DISCARDED
APR 19 2006
CSE

UNITED STATES REPORTS

VOLUME 356

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1957

MARCH 10 THROUGH JUNE 2, 1958

WALTER WYATT
REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1958

For sale by the Superintendent of Documents, U. S. Government Printing Office
Washington 25, D. C. - Price $4.25 (Buckram)

42577

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.
SHERMAN MINTON, Associate Justice.

WILLIAM P. ROGERS, Attorney General.
J. LEE RANKIN, Solicitor General.
JOHN T. FEY, Clerk.
WALTER WYATT, Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HELEN NEWMAN, Librarian.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES.

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

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

For the First Circuit, FELIX FRANKFURTER, Associate Justice.

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

For the Third Circuit, 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 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on pages 901 *et seq.*, are those in which orders were entered.

	Page
Accardo *v.* United States	943
Adams, Saunders *v.*	948
Administrator. See name of administrator; General Services Administrator.	
Agricultural Implement Workers *v.* Russell	634
Agriculture Department, Iowa-Ill. Gas Co. *v.*	949
Agriculture Department *v.* Producers Livestock Assn.	282
Agriculture Department, Tatton *v.*	966
Aircraft Workers *v.* Russell	634
Alaska *v.* American Can Co.	926
Alaska Industrial Board *v.* Chugach Electric Assn.	320
Albonico, Madera Irrigation District *v.*	917
Alcoholic Beverage Control, Hollywood Circle *v.*	902
Algoma, U. S. Plywood Corp. *v.*	957
Alhambra Gold Mine Corp. *v.* Alhambra-Shumway Mines	583
Alhambra-Shumway Mines, Alhambra Gold Mine Corp. *v.*	583
Alien Property Custodian, La Salle Steel Co. *v.*	974
Alker, Nichols *v.*	915
Allen *v.* Ellis	905
Allen *v.* Rhay	941
Allen Industries, Jackson *v.*	972
Alvis, Arcieri *v.*	925
Alvis, Davis *v.*	956
Alvis, Harley *v.*	940
American Can Co., Alaska *v.*	926
American Export Lines *v.* Hellenic Lines	967
American Fed. of Technical Engineers *v.* General Elec. Co.	938
American Motors Corp. *v.* Kenosha	21, 934
American Smelting & Rfg. Co., Black Diamond S. S. Co. *v.*	933
American Smelting & Rfg. Co., Skibs A/S Jolund *v.*	933
Amlin *v.* Verbeem	676
Amsley *v.* Steiner	954

Page
Anderson *v.* Britton 962
Anderson *v.* Commissioner 950
Anderson *v.* Culver 977
Anderson *v.* Dowd 915
Andrew G. Nelson, Inc., *v.* United States 934
Apfel, Forman *v.* 43
Apodaca, Hoshour *v.* 920
Appelbaum *v.* Refrigeradora del Noroeste 901
A & P Trucking Co., United States *v.* 917
Aqua Hotel Corp. *v.* McLaughlin 965
Arcieri *v.* Alvis 925
Arizona, Thomas *v.* 390
Arkansas, Payne *v.* 560
Arkansas, Philyaw *v.* 340
Arlington County School Board *v.* Thompson 958
Army Department, Pratt *v.* 226
Army Secretary, Marshall *v.* 24
Ashmon *v.* Banmiller 945
Associated Plywood Mills, Prentice Machinery Co. *v.* 951
Association. For labor unions, see name of trade.
Atkins *v.* Ellis 915
Atlantic Coast Line, Sapp *v.* 950
Attorney General, Bonetti *v.* 691
Attorney General, La Salle Steel Co. *v.* 974
Attorney General, Lubini *v.* 966
Attorney General, McDonald *v.* 915
Attorney General, McGinty *v.* 952
Attorney General, Perez *v.* 44, 915
Attorney General, Shepherd *v.* 956
Attorney General, Uphaus *v.* 926, 965
Augstein, Zivnostenska Banka *v.* 22
Automobile Workers *v.* Russell 634
Aviles, Marquez *v.* 952
Aycock *v.* Florida 921
Babb *v.* United States 974
Babcock *v.* California 581
Baerchus *v.* Myers 953
Baker *v.* District of Columbia Board of Parole 944
Balaam, Santa Barbara County Water Agency *v.* 917
Ball Construction Co., United States *v.* 934
Baltimore & Ohio R. Co., Erie R. Co. *v.* 970
Baltimore & Ohio R. Co., New York Central R. Co. *v.* 970
Bank of Nevada *v.* United States 938
Banmiller, Ashmon *v.* 945

Page
Banmiller, Frey *v*. 953
Banmiller, Harris *v*. 947
Banmiller, McNeair *v*. 946
Banmiller, Miles *v*. 971
Bannan, Hull *v*. 924
Barenblatt *v*. United States. 929
Barker *v*. United States. 945
Barnes *v*. Columbia Broadcasting System. 928
Barnes *v*. National Broadcasting Co. 928
Bartkus *v*. Illinois. 969
Baxter *v*. Washington. 903
Beacon Theatres, Inc., *v*. Westover. 956
Bell *v*. Buckeye Union Casualty Co. 920
Bell *v*. Maryland. 935
Bell *v*. United States. 963
Bendix Aviation Corp. *v*. Indiana Dept. of Revenue. 928
Benson, Iowa-Illinois Gas & Electric Co. *v*. 949
Benson *v*. Producers Livestock Assn. 282
Bergamin *v*. Illinois. 947
Berge *v*. National Bulk Carriers, Inc. 958
Bersworth *v*. Watson. 972
Bertha Building Corp., National Theatres Corp. *v*. 936
Besser Co., Bowden Concrete Products *v*. 928
Bilderback *v*. United States. 940, 946
Binder *v*. Freeman. 970
Bixby, First National Bank of Elwood *v*. 958
Black, Ginsburg *v*. 948
Blackburn *v*. Mayo. 938, 978
Black Diamond S. S. Co. *v*. American Smelting & Rfg. Co. . . . 933
Blackford *v*. United States. 914
Bland *v*. Ellis. 977
Blue Ridge Rural Electric Coop., Byrd *v*. 525
Blumenfeld *v*. Harris. 930
Board of Equalization, Lucas *v*. 938
Board of Liquor Control, Pompei Winery *v*. 937
Board of Medical Examiners, Watt *v*. 912
Bonetti *v*. Rogers. 691
Boomhower, Inc., *v*. Fischer & Co. 968
Borg-Warner Corp. *v*. Labor Board. 342
Borough. See name of borough.
Boston & P. R. Corp. *v*. New York, N. H. & H. R. Co. 939
Boston & P. R. Stockholders *v*. N. Y., N. H. & H. R. Co. 948
Bouziden *v*. United States. 927, 964
Bove *v*. New York. 924

Page
Bowden Concrete Products *v.* Besser Co. 928
Bowers *v.* Steiner 954
Boxing Club of New York *v.* United States 910
Bradford *v.* United States 927
Brady *v.* Florida 923
Brandt *v.* Heinze 961
Brengle *v.* Newman 951
Brewer, Kovacs *v.* 604
Bridgmon *v.* Florida 977
Brink *v.* Heinze 916, 935
Brister *v.* Mississippi 961
Britton, Anderson *v.* 962
Brotherhood. For labor unions, see name of trade.
Brown, Chandler *v.* 930
Brown *v.* Louisville & N. R. Co. 949
Brown *v.* United States 148, 922, 924, 926, 938, 948, 954
Brownell, McGinty *v.* 952
Brownell, Perez *v.* 44, 915
Browner *v.* Michigan 946
Browning *v.* Kansas 583
Brucker, Marshall *v.* 24
Bryant *v.* Smyth 935
Buckeye Union Casualty Co., Bell *v.* 920
Bulsek *v.* United States 942
Burford, Lee *v.* 935
Burgee *v.* New York 954
Burke, Seamer *v.* 965
Burnett *v.* Nash 953
Bush, Orleans Parish School Board *v.* 969
Butler *v.* Whiteman 271
Butterfield, Ring *v.* 971
Butterfield, Schleich *v.* 971
Buxton *v.* Michigan 978
Byrd *v.* Blue Ridge Rural Electric Coop. 525
Caine *v.* California 340, 978
California, Babcock *v.* 581
California, Caine *v.* 340, 978
California, Caritativo *v.* 971
California, Hodge *v.* 942
California, Jendrejk *v.* 904
California, John *v.* 940
California, McDaniel *v.* 935
California *v.* Washington 955
California, Williams *v.* 964, 977

Page
California Adult Authority, Nor Woods *v*..... 978
California Beverage Control, Hollywood Circle *v*..... 902
California, Department of Mental Hygiene, *v*. Copus..... 967
California Secretary of State, Socialist Party *v*..... 952
California Utilities Comm'n *v*. United States..... 925
Cal-Nine Farms, Shepard *v*..... 951
Campbell *v*. Missouri..... 922
Cantisani *v*. Holton..... 932, 964
Cantwell *v*. Cantwell..... 225, 954
Capitol Coal Corp. *v*. Commissioner..... 936
Cargill, Inc., The Ellen S. Bouchard *v*..... 951
Caritativo *v*. California..... 971
Carter, Spanos *v*..... 933
Caudle *v*. United States..... 921, 964
Cavell, Goins *v*..... 962
Cavell, Jones *v*..... 942
Cavell, Saunders *v*..... 941
Cedar Creek Oil & Gas Co. *v*. Fidelity Gas Co..... 932
Chairman of Parole Board, Sykes *v*..... 914
Chandler *v*. Brown..... 930
Cha'o Li Chi *v*. Murff..... 919
Chapman *v*. Cook..... 965
Chapman *v*. United States..... 945
Charizio *v*. Ferguson..... 962
Chauffeurs Union *v*. Labor Board..... 931
Chauffeurs Union *v*. Newell..... 341
Chauffeurs Union *v*. Oliver..... 966
Chauffeurs Union *v*. Selles..... 975
Chicago, M., St. P. & P. R. Co. *v*. Illinois..... 906
Chief Judge, Kinsey *v*..... 935
Chief Justice of Illinois, Flowers *v*..... 915
Chugach Electric Assn., Alaska Industrial Board *v*..... 320
Ciha *v*. Illinois..... 940
Cirillo *v*. United States..... 949
City. See name of city.
Ciucci *v*. Illinois..... 571
Clapp, Cobas *v*..... 941
Clark *v*. Warden of Maryland House of Correction..... 948
Clarkstown, New York Trap Rock Corp. *v*..... 582
Clemmer, Lampe *v*..... 944
Cobas *v*. Clapp..... 941
Coleman *v*. Smyth..... 923
Collector, Fidelity-Philadelphia Trust Co. *v*..... 274
Collector, Select Theatres Corp. *v*..... 918

