, Misc. MANKO *v.* TUCKER, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 281, Misc. MCDANIEL *v.* TUCKER, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 283, Misc. HOLLIS *v.* ELLIS, DIRECTOR, TEXAS PRISON SYSTEM. Court of Criminal Appeals of Texas. Certiorari denied.

No. 299, Misc. FIRMSTONE *v.* MYERS, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 308, Misc. SCOTT ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioners *pro se*. *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for the United States. Reported below: 101 U. S. App. D. C. 341, 248 F. 2d 754.

No. 311, Misc. MEADORS *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se*. *John M. Dalton,* Attorney General of Missouri, and *Aubrey R. Hammett, Jr.,* Assistant Attorney General, for respondent.

No. 345, Misc. AZULAY *v.* PEPERSACK, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 214 Md. 617, 135 A. 2d 453.

No. 346, Misc. ROGERS *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 347, Misc. BLANK *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Nathan Kestnbaum* for petitioner.

No. 350, Misc. SHERWOOD *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied.

No. 353, Misc. LAWSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for the United States. Reported below: 101 U. S. App. D. C. 332, 248 F. 2d 654.

No. 355, Misc. PARKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 248 F. 2d 803.

No. 356, Misc. FITCH *v.* TUCKER, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 357, Misc. RAYNE *v.* PEPERSACK, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 214 Md. 620, 135 A. 2d 621.

No. 358, Misc. BARCLAY *v.* MARTIN, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 359, Misc. NEAL *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 362, Misc. STEWART *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 364, Misc. PRICE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 249 F. 2d 17.

No. 366, Misc. NEWSOM *v.* SMYTH, SUPERINTENDENT, VIRGINIA PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 367, Misc. REXRODE *v.* TUCKER, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 368, Misc. DENEEN *v.* TUCKER, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 369, Misc. MCABEE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 370, Misc. HUGHES *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 371, Misc. POLLACK *v.* CITY OF NEWARK, NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Thomas M. Kane* for respondents. Reported below: 248 F. 2d 543.

No. 373, Misc. DOBSON *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Reported below: 303 S. W. 2d 650.

No. 375, Misc. SUDOL *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 25 N. J. 132, 135 A. 2d 248.

No. 376, Misc. GOLLA *v.* RHODES, WARDEN. Supreme Court of Delaware. Certiorari denied. Reported below: — Del. —, 135 A. 2d 137.

No. 378, Misc. COOPER *v.* JACKSON, WARDEN. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 380, Misc. JOHNSON *v.* ILLINOIS. Circuit Court of Macon County, Illinois. Certiorari denied.

No. 382, Misc. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for the United States. Reported below: 250 F. 2d 37.

No. 383, Misc. WARREN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 384, Misc. WALKER *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 386, Misc. MILLER *v.* THORN, ANCILLARY EXECUTRIX, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Charles William Freeman* for petitioner.

No. 387, Misc. FAULKNER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 12 Ill. 2d 176, 145 N. E. 2d 632.

No. 413, Misc. HARLESS *v.* IOWA. Supreme Court of Iowa. Certiorari denied. Petitioner *pro se*. *Norman A. Erbe,* Attorney General of Iowa, and *Freeman H. Forrest,* Assistant Attorney General, for respondent. Reported below: 83 N. W. 2d 401.

No. 388, Misc. ROBERTS *v.* PEPERSACK, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 214 Md. 611, 135 A. 2d 446.

No. 390, Misc. MILLER *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 391, Misc. KENNEDY *v.* MARTIN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 393, Misc. JEDWABNY ET AL. *v.* PHILADELPHIA TRANSPORTATION CO. ET AL. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Herman Moskowitz* for petitioners. Reported below: 390 Pa. 231, 135 A. 2d 252.

No. 395, Misc. PAPAGNI *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 396, Misc. RICE *v.* PEPERSACK, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 214 Md. 613, 135 A. 2d 622.

No. 398, Misc. DOBSON *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 214 Md. 654, 135 A. 2d 890.

No. 399, Misc. POLLINO *v.* NEW YORK. County Court of Bronx County, New York. Certiorari denied.

No. 400, Misc. HAINES *v.* RANDOLPH, WARDEN, ET AL. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 401, Misc. MARTIN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 421, Misc. SMITH *v.* HIXON, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *John Patterson,* Attorney General of Alabama, and *Bernard F. Sykes* and *George Young,* Assistant Attorneys General, for respondent. Reported below: 249 F. 2d 41.

No. 532, Misc. FOSTER *v.* GEORGIA. Supreme Court of Georgia. Certiorari denied. *James Barrow* for petitioner. *Eugene Cook,* Attorney General of Georgia, and *E. Freeman Leverett,* Assistant Attorney General, for respondent. Reported below: 213 Ga. 601, 100 S. E. 2d 426.