Page

Collier *v.* Miller 920
Collins *v.* King 945
Collins *v.* United States 952
Columbia Broadcasting System, Barnes *v.* 928
Columbia Broadcasting System *v.* Loew's Inc. 43, 934
Commissioner, Anderson *v.* 950
Commissioner, Capitol Coal Corp. *v.* 936
Commissioner, Eisinger *v.* 913
Commissioner, Gulledge *v.* 959
Commissioner *v.* Lake, Inc. 260, 964
Commissioner, MacFadden *v.* 968
Commissioner, Miller *v.* 915
Commissioner, Pelton Steel Casting Co. *v.* 958
Commissioner, Peurifoy *v.* 956
Commissioner, Pool *v.* 938, 978
Commissioner, Strauss & Son *v.* 966
Commissioner *v.* Sullivan 27
Commissioner, Tank Truck Rentals, Inc., *v.* 30
Commissioner of Housing, Garden Homes, Inc., *v.* 903
Commissioner of Immigration, Mendoza-Martinez *v.* 258
Commissioner of Internal Revenue. See Commissioner.
Commissioner of Patents, Bersworth *v.* 972
Commonwealth. See name of Commonwealth.
Complete Auto Transit, Floyd *v.* 949
Comptroller of New York City, New Yorker Magazine *v.* 339
Connell, Dulien Steel Products, Inc., *v.* 968
Connelly *v.* United States 921, 964
Cook, Chapman *v.* 965
Cook *v.* United States 961
Cook *v.* Warden of Maryland Penitentiary 953
Coons *v.* Michigan Corrections Department 935
Copeland *v.* Smyth 935
Copus, California, Department of Mental Hygiene, *v.* 967
Cores, United States *v.* 405
Corona *v.* United States 954, 978
Costello *v.* Klinger 935
Costello *v.* United States 256
County. See name of county.
Cowlitz Tribe of Indians *v.* Tacoma 934
Crawford *v.* United States 969
Creasy *v.* Ohio Power Co. 917
Crolley, Tatton *v.* 966
Cuiksa *v.* Mansfield 937
Culver, Anderson *v.* 977

Page
Culver, Fernandez *v.* 904
Culver, Miles *v.* 944
Culver, Simpson *v.* 952
Culver, Tilghman *v.* 953
Cummings, Wojculewicz *v.* 969
Curtis *v.* Rhay 905
Cuthill, Miller *v.* 919
Cutshaw *v.* Ohio 905
Cutting *v.* United States 926
Cutting *v.* U. S. Treasury Department 926
Dandridge *v.* United States 259
Daugette *v.* Patterson 902
Daugherty *v.* Rhay 976
Daviditis *v.* National Bank of Mattoon 973
Davis *v.* Alvis 956
Davis *v.* Foreman 974
Davis, Morrison *v.* 968
Davis *v.* National Bank of Mattoon 973
Dean *v.* Jelsma 928
De Casaus *v.* United States 949
Denver Union Stock Yard Co. *v.* Producers Livestock Assn. .. 282
Department of Agriculture, Tatton *v.* 966
Department of Alcoholic Bev. Control, Hollywood Circle *v.* . 902
Department of Army, Pratt *v.* 226
Department of Health *v.* Florida Citrus Exchange 911
Department of Mental Hygiene *v.* Copus 967
Department of Public Instruction, Sealy *v.* 975
Department of Revenue, Bendix Corp. *v.* 928
Dessalernos *v.* Savoretti 269
Dessi *v.* Pennsylvania R. Co. 967
Detroit *v.* Murray Corporation of America 934
Dewan *v.* United States 922
Diamond, United States *v.* 257
Dickson *v.* Ragen 903
Dildine *v.* Willson 953
Director of Immigration. See Immigration Director.
Director of Internal Revenue. See Collector; Commissioner; District Director of Internal Revenue.
District Court Judge *v.* Johnstone 931
District Director of Immigration. See Immigration Director.
District Director of Internal Revenue, Daugette *v.* 902
District Director of Internal Revenue, Erwin *v.* 960
District Director of Internal Revenue, Forster *v.* 913
District Director of Internal Revenue, Howells *v.* 974

Page

District Judge. See U. S. District Judge.
District of Columbia *v.* Scull 920
District of Columbia Parole Board, Baker *v.* 944
District of Columbia Parole Board, Sykes *v.* 914
Division of Sperry Rand Corp. *v.* Engineers Association 932
Doctors Hospital, Edwards *v.* 930
Dodd *v.* Nash 942
Donaldson *v.* Florida 904
Donaldson *v.* United States 922
Donner *v.* Rhay 942
Douglas County Equalization Board, Lucas *v.* 938
Dowd, Anderson *v.* 915
Dowd, Irvin *v.* 948
DuBois *v.* Texas 921
Dulien Steel Products, Inc., *v.* Connell 968
Dulles, Nishikawa *v.* 129
Dulles, Trop *v.* 86
Dumanus, United States *v.* 257
Dunn *v.* United States 942, 970
Eastern Air Lines, Woolley *v.* 931
Economic Advisory Council *v.* Federal Power Comm'n 959
Eddy *v.* Michigan 918
Edelmann & Co. *v.* Federal Trade Comm'n 905
Edwards *v.* Doctors Hospital 930
E. Edelmann & Co. *v.* Federal Trade Comm'n 905
Eichberg & Co. *v.* Van Orman Fort Wayne Corp 927
Einieder *v.* Oakland Circuit Court 922
Eisinger *v.* Commissioner 913
El Dorado Dairy, Chauffeurs, Teamsters & Helpers Union *v.* . . 341
Ellen S. Bouchard, The, *v.* Cargill, Inc 951
Elliott *v.* Metropolitan Casualty Ins. Co 932
Ellis, Allen *v.* 905
Ellis, Atkins *v.* 915
Ellis, Bland *v.* 977
Ellis, Maddox *v.* 946
Ellis, Markham *v.* 958
Ellis *v.* United States 674
Engineers Association, Sperry Gyroscope Co. *v.* 932
Engineers Federation *v.* General Electric Co 938
Engram, Taylor *v.* 901
Equalization Board, Lucas *v.* 938
Erie Railroad Co. *v.* Baltimore & O. R. Co 970
Erwin *v.* Granquist 960
Estate. See name of estate.

Page

Ester *v.* United States 950
Eubanks *v.* Louisiana 584
Evans, Levy *v.* 941
E. V. Prentice Mach. Co. *v.* Associated Plywood Mills 951
Ex parte. See name of party.
Fair *v.* Ragen 954
Fall *v.* Johnstone 931
Farbenfabriken Bayer A. G., Sterling Drug Inc. *v.* 957
Farmers' Educational Union, Stover *v.* 976
Faulkner *v.* Illinois 925
Fay, Matishek *v.* 969
Fay, U. S. *ex rel.* Kozicky *v.* 960
Fay, Wells *v.* 935
Fazio *v.* McNeill 943
Federal Housing Comm'r, Garden Homes, Inc., *v.* 903
Federal Maritime Board *v.* Isbrandtsen Co 481
Federal Power Comm'n, Fla. Economic Council *v.* 959
Federal Power Comm'n, Georgia Power Co. *v.* 912
Federal Power Comm'n, S. C. Generating Co. *v.* 912
Federal Power Comm'n, S. C. Public Service Comm'n *v.* 912
Federal Trade Comm'n, Edelmann & Co. *v.* 905
Federal Trade Comm'n, Moog Industries *v.* 905
Fellows of Harvard College, Irizarry y Puente *v.* 947, 969
Ferguson, Charizio *v.* 962
Ferguson *v.* St. Louis-S. F. R. Co 41
Ferling, Topp *v.* 956
Fernandez *v.* Culver 904
Fidelity Gas Co., Cedar Creek Oil & Gas Co. *v.* 932
Fidelity-Philadelphia Trust Co. *v.* Smith 274
Finsky *v.* Union Carbide & Carbon Corp 957
First National Bank of Elwood *v.* Bixby 958
First Unitarian Church *v.* Los Angeles County 916
Fischer & Co., Boomhower, Inc., *v.* 968
Flint *v.* West Virginia 903
Floete, Gould *v.* 922, 964
Florida, Aycock *v.* 921
Florida, Brady *v.* 923
Florida, Bridgmon *v.* 977
Florida, Donaldson *v.* 904
Florida, Matthews *v.* 918
Florida, McFrederick *v.* 905
Florida Citrus Exchange, Folsom *v.* 911
Florida Economic Council *v.* Federal Power Comm'n 959
Flowers *v.* Klingbiel 915

	Page
Floyd *v.* Complete Auto Transit	949
F. & M. Schaefer Brewing Co., United States *v.*	227
Folsom *v.* Florida Citrus Exchange	911
Foreman, Davis *v.*	974
Forman *v.* Apfel	43
Forster *v.* Sauber	913
Fox, Howells *v.*	974
Frank *v.* United States	962
Freeman, Binder *v.*	970
Frey *v.* Banmiller	953
Fryer *v.* United States	953
F. Strauss & Son *v.* Commissioner	966
Gaitan *v.* United States	937
Galloway *v.* Illinois	914
Gambino *v.* Illinois	904
Ganado Trading Post, Williams *v.*	930
Garcia *v.* Martin	904
Garden Homes, Inc., *v.* Mason	903
Gardner, Sound S. S. Lines, Inc., *v.*	960
Gates, White *v.*	973
Gawron *v.* Supreme Court of Illinois	921
General Electric Co., Am. Fed. of Technical Engineers *v.*	938
General Services Administrator, Gould *v.*	922, 964
General Truck Drivers *v.* Labor Board	931
Gentner *v.* Martin	924
Georgia *v.* United States	273
Georgia Power Co. *v.* Federal Power Comm'n	912
Georgia Revenue Comm'r *v.* Stockham Valves, Inc	911
Gernie *v.* United States	968
Gerosa, New Yorker Magazine *v.*	339
Giardano *v.* United States	973
Gideon *v.* Gideon	902
Ginsburg *v.* Black	948
Ginsburg *v.* Stern	932, 954
Giovengo *v.* Pennsylvania	904
Gladden, Gosso *v.*	960
Goins *v.* Cavell	962
Gold *v.* Lohman	918
Goldstein *v.* Lohman	918
Goldstein *v.* United States	913
Gonzales, Machinists Association *v.*	617
Gonzalez *v.* United States	913
Gosso *v.* Gladden	960
Gould *v.* Floete	922, 964

Page

Grace Line, Inc., *v.* Panama Canal Co. 309, 916
Granquist, Erwin *v.* 960
Gravely *v.* United States 961
Gray *v.* Warden of Maryland Penitentiary 924
Graziano *v.* Ragen 978
Green *v.* United States 165
Gregory *v.* United States 977
Grimes *v.* Raymond Concrete Pile Co. 252
Grimshaw Co., Withrow Co. *v.* 912
Gross Income Tax Division, Bendix Corp. *v.* 928
Guido *v.* United States 950
Gulledge *v.* Commissioner 959
Gumbiner Theatrical Enterprises *v.* Nat. Theatres Corp. 936
G. W. Thomas Drayage Co. *v.* Industrial Indemnity Co. 927
Hagan, Madsen *v.* 971
Hahn *v.* Ross Island Sand & Gravel Co. 972
Hall *v.* Warden of Maryland Penitentiary 912
Hamilton *v.* Pepsi Cola Bottling Co. 961
Handy Cafe *v.* Justices of Superior Court 902
Hardy *v.* United States 944
Harley *v.* Alvis 940
Harrington, Natural Gas Pipeline Co. *v.* 957
Harris *v.* Banmiller 947
Harris, Blumenfeld *v.* 930
Harrison *v.* Settle 954
Hartfield *v.* Ragen 963
Harvard College, Irizarry y Puente *v.* 947, 969
Hayes *v.* United States 914
Haynes Stellite Co., Finsky *v.* 957
Hayward, Levy *v.* 941
Hazelgrove *v.* Indiana 977
Health and Welfare Dept. *v.* Florida Citrus Exchange 911
Heath *v.* Tinsley 971
Heinze, Brandt *v.* 961
Heinze, Brink *v.* 916, 935
Heinze, Jackson *v.* 956
Heinze, Sullivan *v.* 943
Heinze, Woods *v.* 921
Hellenic Lines, American Export Lines *v.* 967
Henderson *v.* Randolph 964
Heusinger *v.* United States 963
H. G. Fischer & Co., Boomhower, Inc., *v.* 968
Hill *v.* United States 704
Hiller *v.* United States 963