No. 549, Misc. JEFFERSON *v.* TEETS, WARDEN. C. A. 9th Cir. Certiorari denied. *A. J. Zirpoli* for petitioner. Reported below: 248 F. 2d 955.

Rehearing Denied. (*See also No. 764, October Term, 1954, ante, p. 949.*)

No. 9. LAWN *v.* UNITED STATES, *ante,* p. 339;

No. 10. GIGLIO ET AL. *v.* UNITED STATES, *ante,* p. 339;

No. 67. NASHVILLE MILK CO. *v.* CARNATION CO., *ante,* p. 373;

No. 71. GORDON *v.* TEXAS, *ante,* p. 369;

No. 85. CITIES SERVICE GAS CO. *v.* STATE CORPORATION COMMISSION OF KANSAS ET AL., *ante,* p. 391;

No. 449. SHELL OIL CO. *v.* FEDERAL POWER COMMISSION, *ante,* p. 930;

No. 576. LEONARDO ET UX. *v.* BOARD OF COUNTY COMMISSIONERS OF ST. MARY'S COUNTY, MARYLAND, ET AL., *ante,* p. 906;

No. 586. RYSTAD *v.* BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, *ante,* p. 912; and

No. 597. BALLF *v.* PUBLIC WELFARE DEPARTMENT OF THE CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL., *ante,* p. 912. Petitions for rehearing denied.

No. 610. STRAUSS ET AL. *v.* UNIVERSITY OF THE STATE OF NEW YORK ET AL., *ante,* p. 394;

No. 611. TAYLOR ET AL. *v.* KENTUCKY, *ante,* p. 394;

No. 62, Misc. BARNES *v.* UNITED STATES, *ante,* p. 927;

No. 266, Misc. KIMBROUGH *v.* UNITED STATES, *ante,* p. 925; and

No. 303, Misc. DI SILVESTRO *v.* UNITED STATES VETERANS ADMINISTRATION, *ante,* p. 935. Petitions for rehearing denied.

No. 110. FEDERAL TRADE COMMISSION *v.* C. E. NIEHOFF & Co., *ante,* p. 411. Rehearing denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application.

AMENDMENTS OF GENERAL ORDERS IN BANKRUPTCY.

(Promulgated March 3, 1958, effective immediately.)

ORDER

IT IS ORDERED that Order 16 of the General Orders in Bankruptcy heretofore promulgated by this Court be and it hereby is amended to read as follows:

"It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment and of the time fixed for the filing of objections to the bankrupt's discharge if such time has been fixed; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond."

IT IS FURTHER ORDERED that this amendment shall take effect immediately.

ORDER

IT IS ORDERED that Order 17 (1) of the General Orders in Bankruptcy heretofore promulgated by this Court be and it hereby is amended to read as follows:

"The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all of the property of the bankrupt or debtor that comes into his possession unless, prior thereto, a receiver or other officer has prepared such an inventory."

IT IS FURTHER ORDERED that this amendment shall take effect immediately.

INDEX

ADMINISTRATIVE OFFICE OF UNITED STATES COURTS.

Appointment of Director, p. 921.

ADMINISTRATIVE PROCEDURE. See **Alcohol Administration Act; Antitrust Acts**, 2–3; **Armed Forces; Constitutional Law**, II, 1; **Jurisdiction**, 6; **Labor**, 1; **Procedure**, 5, 10, 12; **Transportation**, 1–5.

ADMIRALTY.

1. *Jones Act—Seamen—Federal Employers' Liability Act—Liability for death resulting from violation of Coast Guard regulations.*—Employer held liable, without showing of negligence, for death of seaman resulting from violation of Coast Guard regulations pertaining to navigation. Kernan v. American Dredging Co., p. 426.

2. *Longshoremen — Shipboard injury — Plaintiff's negligence — Instructions to jury.*—Trial court did not err in refusing to instruct jury that plaintiff was not entitled to any recovery if he voluntarily chose to use passageway known by him to be unsafe and if there was any other passageway known by him to be safe; it properly instructed jury that plaintiff's negligence was to be considered in mitigation of damages. Palermo v. Luckenbach Steamship Co., p. 20.

3. *Suit by longshoreman against shipowner—Stevedoring contractor interpleaded for indemnity—Questions to be submitted to jury.*—Where longshoreman sued shipowner for injuries and shipowner interpleaded stevedoring contractor, claiming indemnity, all issues of fact involved in third-party action should have been submitted to jury. Weyerhaeuser S. S. Co. v. Nacirema Operating Co., p. 563.

ALCOHOL ADMINISTRATION ACT.

Wholesale liquor dealers—Tie-in or "quota" sales—Suspension of permit.—Wholesale liquor dealer who compelled retailers to buy brands not desired in order to get desired brands violated § 5 of the Federal Alcohol Administration Act and subjected wholesaler to suspension of permit. Black v. Magnolia Liquor Co., p. 24.

ALIENS.