	Page
Hines *v.* Zimmer	977
Hinkle *v.* New England Mutual Life Ins. Co	901
Hoag *v.* New Jersey	464
Hobbs *v.* Wisconsin Power & Light Co	932
Hodge *v.* California	942
Hollywood Circle *v.* Dept. of Alcoholic Beverage Control	902
Holt *v.* Pepersack	924
Holton, U. S. *ex rel.* Cantisani *v.*	932, 964
Home Comfort Co., United States *v.*	595
Hooten *v.* Washington State Parole Board	944
Hoover *v.* United States	960
Hoover Motor Express Co. *v.* United States	38, 934
Hoshour *v.* Apodaca	920
House *v.* Swope	954
Housing Administration, Garden Homes, Inc., *v.*	903
Houston Belt & Terminal R. Co. *v.* United States	23
Howard *v.* United States	25
Howells *v.* Fox	974
Hudson *v.* North Carolina	903
Hull *v.* Bannan	924
Humphries *v.* Pepersack	944
Hurley *v.* Ragen	42
Iino Kauin Kaisha, Ltd., Terminal Operating Co. *v.*	939
Illinois, Bartkus *v.*	969
Illinois, Bergamin *v.*	947
Illinois, Chicago, M., St. P. & P. R. Co. *v.*	906
Illinois, Ciha *v.*	940
Illinois, Ciucci *v.*	571
Illinois, Faulkner *v.*	925
Illinois, Galloway *v.*	914
Illinois, Gambino *v.*	904
Illinois, Jennings *v.*	904
Illinois, Latham *v.*	978
Illinois, McConnell *v.*	914
Illinois, Moretti *v.*	947
Illinois, Morgan *v.*	905
Illinois, Ritchie *v.*	944, 970
Illinois, Shipman *v.*	946
Illinois, Spans *v.*	947
Illinois, Spears *v.*	961
Illinois, Terry *v.*	942
Illinois, Williams *v.*	942
Illinois Chief Justice, Flowers *v.*	915
Illinois Supreme Court, Gawron *v.*	921

Page
Illova *v.* Michigan 962
Immigration and Naturalization Service. See Immigration Commissioner; Immigration Director.
Immigration Commissioner, Mendoza-Martinez *v.* 258
Immigration Director, Cha'o Li Chi *v.* 919
Immigration Director, Dessalernos *v.* 269
Immigration Director, Ring *v.* 971
Immigration Director, Schleich *v.* 971
Immigration Director, U. S. *ex rel.* Cantisani *v.* 932, 964
Immigration Director, Williams *v.* 946, 970
Indiana, Hazelgrove *v.* 977
Indiana Revenue Dept., Bendix Aviation Corp. *v.* 928
Industrial Indemnity Co., Thomas Drayage Co. *v.* 927
In re. See name of party.
Internal Revenue. See Collector; Commissioner; District Director of Internal Revenue.
International Boxing Club *v.* United States 910
International Terminal Co. *v.* Iino Kauin Kaisha, Ltd 939
International Terminal Co., Romero *v.* 955
International Union. See name of trade.
Iowa-Illinois Gas & Electric Co. *v.* Benson 949
Irizarry y Puente *v.* President of Harvard College 947, 969
Irvin *v.* Dowd 948
Isbrandtsen Co., Federal Maritime Board *v.* 481
Ivanhoe Irrigation District *v.* McCracken 917
Jackson *v.* Allen Industries 972
Jackson *v.* Heinze 956
Jackson *v.* Maryland 940
Jackson *v.* Ohio 976
Jackson *v.* Pepersack 943
Japan-Atlantic Freight Conference *v.* United States 481
Jarka Corp. *v.* Iino Kauin Kaisha, Ltd 939
Jefferson *v.* Teets 925
Jelsma, Dean *v.* 928
Jendrejk *v.* California 904
Jennings *v.* Illinois 904
John *v.* California 940
Johnson, Select Theatres Corp. *v.* 918
Johnson Co. *v.* Moist Cold Refrigerator Co 968
Johnstone, Fall *v.* 931
Jones *v.* Cavell 942
Jones *v.* Missouri 940
Jones *v.* United States 919, 923
Jones *v.* Warden of Maryland Penitentiary 940

458778 O—58——2

Page

Jordan *v.* New York 923
Jordan, Socialist Party, USA, *v.* 952
Jung *v.* K. & D. Mining Co. 335
Justices of Superior Court, Handy Cafe *v.* 902
Kahn *v.* United States 918
Kansas, Browning *v.* 583
Kansas City Southern R. Co. *v.* Thomas 959
Kanter *v.* Recorder's Court 921
Kapsalis *v.* United States 901
Kay *v.* United States 976
Kaye *v.* United States 919
K. & D. Mining Co., Jung *v.* 335
Kelley, McKinney *v.* 972
Kenosha, American Motors Corp. *v.* 21, 934
King, Collins *v.* 945
King *v.* McNeill 923
King *v.* Nash 942
Kinsella, Madsen *v.* 925
Kinsey *v.* Knapp 935, 936
Kinsey *v.* Simons 935
Kisor *v.* Ohio 948
Kissinger *v.* United States 958
Kletter *v.* Miami Beach 905
Klingbiel, Flowers *v.* 915
Klinger, Costello *v.* 935
Knapp, Kinsey *v.* 935, 936
Kovacs *v.* Brewer 604
Kozicky *v.* Fay 960
Krueger, Whalen *v.* 924
Labor Board, General Truck Drivers *v.* 931
Labor Board *v.* Wooster Division, Borg-Warner Corp. 342
Labor Dept. *v.* Lublin, McGaughy & Associates 917
Labor Dept., Rennekamp *v.* 950
Labor Union. See name of trade.
La Buy, U. S. *ex rel.* Ortega *v.* 962
Ladner *v.* United States 969
Lake, Inc., Commissioner *v.* 260, 964
Lampe *v.* Clemmer 944
Langford *v.* Michigan 977
Lantz *v.* Looney 905
La Salle Steel Co. *v.* Rogers 974
Latham *v.* Illinois 978
Leach, Smaller *v.* 936
LeCuno Oil Co. *v.* Smith 974

Page
Lee *v.* Burford..... 935
Lee *v.* Madigan..... 911
Lee *v.* Smyth..... 947
Lee, Williams *v*..... 930
Leverette *v.* United States..... 976
Levy *v.* Evans..... 941
Levy *v.* Hayward..... 941
Liquor Control Board, Pompei Winery *v*..... 937
Litterio *v.* United States..... 940, 970
Local Union. See name of trade.
Loew's Inc., Columbia Broadcasting System *v*..... 43, 934
Lohman, U. S. *ex rel.* Goldstein *v*..... 918
Loo *v.* United States..... 928
Looney, Lantz *v*..... 905
Looney, Reese *v*..... 976
Los Angeles County, First Unitarian Church *v*..... 916
Los Angeles County, Valley Unitarian Church *v*..... 916
Louisiana, Eubanks *v*..... 584
Louisiana, United States *v*..... 928
Louisville & N. R. Co., Brown *v*..... 949
Lou Johnson Co. *v.* Moist Cold Refrigerator Co..... 968
Louvier *v.* Texas..... 923
Lowery, *Ex parte*..... 971
Lubbock Compress Co., Peacock *v*..... 973
Lubini *v.* Rogers..... 966
Lublin, McGaughy & Associates, Mitchell *v*..... 917
Lucas *v.* Board of Equalization..... 938
Lucchese *v.* United States..... 256
Lyles *v.* United States..... 931, 961
Mac. See also Mc.
MacFadden *v.* Commissioner..... 968
Machinists Association *v.* Gonzales..... 617
Mack *v.* Ohio..... 923
Mack *v.* United States..... 920
Mackey, Mendoza-Martinez *v*..... 258
Mackie *v.* United States..... 944
Maddox *v.* Ellis..... 946
Madera Irrigation District *v.* Albonico..... 917
Madera Irrigation District *v.* Steiner..... 917
Madigan, Lee *v*..... 911
Madsen *v.* Hagan..... 971
Madsen *v.* Kinsella..... 925
Madsen *v.* Overholser..... 920
Mahurin *v.* Nash..... 953

	Page
Maisenberg *v.* United States	670
Mansfield, Cuiksa *v.*	937
Manuel Rodriguez Trading Corp. *v.* United States	902
Marcus, Milmar Estate, Inc., *v.*	933
Marin County *v.* United States	412
Maritime Board *v.* Isbrandtsen Co.	481
Markham *v.* Ellis	958
Marlette *v.* United States	914
Marquez *v.* Aviles	952
Marshall *v.* Brucker	24
Martin, Garcia *v.*	904
Martin, Reynolds *v.*	954
Martin, U. S. *ex rel.* Gentner *v.*	924
Martinez *v.* Mackey	258
Martinez *v.* Southern Ute Tribe	960
Maryland, Bell *v.*	935
Maryland, Jackson *v.*	940
Maryland, Thompson *v.*	943
Maryland House of Correction. See Warden.	
Maryland Penitentiary Warden. See Warden.	
Marzec *v.* United States	913
Masciale *v.* United States	386
Mason, Garden Homes, Inc., *v.*	903
Massachusetts Superior Court, Handy Cafe *v.*	902
Matishek *v.* Fay	969
Matles *v.* United States	256
Matthews *v.* Florida	918
Mayo, Blackburn *v.*	938, 978
Mc. See also Mac.	
McConnell *v.* Illinois	914
McCracken, Ivanhoe Irrigation District *v.*	917
McCraw *v.* Woodruff	910
McCreary *v.* United States	945
McDaniel *v.* California	935
McDonald *v.* U. S. Attorney General	915
McFarlin, Stone *v.*	934
McFrederick *v.* Florida	905
McGann *v.* United States	923
McGee, Nichols *v.*	922
McGinty *v.* Brownell	952
McGuinn *v.* Pegelow	901
McKinney *v.* Kelley	972
McLaughlin, Aqua Hotel Corp. *v.*	965
McNeair *v.* Banmiller	946

Page

McNeill, Fazio *v.* ... 943
McNeill, King *v.* ... 923
McNeill, Van Newkirk *v.* ... 339
McNinch, United States *v.* ... 595
Meacham *v.* Ragen ... 925
Medical Examiners of Texas, Watt *v.* ... 912
Medley *v.* Steiner ... 935
Mendoza-Martinez *v.* Mackey ... 258
Mental Hygiene Department *v.* Copus ... 967
Metropolitan Casualty Ins. Co., Elliott *v.* ... 932
Miami Beach, Kletter *v.* ... 905
Michigan, Browner *v.* ... 946
Michigan, Buxton *v.* ... 978
Michigan, Eddy *v.* ... 918
Michigan, Illova *v.* ... 962
Michigan, Langford *v.* ... 977
Michigan, Preston *v.* ... 971
Michigan, Shotwell *v.* ... 976
Michigan, Smotherman *v.* ... 935
Michigan, Stewart *v.* ... 964
Michigan Corrections Department, Coons *v.* ... 935
Miles *v.* Banmiller ... 971
Miles *v.* Culver ... 944
Miller, Collier *v.* ... 920
Miller *v.* Commissioner ... 915
Miller *v.* Cuthill ... 919
Miller *v.* Suffield ... 978
Milmar Estate, Inc., *v.* Marcus ... 933
Milom *v.* New York Central R. Co. ... 934
Minnesota Mng. & Mfg. Co. *v.* Sears, Roebuck & Co. ... 915
Mississippi, Brister *v.* ... 961
Missouri, Campbell *v.* ... 922
Missouri, Jones *v.* ... 940
Missouri, Shell *v.* ... 939
Missouri Pacific R. Co., Sinkler *v.* ... 326, 978
Mitchell *v.* Lublin, McGaughy & Associates ... 917
Mitchell, Rennekamp *v.* ... 950
Moist Cold Refrigerator Co., Johnson Co. *v.* ... 968
Mojonnier Dawson Co., U. S. Dairies Sales Corp. *v.* ... 975
Moog Industries *v.* Federal Trade Comm'n ... 905
Moore *v.* Standard Oil Co. of California ... 975
Moore *v.* United States ... 956
Moretti *v.* Illinois ... 947
Morgan *v.* Illinois ... 905

	Page
Morrison *v.* Davis	968
Mulcahey, Williams *v.*	946, 970
Mummert *v.* Pennsylvania	939
Murff, Cha'o Li Chi *v.*	919
Murphy, Nedd *v.*	935
Murray Corporation of America, Detroit *v.*	934
Myers, Baerchus *v.*	953
Nash, Burnett *v.*	953
Nash, Dodd *v.*	942
Nash, King *v.*	942
Nash, Mahurin *v.*	953
National Bank of Mattoon, Daviditis *v.*	973
National Broadcasting Co., Barnes *v.*	928
National Bulk Carriers, Inc., Berge *v.*	958
National Labor Relations Board. See Labor Board.	
National Theatres Corp. *v.* Bertha Bldg. Corp.	936
National Theatres Corp., Gumbiner Enterprises *v.*	936
Natural Gas Pipeline Co. *v.* Harrington	957
Navy Department, White *v.*	973
Nebraska, Parker *v.*	933
Nedd *v.* Murphy	935
Nelson, Inc., *v.* United States	934
Neubauer *v.* United States	927
Nevil C. Withrow Co. *v.* Grimshaw Co.	912
Newberry *v.* Pennsylvania	904
Newell, Chauffeurs, Teamsters & Helpers Union *v.*	341
New England Mutual Life Co., Hinkle *v.*	901
New Jersey, Hoag *v.*	464
Newman, Brengle *v.*	951
Newman Krause Co., Brengle *v.*	951
New Process Gear Corp., New York Central R. Co *v.*	959
New York, Bove *v.*	924
New York, Burgee *v.*	954
New York, Jordan *v.*	923
New York *v.* O'Neill	972
New York, Pogor *v.*	341
New York, Rappaport *v.*	977
New York, Ringe *v.*	962
New York, Runion *v.*	963
New York, Sileo *v.*	923
New York, Van Slyke *v.*	903
New York, Welsh *v.*	945
New York, White *v.*	964
New York, Williams *v.*	943

Page
New York Boxing Club *v.* United States..... 910
New York Central R. Co. *v.* Baltimore & O. R. Co..... 970
New York Central R. Co., Milom *v*..... 934
New York Central R. Co. *v.* New Process Gear Corp..... 959
New York City Comptroller, New Yorker Magazine *v*..... 339
New Yorker Magazine *v.* Gerosa..... 339
New York, N. H. & H. R. Co., Boston & P. R. Corp. *v*..... 939
New York, N. H. & H. R. Co., B. & P. R. Stockholders *v*.... 948
New York Trap Rock Corp. *v.* Clarkstown..... 582
Nichols *v.* Alker..... 915
Nichols *v.* McGee..... 922
Nishikawa *v.* Dulles..... 129
North Carolina, Hudson *v*..... 903
North Carolina, Walker *v*..... 946
Northern Pacific R. Co. *v.* United States..... 1
North Western-Hanna Fuel Co. *v.* United States..... 581
Nor Woods *v.* California Adult Authority..... 978
Novak *v.* Pinto..... 956
Nowak *v.* United States..... 660
Oakland Circuit Court, Einieder *v*..... 922
Ohio, Cutshaw *v*..... 905
Ohio, Jackson *v*..... 976
Ohio, Kisor *v*..... 948
Ohio, Mack *v*..... 923
Ohio, Porchetta *v*..... 582
Ohio, Sexton *v*..... 948
Ohio, Trotter *v*..... 977
Ohio Board of Liquor Control, Pompei Winery *v*..... 937
Ohio Power Co., Creasy *v*..... 917
Ohio Power Co. *v.* United States..... 931
Oliver, Teamsters Union *v*..... 966
O'Neill, New York *v*..... 972
Orleans Parish School Board *v.* Bush..... 969
Orrick, Schwebel *v*..... 927
Ortega *v.* La Buy..... 962
Ortega *v.* Ragen..... 915
Overholser, Madsen *v*..... 920
Palmer *v.* United States..... 914
Panama Canal Co. *v.* Grace Line, Inc..... 309, 916
Parker *v.* Nebraska..... 933
Parker *v.* United States..... 964
Parole Board of D. C., Baker *v*..... 944
Parole Board of D. C., Sykes *v*..... 914
Patterson, *In re*..... 947

	Page
Patterson, Daugette *v.*	902
Payne *v.* Arkansas	560
Peacock *v.* Lubbock Compress Co.	973
Pegelow, McGuinn *v.*	901
Pelton Steel Casting Co. *v.* Commissioner	958
Penguin Frozen Foods *v.* Refrigeradora del Noroeste	901
Pennsylvania, Giovengo *v.*	904
Pennsylvania, Mummert *v.*	939
Pennsylvania, Newberry *v.*	904
Pennsylvania Dept. of Public Instruction, Sealy *v.*	975
Pennsylvania *ex rel.* Saunders *v.* Cavell	941
Pennsylvania R. Co., Dessi *v.*	967
Peoria, Peoria Transit Lines *v.*	225
Peoria Transit Lines *v.* Peoria	225
Pepersack, Holt *v.*	924
Pepersack, Humphries *v.*	944
Pepersack, Jackson *v.*	943
Pepersack, Price *v.*	944
Pepersack, Snyder *v.*	965
Pepersack, Williams *v.*	942
Pepsi Cola Bottling Co., Hamilton *v.*	961
Perez *v.* Brownell	44, 915
Perez *v.* Rogers	44, 915
Perry *v.* United States	941
Persons *v.* Washington	963
Peters Cartage, Amlin *v.*	676
Petrocarbon Limited *v.* Watson	978
Peurifoy *v.* Commissioner	956
P. G. Lake, Inc., Commissioner *v.*	260, 964
Phillips *v.* Phillips	903
Philyaw *v.* Arkansas	340
Pinto, Novak *v.*	956
Pioneer Carissa Gold Mines, Spriggs *v.*	950
Pogor *v.* New York	341
Pompei Winery, Inc., *v.* Ohio Board of Liquor Control	937
Pool *v.* Commissioner	938, 978
Porchetta *v.* Ohio	582
Power Comm'n. See Federal Power Comm'n.	
Prager *v.* United States	939
Pratt *v.* Department of Army	226
Prentice Machinery Co. *v.* Associated Plywood Mills	951
President of Harvard College, Irizarry y Puente *v.*	947, 969
Pressed Steel Car Co. *v.* United States	967
Preston *v.* Michigan	971

Page

Price *v.* Pepersack 944
Procter & Gamble Co., United States *v.* 677
Producers Livestock Assn., Benson *v.* 282
Producers Livestock Assn., Denver Stock Yard Co. *v.* 282
Public Instruction Department, Sealy *v.* 975
Public Service Comm'n *v.* Federal Power Comm'n 912
Public Service Comm'n *v.* United States 421
Public Utilities Comm'n *v.* United States 925
Puente *v.* President of Harvard College 947, 969
Purser *v.* Rhay 940
Radio Station WEMR *v.* Mitchell 950
Ragen, Dickson *v.* 903
Ragen, Fair *v.* 954
Ragen, Graziano *v.* 978
Ragen, Hartfield *v.* 963
Ragen, Hurley *v.* 42
Ragen, Meacham *v.* 925
Ragen, Ortega *v.* 915
Ragen, Turner *v.* 960
Raidy *v.* United States 973
Railroad Retirement Board, Railway Express Agency *v.* 967
Railroad Trainmen *v.* Smith 937, 978
Railway Express Agency *v.* Railroad Retirement Board 967
Railway Express Agency *v.* Virginia 929
Rainwater *v.* United States 590
Randolph, Henderson *v.* 964
Randolph, Shelton *v.* 915
Randolph, Skinner *v.* 922
Randolph, White *v.* 905
Rappaport *v.* New York 977
Ratner *v.* United States 368
Raymond Concrete Pile Co., Grimes *v.* 252
Recorder's Court, Kanter *v.* 921
Reese *v.* Looney 976
Refrigeradora del Noroeste, Appelbaum *v.* 901
Rennekamp *v.* Mitchell 950
Revenue Comm'r *v.* Stockham Valves, Inc. 911
Reynolds *v.* Martin 954
R. F. Ball Construction Co., United States *v.* 934
Rhay, Allen *v.* 941
Rhay, Curtis *v.* 905
Rhay, Daugherty *v.* 976
Rhay, Donner *v.* 942
Rhay, Purser *v.* 940

	Page
Ring *v.* Butterfield	971
Ringe *v.* New York	962
Ringwood *v.* United States	974
Ritchie *v.* Illinois	944, 970
Roberson *v.* United States	919
Robinson *v.* Stevens	939
Robinson *v.* United States	942, 970, 978
Rogers, Bonetti *v.*	691
Rogers, La Salle Steel Co. *v.*	974
Rogers, Lubini *v.*	966
Rogers, Perez *v.*	44, 915
Rogers, Shepherd *v.*	956
Rogers *v.* White Metal Rolling & Stamping Corp.	936
Romero *v.* Int. Operating Terminal Co.	955
Ross Island Sand & Gravel Co., Hahn *v.*	972
Roto-Lith, Ltd., Texas Plastics, Inc., *v.*	957
R. S. Rainwater & Sons *v.* United States	590
Runion *v.* New York	963
Russell, Automobile Workers *v.*	634
Sacher *v.* United States	576
Safeway Stores *v.* Vance	910
St. Louis-S. F. R. Co., Ferguson *v.*	41
Santa Barbara County Water Agency *v.* Balaam	917
Sapp *v.* Atlantic Coast Line	950
Sarkis *v.* United States	919
Sauber, Forster *v.*	913
Saunders *v.* Adams	948
Saunders *v.* Cavell	941
Savoretti, Dessalernos *v.*	269
Savoy *v.* Warden of Maryland House of Correction	963
Scales *v.* United States	945
Schaefer Brewing Co., United States *v.*	227
Schleich *v.* Butterfield	971
School Board of Arlington County *v.* Thompson	958
School Board of Orleans Parish *v.* Bush	969
Schwebel *v.* Orrick	927
Scull, District of Columbia *v.*	920
Sealy *v.* Department of Public Instruction	975
Seamer *v.* Burke	965
Sears, Roebuck & Co., Minnesota Mng. & Mfg. Co. *v.*	915
Secretary of Agriculture, Iowa-Ill. Gas Co. *v.*	949
Secretary of Agriculture *v.* Producers Livestock Assn.	282
Secretary of Army, Marshall *v.*	24
Secretary of Health and Welfare *v.* Florida Citrus Exchange	911