1. *Deportation—Membership in Communist Party—Sufficiency of evidence.*—Sufficiency of evidence of past membership in Communist Party to support deportation order under Internal Security Act. Rowoldt v. Perfetto, p. 115.

ALIENS—Continued.

2. *Deportation—"Willful" failure to depart or apply for travel documents — Criminal offense — Sufficiency of evidence.*—Evidence insufficient to support conviction for "willfully" failing to depart and make timely application for travel documents. Heikkinen v. United States, p. 273.

3. *Exclusion—Chinese claiming to be children of American citizen—Blood-grouping tests.*—Order excluding Chinese seeking entry as children of American citizen vacated and case remanded for more accurate blood-grouping tests. United States ex rel. Lee Kum Hoy v. Murff, p. 169.

ANTITRUST ACTS. See also **Jurisdiction**, 3.

1. *Clayton Act—Robinson-Patman Act—Private suits for violations.*—A private cause of action lies under §§ 4 and 16 of Clayton Act for unlawful price discriminations violating § 2 of Clayton Act, but not for sales at unreasonably low prices violating only § 3 of Robinson-Patman Act. Nashville Milk Co. v. Carnation Co., p. 373; Safeway Stores, Inc., v. Vance, p. 389.

2. *Clayton Act — Robinson-Patman Act — Price discrimination — Meeting competition.*—Oil company's lower price to "jobbers" justified when made to meet lawful and equally low price of competitors; sufficiency of evidence to support findings of Federal Trade Commission; review by this Court of appraisal of evidence by Court of Appeals. Federal Trade Commission v. Standard Oil Co., p. 396.

3. *Clayton Act — Enforcement — Federal Trade Commission.*—Whether cease-and-desist order should be enforced against one firm before similar orders are enforced against its competitors is for Commission to decide, and Court of Appeals should not overrule Commission in absence of patent abuse of discretion. Moog Industries, Inc., v. Federal Trade Commission, p. 411.

APPEAL. See **Constitutional Law**, V; **Jurisdiction**, 4; **Procedure**, 1, 7.

ARKANSAS. See **Labor**, 2.

ARMED FORCES.

Discharge—Less than "honorable"—"Record."—Issuance of less than honorable discharge to soldier, based on actions prior to induction, not authorized; "record" means record of military service. Harmon v. Brucker, p. 579.

ASSIGNMENT. See **Taxation.**

ASSIMILATIVE CRIMES ACT. See **Constitutional Law**, I.

ATTORNEYS. See **Criminal Law; Taxation.**

BANKRUPTCY. See also **Taxation.**

Amendments of General Orders in Bankruptcy, p. 969.

BLOOD TESTS. See **Aliens**, 3.

BOILER INSPECTION ACT. See **Admiralty**, 1.

BURDEN OF PROOF. See **Transportation**, 6.

CALIFORNIA. See **Constitutional Law**, II, 1; IV, 1–2; VI.

CARRIERS. See **Admiralty**; **Constitutional Law**, II, 1; **Jurisdiction**, 6; **Labor**, 3; **Procedure**, 10–12; **Transportation.**

CERTIORARI. See **Jurisdiction**, 2–3; **Procedure**, 2–3, 6.

CHINESE. See **Aliens**, 3.

CITIZENSHIP. See **Aliens**, 3.

CLAYTON ACT. See **Antitrust Acts**, 1–3.

COAST GUARD. See **Admiralty**, 1.

COERCION. See **Labor**, 2.

COMMERCE. See **Constitutional Law**, II, 1; **Procedure**, 8; **Transportation**, 1–5.

COMMUNICATIONS ACT. See **Evidence**, 1–2.

COMMUNISM. See **Aliens**, 1–2; **Contempt**; **Labor**, 1; **Trial.**

COMPETITION. See **Antitrust Acts.**

CONGRESS. See **Constitutional Law**, I.

CONSTITUTIONAL LAW. See also **Jurisdiction**, 1–3; **Procedure**, 9.

I. Congressional Power.

Delegation of authority—Assimilative Crimes Act.—Assimilative Crimes Act of 1948 making subsequently enacted criminal law of State applicable to federal enclave *held* constitutional. United States v. Sharpnack, p. 286.

II. Federal-State Relations.

1. *State regulation of carriers—Conflict with federal laws re procurement.*—State law regulating rates charged by carriers in intrastate commerce not validly applicable to federal procurement of transportation under federal laws and regulations; jurisdiction of District Court under Declaratory Judgment Act; failure of United States to exhaust administrative remedies under state law. Public Utilities Commission of California v. United States, p. 534.

2. *Property of United States—Immunity from state taxation—Private parties leasing, holding or using same in private business.*—Private parties leasing, holding or using federal property in private business not immune from state taxation based on its value, even when taxes increase financial burden on Government. United States v. City of Detroit, p. 466; United States v. Township of Muskegon, p. 484; City of Detroit v. Murray Corp., p. 489.