	Page
Secretary of Labor *v.* Lublin, McGaughy & Associates	917
Secretary of Labor, Rennekamp *v.*	950
Secretary of Navy, White *v.*	973
Secretary of State, Nishikawa *v.*	129
Secretary of State, Trop *v.*	86
Secretary of State of California, Socialist Party *v.*	952
Select Theatres Corp. *v.* Johnson	918
Selles, Teamsters Union *v.*	975
Settle, Harrison *v.*	954
Sexton *v.* Ohio	948
Shaw Construction Co. *v.* Stark	937
Shell *v.* Missouri	939
Shelton *v.* Randolph	915
Shelton *v.* United States	26
Shepard *v.* Cal-Nine Farms	951
Shepherd *v.* Rogers	956
Sheridan *v.* United States	976
Sherman *v.* United States	369
Shipman *v.* Illinois	946
Shotwell *v.* Michigan	976
Sileo *v.* New York	923
Simons, Kinsey *v.*	935
Simpson *v.* Culver	952
Sinkler *v.* Missouri Pacific R. Co.	326, 978
Skibs A/S Jolund *v.* American Smelting & Rfg. Co.	933
Skinner *v.* Randolph	922
Slater, United States *v.*	257
Smaller *v.* Leach	936
Smith, Fidelity-Philadelphia Trust Co. *v.*	274
Smith, LeCuno Oil Co. *v.*	974
Smith, Railroad Trainmen *v.*	937, 978
Smith *v.* Steele	905
Smith *v.* United States	951
Smith *v.* Warden of Maryland House of Correction	963
Smotherman *v.* Michigan	935
Smyth, Bryant *v.*	935
Smyth, Coleman *v.*	923
Smyth, Copeland *v.*	935
Smyth, Lee *v.*	947
Snyder *v.* Pepersack	965
Socialist Party, USA, *v.* Jordan	952
Socony Mobil Oil Co., United States *v.*	925
Somerville *v.* Tucker	904
Sound S. S. Lines, Inc., *v.* Gardner	960

	Page
South Carolina Generating Co. *v.* Federal Power Comm'n...	912
South Carolina Pub. Serv. Comm'n *v.* Federal Power Comm'n.	912
Southern Ute Tribe, Martinez *v*.....	960
Spanos *v.* Carter.....	933
Spans *v.* Illinois.....	947
Spears *v.* Illinois.....	961
Speed *v.* Tallahassee.....	913
Sperry Gyroscope Co. *v.* Engineers Association.....	932
Spriggs *v.* Pioneer Carissa Gold Mines.....	950
Standard Oil Co. of California, Moore *v*.....	975
Stark, Shaw Construction Co. *v*.....	937
State. See name of State.	
State Department. See Secretary of State.	
State Revenue Comm'r *v.* Stockham Valves, Inc.....	911
State Revenue Dept., Bendix Corp. *v*.....	928
Statutory Review Committee, Tatton *v*.....	966
Steele, Smith *v*.....	905
Stefanich *v.* Uffelman.....	903
Steiner, Amsley *v*.....	954
Steiner, Bowers *v*.....	954
Steiner, Madera Irrigation District *v*.....	917
Steiner, Medley *v*.....	935
Stephen, Zivnostenska Banka *v*.....	22
Sterling Drug Inc. *v.* Farbenfabriken Bayer A. G.....	957
Stern, Ginsburg *v*.....	932, 954
Stevens, Robinson *v*.....	939
Stewart *v.* Michigan.....	964
Stockham Valves & Fittings, Inc., Williams *v*.....	911
Stokes *v.* Travelers Ins. Co.....	951
Stone *v.* McFarlin.....	934
Storer Broadcasting Co. *v.* United States.....	951
Stover *v.* Farmers' Educational Union.....	976
Strauss & Son *v.* Commissioner.....	966
Strong *v.* United States.....	226
Suffield, Miller *v*.....	978
Sullivan, Commissioner *v*.....	27
Sullivan *v.* Heinze.....	943
Supreme Court of Illinois, Gawron *v*.....	921
Surplex Sales *v.* Union Carbide & Carbon Corp.....	957
Swope, House *v*.....	954
Sykes *v.* Chairman of Parole Board.....	914
Tacoma, Cowlitz Tribe of Indians *v*.....	934
Tacoma *v.* Taxpayers of Tacoma.....	916
Tallahassee, Speed *v*.....	913

Page

Tankport Terminals, Inc., Wills Lines, Inc., *v*..... 939
Tank Truck Rentals, Inc., *v*. Commissioner..... 30
Tatton *v*. Crolley..... 966
Tatum *v*. United States..... 943
Taxpayers of Tacoma, Tacoma *v*..... 916
Taylor *v*. Engram..... 901
Taylor *v*. Tinsley..... 935
Teamsters Union *v*. Labor Board..... 931
Teamsters Union *v*. Newell..... 341
Teamsters Union *v*. Oliver..... 966
Teamsters Union *v*. Selles..... 975
Technical Engineers *v*. General Electric Co..... 938
Teets, Jefferson *v*..... 925
Terminal Operating Co. *v*. Iino Kauin Kaisha, Ltd..... 939
Territory. See name of Territory.
Terry *v*. Illinois..... 942
Texas, DuBois *v*..... 921
Texas, Louvier *v*..... 923
Texas Board of Medical Examiners, Watt *v*..... 912
Texas Plastics, Inc., *v*. Roto-Lith, Ltd..... 957
Thomas *v*. Arizona..... 390
Thomas, Kansas City Southern R. Co. *v*..... 959
Thomas Drayage Co. *v*. Industrial Indemnity Co..... 927
Thompson, Arlington County School Board *v*..... 958
Thompson *v*. Maryland..... 943
Thornson, United States *v*..... 257
Tilghman *v*. Culver..... 953
Tinsley, Heath *v*..... 971
Tinsley, Taylor *v*..... 935
Tomley *v*. United States..... 928
Topp *v*. Ferling..... 956
Town. See name of town.
Trade Commission. See Federal Trade Comm'n.
Travelers Ins. Co., Stokes *v*..... 951
Treasury Department, Cutting *v*..... 926
Trop *v*. Dulles..... 86
Trotter *v*. Ohio..... 977
Truck Drivers Union *v*. Labor Board..... 931
Tucker, Somerville *v*..... 904
Tucker, Wood *v*..... 903
Turner *v*. Ragen..... 960
Twin City Power Co., United States *v*..... 918
Tyler *v*. Warden of Baltimore City Jail..... 944
Uffelman, Stefanich *v*..... 903

Page

Union. See name of trade.
Union Carbide & Carbon Corp., Finsky *v*..... 957
United. For trade union, see name of trade.
United States. See also U. S. *ex rel.*
United States, Accardo *v*..... 943
United States, Andrew G. Nelson, Inc., *v*..... 934
United States *v*. A & P Trucking Co..... 917
United States, Babb *v*..... 974
United States *v*. Ball Construction Co..... 934
United States, Bank of Nevada *v*..... 938
United States, Barenblatt *v*..... 929
United States, Barker *v*..... 945
United States, Bell *v*..... 963
United States, Bilderback *v*..... 940, 946
United States, Blackford *v*..... 914
United States, Borough of Ringwood *v*..... 974
United States, Bouziden *v*..... 927, 964
United States, Bradford *v*..... 927
United States, Brown *v*..... 148, 922, 924, 926, 938, 948, 954
United States, Bulsek *v*..... 942
United States, Caudle *v*..... 921, 964
United States, Chapman *v*..... 945
United States, Cirillo *v*..... 949
United States, Collins *v*..... 952
United States, Connelly *v*..... 921, 964
United States, Cook *v*..... 961
United States *v*. Cores..... 405
United States, Corona *v*..... 954, 978
United States, Costello *v*..... 256
United States, Crawford *v*..... 969
United States, Cutting *v*..... 926
United States, Dandridge *v*..... 259
United States, De Casaus *v*..... 949
United States, Dewan *v*..... 922
United States *v*. Diamond..... 257
United States, Donaldson *v*..... 922
United States *v*. Dumanus..... 257
United States, Dunn *v*..... 942, 970
United States, Ellis *v*..... 674
United States, Ester *v*..... 950
United States *v*. F. & M. Schaefer Brewing Co..... 227
United States, Frank *v*..... 962
United States, Fryer *v*..... 953
United States, Gaitan *v*..... 937

Page
United States, Georgia *v.* 273
United States, Gernie *v.* 968
United States, Giardano *v.* 973
United States, Goldstein *v.* 913
United States, Gonzalez *v.* 913
United States, Gravely *v.* 961
United States, Green *v.* 165
United States, Gregory *v.* 977
United States, Guido *v.* 950
United States, Hardy *v.* 944
United States, Hayes *v.* 914
United States, Heusinger *v.* 963
United States, Hill *v.* 704
United States, Hiller *v.* 963
United States *v.* Home Comfort Co. 595
United States, Hoover *v.* 960
United States, Hoover Motor Express Co. *v.* 38, 934
United States, Houston Belt & Terminal R. Co. *v.* 23
United States, Howard *v.* 25
United States, International Boxing Club *v.* 910
United States, Japan-Atlantic Freight Conference *v.* 481
United States, Jones *v.* 919, 923
United States, Kahn *v.* 918
United States, Kapsalis *v.* 901
United States, Kay *v.* 976
United States, Kaye *v.* 919
United States, Kissinger *v.* 958
United States, Ladner *v.* 969
United States, Leverette *v.* 976
United States, Litterio *v.* 940, 970
United States, Loo *v.* 928
United States *v.* Louisiana 928
United States, Lucchese *v.* 256
United States, Lyles *v.* 931, 961
United States, Mack *v.* 920
United States, Mackie *v.* 944
United States, Maisenberg *v.* 670
United States *v.* Manuel Rodriguez Trading Corp. 902
United States, Marin County *v.* 412
United States, Marlette *v.* 914
United States, Marzec *v.* 913
United States, Masciale *v.* 386
United States, Matles *v.* 256
United States, McCreary *v.* 945

	Page
United States, McGann *v*.	923
United States *v*. McNinch	595
United States, Moore *v*.	956
United States, Nelson, Inc., *v*.	934
United States, Neubauer *v*.	927
United States, Northern Pacific R. Co. *v*.	1
United States, North Western-Hanna Fuel Co. *v*.	581
United States, Nowak *v*.	660
United States, Ohio Power Co. *v*.	931
United States, Palmer *v*.	914
United States, Parker *v*.	964
United States, Perry *v*.	941
United States, Prager *v*.	939
United States, Pressed Steel Car Co. *v*.	967
United States *v*. Procter & Gamble Co.	677
United States, Public Service Comm'n *v*.	421
United States, Public Utilities Comm'n *v*.	925
United States, Raidy *v*.	973
United States, Rainwater *v*.	590
United States, Ratner *v*.	368
United States *v*. R. F. Ball Construction Co.	934
United States, Ringwood *v*.	974
United States, Roberson *v*.	919
United States, Robinson *v*.	942, 970, 978
United States *v*. Rodriguez Trading Corp.	902
United States, R. S. Rainwater & Sons *v*.	590
United States, Sacher *v*.	576
United States, Sarkis *v*.	919
United States, Scales *v*.	945
United States *v*. Schaefer Brewing Co.	227
United States, Shelton *v*.	26
United States, Sheridan *v*.	976
United States, Sherman *v*.	369
United States *v*. Slater	257
United States, Smith *v*.	951
United States *v*. Socony Mobil Oil Co.	925
United States, Storer Broadcasting Co. *v*.	951
United States, Strong *v*.	226
United States, Tatum *v*.	943
United States *v*. Thornson	257
United States, Tomley *v*.	928
United States *v*. Twin City Power Co.	918
United States, Volkell *v*.	962
United States, Waldin *v*.	973

	Page
United States, Weems *v.*	924
United States, Williams *v.*	941
United States, Yates *v.*	363
U. S. Attorney General, McDonald *v.*	915
U. S. Dairies Sales Corp. *v.* Mojonnier Dawson Co.	975
U. S. District Judge, Beacon Theatres, Inc., *v.*	956
U. S. District Judge, Binder *v.*	970
U. S. District Judge, Ortega *v.*	962
U. S. *ex rel.* Cantisani *v.* Holton	932, 964
U. S. *ex rel.* Gentner *v.* Martin	924
U. S. *ex rel.* Goldstein *v.* Lohman	918
U. S. *ex rel.* Kozicky *v.* Fay	960
U. S. *ex rel.* Ortega *v.* La Buy	962
U. S. Plywood Corp. *v.* Algoma	957
U. S. Treasury Department, Cutting *v.*	926
Uphaus *v.* Wyman	926, 965
Utah Public Service Comm'n *v.* United States	421
Ute Tribe, Martinez *v.*	960
Utilities Comm'n of California *v.* United States	925
Valley Unitarian Church *v.* Los Angeles County	916
Vance, Safeway Stores *v.*	910
Van Newkirk *v.* McNeill	339
Van Orman Fort Wayne Corp., Eichberg & Co. *v.*	927
Van Slyke *v.* New York	903
Verbeem, Amlin *v.*	676
Virginia, Railway Express Agency *v.*	929
Volkell *v.* United States	962
Wagg, Wilson *v.*	953
Waldin *v.* United States	973
Walker *v.* North Carolina	946
Warden of Baltimore City Jail, Tyler *v.*	944
Warden of Maryland House of Correction, Clark *v.*	948
Warden of Maryland House of Correction, Savoy *v.*	963
Warden of Maryland House of Correction, Smith *v.*	963
Warden of Maryland Penitentiary, Cook *v.*	953
Warden of Maryland Penitentiary, Gray *v.*	924
Warden of Maryland Penitentiary, Hall *v.*	912
Warden of Maryland Penitentiary, Jones *v.*	940
Warehousemen & Helpers Union *v.* Labor Board	931
Warehousemen & Helpers Union *v.* Oliver	966
Warehousemen & Helpers Union, Selles *v.*	975
Washington, Baxter *v.*	903
Washington, California *v.*	955
Washington, Persons *v.*	963

458778 O—58——3

	Page
Washington State Parole Board, Hooten *v.*	944
Watson, Bersworth *v.*	972
Watson, Petrocarbon Limited *v.*	978
Watt *v.* Texas Board of Medical Examiners	912
Weems *v.* United States	924
Welfare Department *v.* Florida Citrus Exchange	911
Wells *v.* Fay	935
Welsh *v.* New York	945
WEMR Radio Station *v.* Mitchell	950
Westover, Beacon Theatres, Inc., *v.*	956
West Virginia, Flint *v.*	903
Weyerhaeuser S. S. Co. *v.* Yanow	937
Whalen *v.* Krueger	924
White *v.* Gates	973
White *v.* New York	964
White *v.* Randolph	905
Whiteman, Butler *v.*	271
White Metal Rolling & Stamping Corp., Rogers *v.*	936
Williams *v.* California	964, 977
Williams *v.* Illinois	942
Williams *v.* Lee	930
Williams *v.* Mulcahey	946, 970
Williams *v.* New York	943
Williams *v.* Pepersack	942
Williams *v.* Stockham Valves & Fittings, Inc	911
Williams *v.* United States	941
Wills Lines, Inc., *v.* Tankport Terminals, Inc	939
Willson, Dildine *v.*	953
Wilson *v.* Wagg	953
Wisconsin Power & Light Co., Hobbs *v.*	932
Withrow Co. *v.* Grimshaw Co	912
Wojculewicz *v.* Cummings	969
Wood *v.* Tucker	903
Woodruff, McCraw *v.*	910
Woods *v.* California Adult Authority	978
Woods *v.* Heinze	921
Woolley *v.* Eastern Air Lines	931
Wooster Division, Borg-Warner Corp. *v.* Labor Board	342
W. R. Grimshaw Co., Withrow Co. *v.*	912
Wyman, Uphaus *v.*	926, 965
Yanow, Weyerhaeuser S. S. Co. *v.*	937
Yates *v.* United States	363
Zimmer, Hines *v.*	977
Zivnostenska Banka *v.* Stephen	22

TABLE OF CASES CITED

	Page
Abramowitz v. Brucker, 355 U. S. 579	24
Acheson v. Maenza, 92 U. S. App. D. C. 85	68, 134, 143
Acheson v. Murata, 342 U. S. 900	133, 134, 140, 143
Acheson v. Okimura, 342 U. S. 899	133, 134, 140, 143
Adams v. Davison-Paxon Co., 230 S. C. 532	533–535, 547, 548, 554
Adams v. McCann, 317 U. S. 269	83
Adamson v. California, 332 U. S. 46	83
Addison v. Holly Hill Co., 322 U. S. 607	287, 306, 908
Adler v. Board, 342 U. S. 485	83
Administrator. See name of administrator.	
Aetna Ins. Co. v. Haworth, 300 U. S. 227	270
Agwilines, Inc., v. Board, 87 F. 2d 146	643
Akins v. Texas, 325 U. S. 398	585
Alabama v. United States, 283 U. S. 776	440, 441
Alabama Power Co. v. Goodwin, 210 Ala. 657	658
Alata v. Dulles, 95 U. S. App. D. C. 182	134, 143
Alleghany Corp. v. Breswick & Co., 353 U. S. 151	419
Allen v. Allen, 105 N. Y. 628	612, 613
Allen-Bradley Local v. Board, 315 U. S. 740	647
Allis-Chalmers Co. v. Board, 213 F. 2d 374	348
Amalgamated Bus Employees v. Board, 340 U. S. 383	644
Amalgamated Meat Cutters v. Fairlawn, Inc., 353 U. S. 20	644
Amazon Mill Co. v. Textile Workers, 167 F. 2d 183	630
American Communications Assn. v. Douds, 339 U. S. 382	83
American Express Co. v. Caldwell, 244 U. S. 617	434
Anderson v. Helvering, 310 U. S. 404	261, 362
Angel v. Bullington, 330 U. S. 183	535
Arndstein v. McCarthy, 254 U. S. 71	154, 158
Arnold v. P. & S. F. R. Co., 353 U. S. 360	41
Ashbaugh v. Circuit Court, 97 Wis. 1	194
Ashcraft v. Tennessee, 322 U. S. 143	561, 562, 567
A/S J. Ludwig Rederi v. Isbrandtsen Co., 342 U. S. 950	522
Associated Press v. Board, 301 U. S. 103	287, 306
Atkinson v. A., T. & S. F. R. Co., 197 F. 2d 244	159
Atlantic Coast Line v. Florida, 295 U. S. 301	907
Attorney General re Ashbaugh v. Circuit Court, 97 Wis. 1	194
Augello v. Dulles, 220 F. 2d 344	134, 143
Bachman v. Mejias, 1 N. Y. 2d 575	608, 613
Baglin v. Cusenier Co., 221 U. S. 580	191
Bailey v. Alabama, 219 U. S. 219	76
Baltimore & P. S. Co. v. Norton, 284 U. S. 408	324
Barber v. Gonzales, 347 U. S. 637	699
Barenblatt v. United States, 354 U. S. 930	930

Page

Bauer v. Clark, 332 U. S. 839; 161 F. 2d 397 68
Baumgartner v. United States, 322 U. S. 665 66, 98, 133, 141, 663
Beauharnais v. Illinois, 343 U. S. 250 83, 197
Bell v. United States, 349 U. S. 81 699
Bernhardt v. Polygraphic Co., 350 U. S. 198 535–539, 550
Berrebi v. Crossman, 208 F. 2d 498 696
Berry v. Atl. Greyhound Lines, 114 F. 2d 255 556
Bessette v. Conkey Co., 194 U. S. 324 183, 184, 191
Bethlehem Steel Co. v. Board, 330 U. S. 767 645
Betts v. Brady, 316 U. S. 455 83
Bilokumsky v. Tod, 263 U. S. 149 159
Binder v. Commercial Assn., 165 F. 2d 896 245
Blackmer v. United States, 284 U. S. 421 191
Blair v. United States, 250 U. S. 273 191
Blau v. United States, 340 U. S. 332 191
Blodgett v. Holden, 275 U. S. 142 120
Bohnen v. Harrison, 199 F. 2d 492 276
Bonsor v. Musicians' Union, [1956] A. C. 104 618
Born v. Laube, 213 F. 2d 407; 214 F. 2d 349 629
Boseman v. Pacific Mills, 193 S. C. 479 529, 555
Brady v. C. & G. W. R. Co., 114 F. 100 329, 333
Breard v. Alexandria, 341 U. S. 622 83
Breithaupt v. Abram, 352 U. S. 432 83
Bridges v. California, 314 U. S. 252 196, 212
Brock v. North Carolina, 344 U. S. 424 468–470, 477
Brown v. Allen, 344 U. S. 443 393, 403

Page

Brown v. Lederer, 140 F. 2d 136 182
Brown v. Mississippi, 297 U. S. 278 393, 401, 561, 562
Brown v. United States, 276 U. S. 134 191
Brown v. Walker, 161 U. S. 591 191
Bruni v. Dulles, 98 U. S. App. D. C. 358 134, 143
Bugajewitz v. Adams, 228 U. S. 585 98
Building Trades Council v. Kinard Co., 346 U. S. 933 625
Burnes v. K. C., Ft. S. & M. R. Co., 129 Mo. 41 329
Burnet v. Coronado Co., 285 U. S. 393 195
Burnet v. Hormel, 287 U. S. 103 265
Burr, Ex parte, 4 Fed. Cas. 791 186
Burr v. Comm'r, 156 F. 2d 871 276, 281
Burroughs Bldg. Co. v. Comm'r, 47 F. 2d 178 36
Burrus, In re, 136 U. S. 586 191
Burton v. United States, 202 U. S. 344 478
Bute v. Illinois, 333 U. S. 640 83
Butler v. Whiteman, 356 U. S. 271 333
Butts v. United States, 273 F. 35 376
Calder v. Bull, 3 Dall. 386 95, 96
Callan v. Wilson, 127 U. S. 540 201
Camara v. Nicolls, 161 F. 2d 860 133, 136
Cammer v. United States, 350 U. S. 399 172, 191, 196
Carter v. Texas, 177 U. S. 442 585
Carumbo v. Cape Cod Co., 123 F. 2d 991 271
Cassell v. Texas, 339 U. S. 282 585
Chae Chan Ping v. United States, 130 U. S. 581 699
Chambers v. Florida, 309 U. S. 227 199, 561, 562, 567, 568

Page

Chase Nat. Bank v. United States, 278 U. S. 327 279
Cherry Cotton Mills v. United States, 327 U. S. 536 592
Chicago Board of Trade v. United States, 246 U. S. 231 5, 287, 288, 306
Chicago Gt. W. R. Co. v. Comm'n, 294 U. S. 50 318
Chicago, M., St. P. & P. R. Co. v. Illinois, 355 U. S. 300 426–429, 458, 459, 906, 907
Chicago, R. I. & P. R. Co. v. Comm'r, 47 F. 2d 990 36
Chiles, In re, 22 Wall. 157 191, 192
Cities Service Co. v. Dunlap, 308 U. S. 208 534, 535
City. See name of city.
Civil Aeronautics Board v. Modern Air Transp., 179 F. 2d 622 521
Claassen v. United States, 142 U. S. 140 579
Clark v. Kansas City, 172 U. S. 334 337
Clark v. United States, 289 U. S. 1 191
Claussen v. Day, 279 U. S. 398 697, 699, 703
Cohen v. Beneficial Loan Corp., 337 U. S. 541 535
Comitis v. Parkerson, 56 F. 556 49, 72
Commissioner v. Bedford Estate, 325 U. S. 283 243, 244
Commissioner v. Church Estate, 335 U. S. 632 279
Commissioner v. Clise, 122 F. 2d 998 279
Commissioner v. Doyle, 231 F. 2d 635 28
Commissioner v. Heininger, 320 U. S. 467 29, 34, 35
Commissioner v. Meyer, 139 F. 2d 256 281
Commissioner v. Sullivan, 356 U. S. 27 39
Commissioner v. Wilder Estate, 118 F. 2d 281 279