CONSTITUTIONAL LAW—Continued.

III. Freedom of Speech.

Prior restraint—City ordinance requiring license before soliciting membership in union.—City ordinance requiring license before soliciting membership in union *held* unconstitutional as prior restraint on freedom of speech. Staub v. City of Baxley, p. 313.

IV. Due Process.

1. *Notice—Law requiring registration of convicts.*—Conviction of ex-convict for failure to register as such violated due process when she had no knowledge of duty to register. Lambert v. California, p. 225.

2. *Notice—Foreign corporation—Service by registered mail.*—Foreign corporation insuring resident by mail and having no agent or place of business in insured's State subject to suit in his State, though process could be served only by registered mail. McGee v. International Life Ins. Co., p. 220.

3. *State courts—Right to counsel—Waiver.*—Youthful Negro who refused counsel in state court and pleaded guilty of murder, when he had several possible technical defenses, had not validly waived counsel, and his conviction and sentence were invalid. Moore v. Michigan, p. 155.

4. *State courts—Conviction of murder on perjured testimony—Habeas corpus.*—State-court denial of habeas corpus to person convicted of murder on perjured testimony *held* violative of due process. Alcorta v. Texas, p. 28.

V. Double Jeopardy.

Appeal — Reversal — Retrial.—Reversal of conviction for lesser offense did not subject accused to second trial for greater offense for which he was tried but not convicted on first trial. Green v. United States, p. 184.

VI. Impairment of Contracts.

Insurance contracts—Impairment—Foreign corporation—Notice of suit by registered mail.—After insurance contract with foreign corporation had been made, State could authorize its citizens to sue thereon in own State and serve notice by registered mail; no impairment of contract. McGee v. International Life Ins. Co., p. 220.

CONTEMPT.

Criminal contempt—Refusal to answer—Punishment.—Refusal to answer 11 questions of same class constituted only one contempt; punishment for criminal contempt not barred by witness' imprisonment for civil contempt. Yates v. United States, p. 66.

CONTRACTS. See **Constitutional Law**, VI.

COURTS OF APPEALS. See **Antitrust Acts**, 3; **Procedure**, 5, 7.

CONVICTS. See **Constitutional Law**, IV, 1.

COUNSEL. See **Constitutional Law**, IV, 3; **Criminal Law**; **Taxation.**

CRIMINAL LAW. See also **Aliens**, 2; **Constitutional Law**, I; IV, 3–4; V; **Contempt**; **Evidence**; **Jurisdiction**, 4; **Procedure**, 1–2, 4, 7, 9; **Trial.**

Perjury—Law authorizing oath—District Court Rule.—Oath administered to attorney under District Court Rule re examination of fitness for practice was administered under "law of United States" within meaning of 18 U. S. C. § 1621. United States v. Hvass, p. 570.

DAMAGES. See **Admiralty**; **Employers' Liability Act.**

DEATH. See **Admiralty**, 1.

DECLARATORY JUDGMENTS ACT. See **Jurisdiction**, 6; **Procedure**, 10.

DEFAMATION. See **Procedure**, 3.

DELEGATION OF POWER. See **Constitutional Law**, I.

DEPORTATION. See **Aliens**, 1–2.

DISCHARGE. See **Armed Forces.**

DISCRIMINATION. See **Labor**, 3.

DOUBLE JEOPARDY. See **Constitutional Law**, V.

DRUGSTORES. See **Transportation**, 2.

DUE PROCESS. See **Constitutional Law**, IV.

EMPLOYERS' LIABILITY ACT. See also **Admiralty.**

Liability of employer—Questions for jury—Sufficiency of evidence.—Gibson v. Thompson, p. 18; Stinson v. Atlantic Coast Line R. Co., p. 62; Honeycutt v. Wabash R. Co., p. 424.

EVIDENCE. See also **Aliens**, 1–2; **Antitrust Acts**, 2; **Employers' Liability Act**; **Procedure**, 4–5, 9; **Transportation**, 6.

1. *Admissibility—Federal courts—Wiretapping authorized by state law.*—Evidence obtained as result of wiretapping by state officers under warrant authorized by state law not admissible in criminal trial in federal court under § 605 of Federal Communications Act. Benanti v. United States, p. 96.

2. *Admissibility — Federal courts — Wiretapping — Listening on regular telephone extension.*—Communications overheard by police officers on regularly used telephone extension with consent of subscriber who is also party to conversation not barred from evidence in federal court under § 605 of Federal Communications Act. Rathbun v. United States, p. 107.

EVIDENCE—Continued.

3. *Crimes—Tax evasion—"Net worth" method of proof.*—In a tax-evasion prosecution based on net worth, proof of likely source of net-worth increases not essential when all possible sources of nontaxable income negatived by evidence. United States v. Massei, p. 595.

EXCLUSION. See **Aliens**, 3.

FEDERAL ALCOHOL ADMINISTRATION ACT. See **Alcohol Administration Act.**

FEDERAL COMMUNICATIONS ACT. See **Evidence**, 1–2.

FEDERAL EMPLOYERS' LIABILITY ACT. See **Admiralty**, 1; **Employers' Liability Act.**

FEDERAL-STATE RELATIONS. See **Constitutional Law**, I, II; **Evidence**, 1; **Jurisdiction**, 1–3; **Labor**, 2.

FEDERAL TRADE COMMISSION. See **Antitrust Acts**, 2–3; **Procedure**, 5.

FIFTH AMENDMENT. See **Constitutional Law**, IV, V.

FOREIGN CORPORATIONS. See **Constitutional Law**, IV, 2; VI.

FOURTEENTH AMENDMENT. See **Constitutional Law**, III; IV, 3–4.

FRAUD. See **Procedure**, 4.

FREEDOM OF SPEECH. See **Constitutional Law**, III.

GEORGIA. See **Constitutional Law**, III.

GRANDFATHER CLAUSE. See **Transportation**, 2.

GRAND JURY. See **Procedure**, 9.

GRANITE. See **Transportation**, 3.

HABEAS CORPUS. See **Constitutional Law**, IV, 3; **Jurisdiction**, 2.

IMMIGRATION ACT. See **Aliens.**

IMMUNITY. See **Constitutional Law**, II, 2; **Procedure**, 3.

IMPAIRMENT OF CONTRACTS. See **Constitutional Law**, VI.

INCOME TAX. See **Evidence**, 3.

INDEMNITY. See **Admiralty**, 3.

INDICTMENT. See **Procedure**, 1, 9.

INJUNCTION. See **Constitutional Law**, II, 1; **Labor**, 2–3; **Procedure**, 8.

INSTRUCTIONS TO JURY. See **Admiralty**, 2.

INSURANCE. See **Constitutional Law**, IV, 2; VI.

INTERNAL REVENUE. See **Evidence**, 3; **Taxation.**

INTERNAL SECURITY ACT. See **Aliens**, 1.

INTERSTATE COMMERCE COMMISSION. See **Procedure**, 8, 12; **Transportation**, 1–5.

INTIMIDATION. See **Labor**, 2.

INTOXICATING LIQUORS. See **Alcohol Administration Act.**

INTRASTATE COMMERCE. See **Constitutional Law**, II, 1.

IRON ORE. See **Transportation**, 5.

JONES ACT. See **Admiralty.**

JUDICIAL REVIEW. See **Antitrust Acts**, 2–3; **Jurisdiction; Labor**, 1; **Procedure.**

JURISDICTION. See also **Constitutional Law**, II, 1; IV, 2; **Labor**, 1; **Procedure.**

1. *Supreme Court—Constitutional issue—Adequacy of nonfederal ground for state decision.*—Failure to apply for license or to attack specific sections not adequate nonfederal ground for state decision sustaining ordinance requiring license before soliciting membership in union. Staub v. City of Baxley, p. 313.

2. *Supreme Court—Constitutional issue—Adequate state ground.*—Where judgment of state court denying writ of habeas corpus rested on adequate state ground, this Court denied certiorari. In re Lamkin, p. 59.

3. *Supreme Court—Constitutional issue—Adequate state ground.*—Certiorari to review dismissal of civil suit in state court dismissed when judgment rested on adequate state ground. Wilson v. Loew's Incorporated, p. 597.

4. *Supreme Court—Direct appeal from District Court—Dismissal of indictment based on construction of statute.*—Direct appeal to Supreme Court from judgment of District Court dismissing indictment on construction of statute, sustained. United States v. Hvass, p. 570.

5. *Supreme Court—Prohibition and mandamus—Moot case.*—Application to Supreme Court for writ to compel lower federal court to decide case and vacate temporary restraining order became moot when lower court vacated temporary restraining order. Williams v. Simons, p. 49.

6. *District Courts—Declaratory Judgment Act—"Actual controversy."*—Proposed enforcement of state law regulating carriers, as applied to transportation of federal property under federal law, produced "actual controversy" giving Federal District Court jurisdiction of suit under Declaratory Judgment Act, notwithstanding failure to exhaust administrative remedies. Public Utilities Commission of California v. United States, p. 534.

JURISDICTION—Continued.

7. *District Courts — Railway Labor Act — Suit against union to enjoin racial discrimination.*—District Court had jurisdiction of suit against union by Negro railway employees to enjoin racial discrimination; not prevented by § 3 First (i) of Railway Labor Act; railroad not necessary party. Conley v. Gibson, p. 41.

JURY. See **Admiralty**, 2, 3; **Employers' Liability Act; Procedure**, 9.

LABOR. See also **Admiralty; Constitutional Law**, III; **Employers' Liability Act; Jurisdiction**, 1; **Procedure**, 12.