Page

Commissioner of Internal Revenue. See Commissioner.
Commonwealth. See also name of Commonwealth.
Commonwealth v. Evans, 101 Mass. 25 471
Commonwealth v. Roby, 12 Pick. (Mass.) 496 479
Cone v. West Va. Paper Co., 330 U. S. 212 533
Conley v. United States, 59 F. 2d 929 182
Connelly v. U. S. District Court, 191 F. 2d 692 364
Conway v. Glenn, 193 F. 2d 965 276, 281
Cooke v. United States, 267 U. S. 517 184, 191, 217
Cooper v. Brown, 126 F. 2d 874 538
Corn Products Co. v. Comm'r, 350 U. S. 46 265
Cory Bros. v. United States, 47 F. 2d 607 337
Costello v. United States, 350 U. S. 359 681
County. See name of county.
Craig v. Hecht, 263 U. S. 255 191
Cratty v. United States, 82 U. S. App. D. C. 236 377
Creekmore v. United States, 237 F. 743 182
Crowell v. Benson, 285 U. S. 22 536
Crutcher v. Joyce, 134 F. 2d 809 337
Cuddy, In re, 131 U. S. 280 191
Cummings v. Missouri, 4 Wall. 277 96
Darr v. Burford, 339 U. S. 200 392
Davidson v. New Orleans, 96 U. S. 97 60
Davis v. Beason, 133 U. S. 333 96, 97
Debs, In re, 158 U. S. 564 183, 184, 191, 196
Decatur v. Paulding, 14 Pet. 497 318

Page

Deen v. G., C. & S. F. R. Co., 353 U. S. 925 41, 333
Delgadillo v. Carmichael, 332 U. S. 388 700
Demos v. United States, 205 F. 2d 596 377
Dennis v. United States, 341 U. S. 494 83, 167, 219, 663
Denver Stock Yard Co. v. Producers Assn., 356 U. S. 282 498
Deputy v. du Pont, 308 U. S. 488 33, 39
Desper v. Starved Rock Co., 342 U. S. 187 273
Detroit v. Murray Corp., 355 U. S. 489 21
Dice v. A., C. & Y. R. Co., 342 U. S. 359 536
Diederich v. Am. News Co., 128 F. 2d 144 537, 539
Dimick v. Schiedt, 293 U. S. 474 215
Dingwall v. Street R. Employees, 4 Cal. App. 565 619
Dinwiddie v. States, 202 Ark. 562 570
District Lodge of Machinists v. Cavett Co., 355 U. S. 39 624
District of Columbia v. Clawans, 300 U. S. 617 201
Dos Reis ex rel. Camara v. Nicolls, 161 F. 2d 860 133, 136
Drysdale, Petition of, 20 F. 2d 957 71, 72
Dunn v. United States, 284 U. S. 390 472
Edwards v. Doctors Hospital, 242 F. 2d 888 245
Eilenbecker v. District Court, 134 U. S. 31 183
Eisner v. Macomber, 252 U. S. 189 211
Ellis v. United States, 356 U. S. 674 704
Emergency Fleet Corp. v. Western Union, 275 U. S. 415 592, 594
Emich Motors Corp. v. General Motors Corp., 340 U. S. 558 476

Page

Erie R. Co. v. Tompkins, 304 U. S. 64 195, 534–539, 548, 550
Estate. See name of estate.
Ettelson v. Metropolitan Ins. Co., 137 F. 2d 62 538
Evans v. Phillips, 4 Wheat. 73 680
Ex parte. See name of party.
F——, Matter of, 2 I. & N. Dec. 427 77
Far East Conference v. United States, 342 U. S. 570 496–498, 517, 522–524
Farley v. United States, 354 U. S. 521 674, 704
Fashion Guild v. Comm'n, 312 U. S. 457 5
Fay v. New York, 332 U. S. 261 475
Federal Communications Comm'n v. Pottsville Co., 309 U. S. 134 520
Feiner v. New York, 340 U. S. 315 83, 471
Feldman v. United States, 322 U. S. 487 158
Ferguson v. Moore-McCormack Lines, 352 U. S. 521 271, 332
Ferguson v. St. Louis-S. F. R. Co., 356 U. S. 41 333
Fidelity & Deposit Co. v. Arenz, 290 U. S. 66 602
Fikes v. Alabama, 352 U. S. 191 393, 401, 562, 567
Finlay v. Finlay, 240 N. Y. 429 612
Fisher v. Pace, 336 U. S. 155 199
Fitzpatrick v. United States, 178 U. S. 304 155
Fitzroy, In re, 4 F. 2d 541 71, 72
Floody v. Great N. R. Co., 102 Minn. 81 329
Florida v. United States, 282 U. S. 194 425, 426, 434
Florida v. United States, 292 U. S. 1 438, 442
Fong Haw Tan v. Phelan, 333 U. S. 6 699

Page

Fong Yue Ting v. United States, 149 U. S. 698 65, 98, 124
Forstner Chain Corp., In re, 177 F. 2d 572 232–234
Fort Worth Belt R. Co. v. United States, 22 F. 2d 795 333
Fort Worth & D. C. R. Co. v. Smith, 39 Tex. Civ. App. 92 329
Fountain v. Filson, 336 U. S. 681 533
Francis v. Resweber, 329 U. S. 459 99
Frisbie v. Collins, 342 U. S. 519 392
Futrelle v. Atlantic Coast Line, 353 U. S. 920 41, 332
Gallegos v. Nebraska, 342 U. S. 55 403
Galvan v. Press, 347 U. S. 522 698, 701
Garland, Ex parte, 4 Wall. 333 96
Garner v. Teamsters Union, 346 U. S. 485 619, 623–625, 633, 644, 649
Gavieres v. United States, 220 U. S. 338 478
General Am. Tank Corp. v. El Dorado Co., 308 U. S. 422 304
Georgia Pub. Serv. Comm'n v. United States, 283 U. S. 765 433, 449
Gianfala v. Texas Co., 350 U. S. 879 253, 271
Gibson v. Mississippi, 162 U. S. 565 585
Gibson v. Thompson, 355 U. S. 18 41, 42, 333
Globe Liquor Co. v. San Roman, 332 U. S. 571 553
Goldstone v. United States, 325 U. S. 687 278, 279
Gompers v. Bucks Co., 221 U. S. 418 184, 191, 221
Gompers v. United States, 233 U. S. 604 184, 191, 192, 201, 204
Gonzales v. Landon, 350 U. S. 920 47, 133, 134, 141, 143

Page

Gordon v. Hollywood-Beaufort Corp., 213 S. C. 438 535, 547
Gorham v. Mutual Health Assn., 114 F. 2d 97 537
Gospel Army v. Los Angeles, 331 U. S. 543 583
Gotcheus v. Matheson, 58 Barb. (N. Y.) 152 108
Graves v. O'Keefe, 306 U. S. 466 195
Great Northern R. Co. v. Comm'r, 40 F. 2d 372 36
Great Northern R. Co. v. Merchants Co., 259 U. S. 285 521
Green v. Neal's Lessee, 6 Pet. 291 539
Green v. United States, 355 U. S. 184 472, 477, 478
Green v. United States, 356 U. S. 165 161, 367
Griffin, Ex parte, 237 F. 445 52
Grimes v. Raymond Co., 356 U. S. 252 271
Grimm v. United States, 156 U. S. 604 382
Groban, In re, 352 U. S. 330 83
Guaranty Trust Co. v. York, 326 U. S. 99 535–539, 548–551
Gulf, C. & S. F. R. Co. v. Shearer, 1 Tex. Civ. App. 343 329
Gulf, C. & S. F. R. Co. v. Shelton, 96 Tex. 301 329
Guss v. Board, 353 U. S. 1 624, 626, 632, 650
Gutierrez v. Public Serv. Co., 168 F. 2d 678 538
Hale v. Kentucky, 303 U. S. 613 585
Haley v. Ohio, 332 U. S. 596 401, 403, 561, 562, 567
Hall v. Walters, 226 S. C. 430 649
Halvey v. Halvey, 330 U. S. 610 607
Hamamoto v. Acheson, 98 F. Supp. 904 143
Hammond Packing Co. v. Arkansas, 212 U. S. 322 160
Harisiades v. Shaughnessy, 342 U. S. 580 65

Page

Harmon v. Brucker, 355 U. S. 579 24, 91, 318
Harris v. State, 193 Ga. 109 471, 476
Harrison v. Bohnen, 345 U. S. 946 276
Harrison v. Schaffner, 312 U. S. 579 267
Hawker v. New York, 170 U. S. 189 96
Helvering v. Bullard, 303 U. S. 297 279
Helvering v. Clifford, 309 U. S. 331 267
Helvering v. Horst, 311 U. S. 112 267
Helvering v. Le Gierse, 312 U. S. 531 277–279
Helvering v. Meredith, 140 F. 2d 973 281
Helvering v. N. Y. Trust Co., 292 U. S. 455 266
Helvering v. Reynolds, 313 U. S. 428 266
Hernandez v. Texas, 347 U. S. 475 585, 587
Herron v. Southern Pac. Co., 283 U. S. 91 538, 539
Herzog v. Morgan, 287 N. Y. 317 613
Hickman v. Taylor, 329 U. S. 495 682
Hicks v. Bridges, 2 App. Div. 2d 335 613
Higgins v. Smith, 308 U. S. 473 33, 593
Hill v. Florida, 325 U. S. 538 648
Hill v. Texas, 316 U. S. 400 585, 589
Hill v. Watson, 325 U. S. 538 645
Hill v. Weiner, 300 U. S. 105 182
Hines v. Davidowitz, 312 U. S. 52 649
Hirabayashi v. United States, 320 U. S. 81 121
Hirsh v. United States, 68 Ct. Cl. 508 280
Hoag v. New Jersey, 356 U. S. 464 573
Hoffman v. United States, 341 U. S. 479 191

Page

Holland v. Georgia Lbr. Co., 214 S. C. 195 535, 548
Home Bldg. Assn. v. Blaisdell, 290 U. S. 398 121
Honeycutt v. Wabash R. Co., 355 U. S. 424 41, 333
Hoover Motor Co. v. United States, 356 U. S. 38 28, 29
Hopkins v. Darlington Co., 208 S. C. 307 555
Horton v. Baruch, 217 S. C. 48 535, 548
Houston v. Moore, 5 Wheat. 1 626
Houston, E. & W. T. R. Co. v. United States, 234 U. S. 342 430
Howard v. Fleming, 191 U. S. 126 99
Huber v. Reily, 53 Pa. 112 108, 109, 116
Hudgings, Ex parte, 249 U. S. 378 153, 161, 172, 173, 184, 191
Hull v. Phila. & R. R. Co., 252 U. S. 475 334
Hurtado v. California, 110 U. S. 516 468
Hyde v. Shine, 199 U. S. 62 410
Illinois v. United States, 342 U. S. 930; 101 F. Supp. 36 462
Illinois Cent. R. Co. v. Comm'n, 245 U. S. 493 425
Illinois Cent. R. Co. v. Comm'n, 349 U. S. 908 446, 458
Illinois Commerce Comm'n v. United States, 292 U. S. 474 427, 437, 438, 442, 447, 459, 460
Inglis v. Trustees, 3 Pet. 99 67
Inland Steel Co. v. Board, 170 F. 2d 247 358
Inland Waterways Corp. v. Young, 309 U. S. 517 592
In re. See name of party.
Internal Revenue Commissioner. See Commissioner.
International Auto. Workers v. Board, 336 U. S. 245 647
International Auto. Workers v. O'Brien, 339 U. S. 454 644, 648