1. *National Labor Relations Act—Employer assisting union to defeat rival union—Appropriate remedy—Scope of judicial review.*—When employer committed unfair labor practice by assisting undominated union to defeat rival union in representation election, Board erred in ordering employer to withhold recognition of assisted union until it obtained Board certification when that was impossible because assisted union was not in compliance with § 9 (f), (g) and (h); Court of Appeals exceeded review power in modifying Board's order so as to dispense with election and in modifying the order on a point not raised before Board. National Labor Relations Board v. Mine Workers, p. 453.

2. *National Labor Relations Act—State-court injunction—Intimidation of employees—Peaceful picketing.*—State court could enjoin intimidation and coercion of nonstriking employees and of officers and agent of employer, but not peaceful picketing. Youngdahl v. Rainfair, Inc., p. 131.

3. *Railway Labor Act—Racial discrimination in union representation—Suit by Negro employees against union.*—Right of Negro railroad employees to sue union designated as their bargaining agent under Railway Labor Act to compel it to represent them fairly; Adjustment Board did not have exclusive jurisdiction; railroad not necessary party; sufficiency of complaint. Conley v. Gibson, p. 41.

LIBEL. See **Procedure**, 3.

LICENSE. See **Alcohol Administration Act; Constitutional Law**, III; **Jurisdiction**, 1.

LIENS. See **Taxation.**

LIQUOR DEALERS. See **Alcohol Administration Act.**

LONGSHOREMEN. See **Admiralty**, 2–3.

MAIL. See **Constitutional Law**, IV, 2.

MANDAMUS. See **Jurisdiction**, 5.

MASTER AND SERVANT. See **Admiralty**, 1–2; **Employers' Liability Act**; **Labor.**

MICHIGAN. See **Constitutional Law**, II, 2; IV, 3; **Jurisdiction**, 5.

MOOT CASE. See **Jurisdiction**, 5.

MOTOR CARRIER ACT. See **Transportation**, 2–4; **Procedure**, 12.

MUNICIPALITIES. See **Constitutional Law**, II, 2; III; IV, 1.

MURDER. See **Constitutional Law**, IV, 3–4; V.

NATIONAL LABOR RELATIONS ACT. See **Labor**, 1–2.

NATIONAL TRANSPORTATION POLICY. See **Transportation**, 3–4.

NEGLIGENCE. See **Admiralty**, 1–2; **Employers' Liability Act.**

NEGROES. See **Constitutional Law**, IV, 3; **Labor**, 3.

NET WORTH. See **Evidence**, 3.

NEW YORK. See **Evidence**, 1.

NOTICE. See **Constitutional Law**, IV, 1–2; **Procedure**, 7.

OATH. See **Criminal Law.**

PARITY. See **Transportation**, 5.

PARTIES. See **Procedure**, 11.

PERJURY. See **Constitutional Law**, IV, 4; **Criminal Law**; **Procedure**, 4.

PERMITS. See **Alcohol Administration Act**; **Constitutional Law**, III; **Transportation**, 2–4.

PERSONAL INJURIES. See **Admiralty**, 1–3; **Employers' Liability Act.**

PICKETING. See **Labor**, 2.

POLICE. See **Evidence**, 1–2.

PORTS. See **Transportation**, 5.

PRICE DISCRIMINATION. See **Antitrust Acts.**

PRIORITY. See **Taxation.**

PRIVILEGE. See **Procedure**, 3.

PROCEDURE. See also **Admiralty**, 3; **Antitrust Acts**, 3; **Constitutional Law**, II, 1; IV, 2; **Jurisdiction**; **Transportation**, 6.

1. *Supreme Court—Direct appeal—Dismissal of indictment for failure to allege violation of statute.*—When District Court dismisses indictment for failure to allege violation of statute, based on construction of statute, direct appeal to Supreme Court lies under 18 U. S. C. § 3731. United States v. Hvass, p. 570.

PROCEDURE—Continued.

2. *Supreme Court—Scope of review—Issues not raised below or in petition for certiorari.*—Issues not raised in Court of Appeals and not mentioned in petition for certiorari not properly before this Court. Lawn v. United States, p. 339.

3. *Supreme Court—Scope of judicial review.*—Where petition for certiorari presented question of absolute immunity of government officials from defamation suits, but narrower defense of qualified privilege had been urged below but not passed on by Court of Appeals, case remanded to Court of Appeals to consider defense of qualified privilege. Barr v. Matteo, p. 171.

4. *Supreme Court — Record tainted by perjury and fraud — Remand.*—Supreme Court will not review criminal case when record is challenged, on basis of newly discovered evidence, as being tainted with perjury and fraud; case remanded to trial court for consideration of such charge. United States v. Shotwell Mfg. Co., p. 233.

5. *Supreme Court—Review of Court of Appeals—Sufficiency of evidence to support agency findings.*—Whether there is sufficient evidence to support findings of Federal Trade Commission is left by Congress to Court of Appeals, and this Court will intervene only when the standard appears to have been misapprehended or grossly misapplied. Federal Trade Commission v. Standard Oil Co., p. 396.

6. *Supreme Court—Denial of certiorari—No legal significance.*—Elgin, J. & E. R. Co. v. Gibson (memorandum of FRANKFURTER, J.), p. 897.

7. *Courts of Appeals—Notice of appeal—Timeliness.*—In circumstances of case, Court of Appeals erred in holding that notice of appeal from conviction of crime was untimely. Rosenbloom v. United States, p. 80.

8. *District Courts—Action on remand of case by this Court.*—When this Court reversed judgment of District Court setting aside order of Interstate Commerce Commission and remanded case for consideration of only one question, District Court should not again enjoin Commission's order on another ground. Alleghany Corp. v. Breswick & Co., p. 415.

9. *Criminal cases—Preliminary hearing re grand jury proceedings—Admissibility and sufficiency of evidence.*—Accused not entitled to preliminary hearing as to whether grand jury which returned indictment had considered evidence presented to earlier grand jury in violation of their privilege against self-incrimination; admissibility and sufficiency of evidence at trial; not deprived of fair trial by statements of government counsel. Lawn v. United States, p. 339.

PROCEDURE—Continued.

10. *Declaratory Judgment Act—Suit by Federal Government challenging validity of state law regulating carriers—Failure to exhaust administrative remedies.*—Failure of Federal Government to exhaust administrative remedies under state law regulating carriers did not bar its suit challenging validity as applied to transportation of federal property. Public Utilities Commission of California v. United States, p. 534.

11. *Suit against railway union to enjoin racial discrimination—Railroad not necessary party.*—In suit against union by Negro railway employees to enjoin racial discrimination, railroad was not necessary party. Conley v. Gibson, p. 41.

12. *District Courts—Attack on order of Interstate Commerce Commission—Standing of labor organizations to sue.*—Labor organizations representing employees of parent railroad had standing to sue to set aside order of Interstate Commerce Commission permitting motor carrier subsidiary of railroad to provide ordinary motor carrier service not auxiliary or supplemental to rail service. American Trucking Associations v. United States, p. 141.

PROCESS. See **Constitutional Law**, IV, 2.

PROCUREMENT. See **Constitutional Law**, II, 1.

PROHIBITION. See **Jurisdiction**, 5.

QUOTA SALES. See **Alcohol Administration Act.**

RACIAL DISCRIMINATION. See **Labor**, 3.

RAILROADS. See **Constitutional Law**, II, 1; **Jurisdiction**, 7; **Labor**, 3; **Procedure**, 10–12; **Transportation**, 1, 3–6.

RAILWAY LABOR ACT. See **Jurisdiction**, 7; **Labor**, 3.

RECORD. See **Armed Forces.**

REGISTERED MAIL. See **Constitutional Law**, IV, 2.

REGISTRATION. See **Constitutional Law**, IV, 1.

REMAND. See **Procedure**, 3–4, 8.

REMEDIES. See **Antitrust Acts**, 1, 3.

RETRIAL. See **Constitutional Law**, V.

REVIEW. See **Antitrust Acts**, 2–3; **Jurisdiction**; **Labor**, 1; **Procedure.**

ROBINSON-PATMAN ACT. See **Antitrust Acts**, 1–2.

SAFETY APPLIANCE ACTS. See **Admiralty**, 1.

SALES. See **Alcohol Administration Act**; **Antitrust Acts**, 1–2.

SEAMEN. See **Admiralty**, 1.

SELF-INCRIMINATION. See **Procedure**, 9.

SERVICE OF PROCESS. See **Constitutional Law**, IV, 2.

SHIPOWNERS. See **Admiralty**, 1–3.

SOLICITATION. See **Constitutional Law**, III.

STEVEDORES. See **Admiralty.**

STRIKES. See **Labor**, 2.

SUPREME COURT. See also **Jurisdiction**, 1–5; **Procedure**, 1–6.

1. Amendments of General Orders in Bankruptcy, p. 969.

2. Mr. Justice Reed (retired) designated to perform judicial duties in United States Court of Claims (pp. 860, 886) and the United States Court of Appeals for District of Columbia Circuit (p. 944) and appointed Special Master in Virginia v. Maryland (p. 946).

3. Mr. Justice Minton (retired) designated to perform judicial duties in Court of Claims, p. 880.

4. Appointment of Director of Administrative Office of United States Courts, p. 921.

SURETIES. See **Taxation.**

TAFT-HARTLEY ACT. See **Labor**, 1–2.

TAXATION. See also **Constitutional Law**, II, 2; **Evidence**, 3.

Federal tax lien—Priority—"Mortgagee."—Priority of lien for federal taxes over "assignment" to performance-bond surety of all sums to become due under subcontract; assignee not "mortgagee" within meaning of § 3672 (a) of Internal Revenue Code of 1939, as amended; same as to interpleader's claim for attorney's fees. United States v. Ball Construction Co., p. 587.

TELEPHONES. See **Evidence**, 1–2.

TEXAS. See **Constitutional Law**, IV, 4; VI.

TIE-IN SALES. See **Alcohol Administration Act.**

TRIAL. See also **Procedure**, 9.

Criminal cases—Cross-examination—Right to inspect investigators' reports.—Scales v. United States, p. 1; Lightfoot v. United States, p. 2.

TRANSPORTATION. See also **Admiralty**; **Constitutional Law**, II, 1; **Jurisdiction**, 6; **Procedure**, 8, 10–12.

1. *Interstate Commerce Commission—Fixing intrastate rail fares—Sufficiency of findings.*—Findings held insufficient to support order fixing intrastate rail fares on Chicago suburban commuter service under 49 U. S. C. § 13 (4). Chicago, M., St. P. & P. R. Co. v. Illinois, p. 300.

TRANSPORTATION—Continued.

2. *Motor Carrier Act—Permit issued under "grandfather clause"—Subsequent interpretation by Commission.*—Subsequent interpretation by Interstate Commerce Commission of commodity description, "stock in trade of drug stores," in permit issued under "grandfather clause" of Motor Carrier Act, sustained. Nelson, Inc., v. United States, p. 554.

3. *Motor Carrier Act—Application to serve points then served only by railroads—National Transportation Policy—"Inherent advantages."*—In passing on application of motor carrier for authority to serve points presently served only by rail, Commission must, under National Transportation Policy, assess "inherent advantages" of proposed service; finding that existing rail service is "reasonably adequate" not alone sufficient to support denial of application. Schaffer Transportation Co. v. United States, p. 83.

4. *Railroads—Motor carrier subsidiary—Scope of service.*—In proceeding under § 207 of Interstate Commerce Act by motor carrier subsidiary of railroad for authority to provide ordinary motor carrier service, Commission not required by § 5 (2) (b) or National Transportation Policy to restrict such service to that which is auxiliary to, or supplemental of, parent railroad's services. American Trucking Associations v. United States, p. 141.

5. *Rail rates—Parity between ports—Interrelationship.*—In reconsidering applications for establishment of parity in rates on shipments of imported iron ore from Baltimore, Philadelphia and New York, Interstate Commerce Commission should be permitted to consider interrelationship of all three ports. Interstate Commerce Commission v. Baltimore & O. R. Co., p. 175.

6. *Tucker Act—Suit by railroad to recover overcharges deducted from later bill—Burden of proof.*—Railroad suing Government under Tucker Act to recover amount deducted as overcharges from bill for subsequent services has burden of proving that original charges were proper. United States v. New York, N. H. & H. R. Co., p. 253.

TREBLE DAMAGES. See **Antitrust Acts**, 1.

TUCKER ACT. See **Transportation**, 6.

UNIONS. See **Constitutional Law**, III; **Jurisdiction**, 1, 7; **Labor**, 1–3; **Procedure**, 12.

VIOLENCE. See **Labor**, 2.

WAIVER. See **Constitutional Law**, IV, 3.

WIRETAPPING. See **Evidence**, 1–2.

WITNESSES. See **Contempt**; **Criminal Law.**

WORDS.

1. *"Actual controversy."*—Declaratory Judgment Act. Public Utilities Commission of California v. United States, p. 534.

2. *"Disputes between an employee or group of employees and a carrier or carriers."*—§ 3 First (i) of Railway Labor Act. Conley v. Gibson, p. 41.

3. *"Grandfather clause."* — Motor Carrier Act, 49 U. S. C. § 309 (a) (1). Andrew G. Nelson, Inc., v. United States, p. 554.

4. *"Inherent advantages."* — National Transportation Policy. Schaffer Transportation Co. v. United States, p. 83.

5. *"Intercept."*—§ 605, Federal Communications Act. Rathbun v. United States, p. 107.

6. *"Law of the United States."*—18 U. S. C. § 1621. United States v. Hvass, p. 570.

7. *"Mortgagee."*—§ 3672 (a), Internal Revenue Code of 1939. United States v. R. F. Ball Construction Co., p. 587.

8. *"Oath to be administered," authorization.*—18 U. S. C. § 1621. United States v. Hvass, p. 570.

9. *"Record."*—38 U. S. C. § 693h. Harmon v. Brucker, p. 579.

10. *"Service in its operations."*—§ 5 (2) (b) of Interstate Commerce Act. American Trucking Associations v. United States, p. 141.

11. *"Stock in trade of drug stores."*—Contract motor carrier permit. Andrew G. Nelson, Inc., v. United States, p. 554.

12. *"Willfully" failing to depart from United States.*—§ 20 (c), Immigration Act of 1917. Heikkinen v. United States, p. 273.

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