Page

International Auto. Workers v. Russell, 356 U. S. 634 621
International Business Mach. Corp. v. United States, 298 U. S. 131 6
International Machinists Assn. v. Gonzales, 356 U. S. 617 646, 650
International Salt Co. v. United States, 332 U. S. 392 5–13, 18, 287
Interstate Commerce Comm'n v. Baird, 194 U. S. 25 520
Interstate Commerce Comm'n v. Brimson, 154 U. S. 447 183
Interstate Commerce Comm'n v. Humboldt Co., 224 U. S. 474 317
In the Matter of. See name of party.
Isbrandtsen Co. v. United States, 96 F. Supp. 883 500
Jackson v. Taylor, 353 U. S. 569 109, 119
Jacob v. New York, 315 U. S. 752 537
Jacobson v. Massachusetts, 197 U. S. 11 121
Jencks v. United States, 353 U. S. 657 683
Jerry Rossman Corp. v. Comm'r, 175 F. 2d 711 35, 36
Johnson v. United States, 352 U. S. 565 675, 704
Johnston v. United States, 351 U. S. 215 410
Kansas City So. R. Co. v. Comm'n, 252 U. S. 178 318
Kawakita v. United States, 343 U. S. 717 137, 145
Kearney, Ex parte, 7 Wheat. 38 191
Keegan v. United States, 325 U. S. 478 82
Keifer & Keifer v. R. F. C., 306 U. S. 381 594
Kelton v. United States, 294 F. 491 221, 223
Kemmler, In re, 136 U. S. 436 99, 100

Page

Kennerly v. Ocmulgee Co., 206 S. C. 481 555
Kernan v. Am. Dredging Co., 355 U. S. 426 329–334
King v. United States, 344 U. S. 254 424–427, 438, 444–448, 456–458
King, The, v. Almon (unreported) 185, 186, 191, 204
Kiyokuro Okimura v. Acheson, 99 F. Supp. 587 134
Klapprott v. United States, 335 U. S. 601 124
Klaxon Co. v. Stentor Co., 313 U. S. 487 534, 549
Klig v. Brownell, 355 U. S. 809; 100 U. S. App. D. C. 294 696
Klig v. Rogers, 355 U. S. 605 696
Knauer v. United States, 328 U. S. 654 66
Kniffen v. Knight, 184 Misc. 545 613
Knight v. Shepherd, 191 S. C. 452 535, 547
Korematsu v. United States, 323 U. S. 214 107
Krausmann, In re, 28 F. 2d 1004 70, 72
Kurtz v. Moffitt, 115 U. S. 487 108, 109, 117
Kwelman, In re, 31 F. Supp. 23 221, 223
Labor Board v. Allison & Co., 165 F. 2d 766 353
Labor Board v. Am. Nat. Ins. Co., 343 U. S. 395 349–351, 356–359
Labor Board v. Corsicana Mills, 178 F. 2d 344 348
Labor Board v. Darlington Co., 236 F. 2d 85 348
Labor Board v. Griswold Co., 106 F. 2d 713 354
Labor Board v. Jones & Laughlin, 301 U. S. 1 351
Labor Board v. Nat. Maritime Union, 175 F. 2d 686 360
Labor Board v. Operating Engineers, 237 F. 2d 670 627
La Crosse Tel. Corp. v. Board, 336 U. S. 18 645

Page

Lake County v. Rollins, 130 U. S. 662 211
Lambert v. California, 355 U. S. 225 83
Lapina v. Williams, 232 U. S. 78 699
Lehmann v. Acheson, 206 F. 2d 592 134, 143
Leland v. Oregon, 343 U. S. 790 141
Lennon, In re, 166 U. S. 548 191
Leonard v. Prince Line, 157 F. 2d 987 245
LeTulle v. Scofield, 308 U. S. 415 325
Lewis v. Frick, 233 U. S. 291 697, 699
Leyra v. Denno, 347 U. S. 556 401, 561, 562
Lilly v. Comm'r, 343 U. S. 90 29, 34
Linstead v. C. & O. R. Co., 276 U. S. 28 331
Lisenba v. California, 314 U. S. 219 561, 562, 567
Local Electrical Workers Union v. Farnsworth Co., 353 U. S. 969 625
Local Teamsters Union v. N. Y., N. H. & H. R. Co., 350 U. S. 155 655
Lopiparo v. United States, 216 F. 2d 87 182
Louie Hung v. United States, 111 F. 2d 325 377
Louisiana v. Dowels (Crim. Dist. Ct., No. 139–324, Oct. 1952) 588
Louisiana ex rel. Francis v. Resweber, 329 U. S. 459 99
Louisiana Pub. Serv. Comm'n v. T. & N. O. R. Co., 284 U. S. 125 433, 441
Louisiana Pub. Serv. Comm'n v. United States, 348 U. S. 885; 125 F. Supp. 180 446
Ludwig Mowinckels Rederi v. Isbrandtsen Co., 342 U. S. 950 522
Luria v. United States, 231 U. S. 9 126

Page

Lutfy v. United States, 198 F. 2d 760 376, 377
Lynch, In re, 31 F. 2d 762 72
Lyons v. Oklahoma, 322 U. S. 596 567, 568

Mac. See also Mc.

Mackenzie v. Hare, 239 U. S. 299 51, 52, 57, 61, 68–73, 80, 126, 139, 140
Mackim v. United States, 117 U. S. 348 183
Mahler v. Eby, 264 U. S. 32 96, 98
Mahoney v. Sailors' Union, 45 Wash. 2d 453 629
Malinski v. New York, 324 U. S. 401 393, 401, 561, 562, 568
Mandoli v. Acheson, 344 U. S. 133 133, 143
Manley v. Georgia, 279 U. S. 1 76
Marbury v. Madison, 1 Cranch 137 318
Marchbanks v. Duke Power Co., 190 S. C. 336 528, 529, 555
Marcus v. Hess, 317 U. S. 537 592, 598, 602
Markert v. Swift & Co., 173 F. 2d 517 245
Martin v. Texas, 200 U. S. 316 585
Matter of. See name of party.
Matteson v. United States, 240 F. 2d 517 230, 243–246, 251
Maxwell v. Dow, 176 U. S. 581 468

Mc. See also Mac.

McBride v. Toledo T. R. Co., 354 U. S. 517 41, 333
McCafferty v. Guyer, 59 Pa. 109 108
McCarthy v. Arndstein, 262 U. S. 355; 266 U. S. 34 154, 158
McClellan v. State, 203 Ark. 386 566
McCulloch v. Maryland, 4 Wheat. 316 114
McDaniel v. Textile Workers, 36 Tenn. App. 236 649

Page

McDonald v. Comm'r, 323 U. S. 57 33
McDowell v. Stilley Co., 210 S. C. 173 535, 547
McLennan v. Wilbur, 283 U. S. 414 317
McNabb v. United States, 318 U. S. 332 161, 380
McNish v. Am. Brass Co., 139 Conn. 44 629
McSweeney v. Prudential Co., 128 F. 2d 660 538
Mearkle's Estate v. Comm'r, 129 F. 2d 386 279
Medo Photo Corp. v. Board, 321 U. S. 678 350, 360, 361
Michael, In re, 326 U. S. 224 153, 161, 163, 172, 191, 196, 213
Michaelson v. C., St. P., M. & O. R. Co., 266 U. S. 42 184, 202
Miles v. West Va. Pulp Co., 212 S. C. 424 535, 547
Milligan, Ex parte, 4 Wall. 2 215
Milwaukee Soc. Dem. Pub. Co. v. Burleson, 255 U. S. 407 100
Minnesota v. Nat. Tea Co., 309 U. S. 551 608, 616
Mississippi ex rel. Rice v. United States, 307 U. S. 610 443
Mississippi Pub. Serv. Comm'n v. United States, 124 F. Supp. 809 446, 458
Missouri & K. I. R. Co. v. Olathe, 222 U. S. 185 337
Missouri P. R. Co. v. Porter, 273 U. S. 341 625
Moleton v. Union P. R. Co., 118 Utah 107 333
Montana-Dakota Util. Co. v. N. W. Pub. Serv. Co., 341 U. S. 246 521
Moore v. Michigan, 355 U. S. 155 569
Morgan v. United States, 298 U. S. 468; 304 U. S. 1 288
Morrill v. Morrill, 83 Conn. 479 615

Page

Morse v. Carpenters Union, 78 Idaho 405 629
Murchison, In re, 349 U. S. 133 199
Murphy v. Lehigh V. R. Co., 158 F. 2d 481 245
Murphy v. Ramsey, 114 U. S. 15 96, 97
Myers v. United States, 264 U. S. 95 184
Napier v. D., L. & W. R. Co., 223 F. 2d 28 245
Nashville, C. & St. L. R. v. Tennessee, 262 U. S. 318 433
National Cooks Union v. Arnold, 348 U. S. 37 160
National Labor Relations Board. See Labor Board.
Neal v. Delaware, 103 U. S. 370 585
Nelson v. United States, 201 U. S. 92 191
Nero v. United States, 189 F. 2d 515 377
New England Divisions Case, 261 U. S. 184 432, 449, 457, 520
New Orleans v. Steamship Co., 20 Wall. 387 202
New York v. United States, 257 U. S. 591 440, 449
New York v. United States, 331 U. S. 284 317
New York v. United States, 342 U. S. 882 444, 456, 462
New York v. United States, 98 F. Supp. 855 444, 462
New York ex rel. Allen v. Allen, 105 N. Y. 628 612, 613
New York ex rel. Halvey v. Halvey, 330 U. S. 610 607
New York ex rel. Herzog v. Morgan, 287 N. Y. 317 613
New York ex rel. Kniffin v. Knight, 184 Misc. 545 613
New York ex rel. Rogers v. Graves, 299 U. S. 401 311
Ng Fung Sing, Ex parte, 6 F. 2d 670 52
Niemotko v. Maryland, 340 U. S. 268 471, 475
Nilva v. United States, 352 U. S. 385 188, 191, 199
Nolan v. State, 205 Ark. 103 570

Page

Norris v. Alabama, 294 U. S. 587 585, 587
North Carolina v. United States, 325 U. S. 507 425
North Chicago St. R. Co. v. Dudgeon, 184 Ill. 477 329
Northern Pac. R. Co. v. United States, 356 U. S. 1 287
Nowak v. United States, 356 U. S. 660 671, 672
Nye v. United States, 313 U. S. 33 172, 191, 195, 196
Offutt v. United States, 348 U. S. 11 161, 199
Ohio v. United States, 292 U. S. 498 433
Oliver, In re, 333 U. S. 257 196, 199
Olmstead v. United States, 277 U. S. 438 380
O'Neil v. Vermont, 144 U. S. 323 99, 100
Order of Commercial Travelers v. Duncan, 221 F. 2d 703 538
Osborn v. Bank of United States, 9 Wheat. 738 66, 139
Oyama v. California, 332 U. S. 633 64
P———, Matter of, 1 I. & N. Dec. 267 75
Page, In re, 12 F. 2d 135 70, 72
Palko v. Connecticut, 302 U. S. 319 466, 467, 480, 573
Pandolfo v. Acheson, 202 F. 2d 38 47
Panhandle Oil Co. v. Knox, 277 U. S. 218 127
Papanikolaou v. Atl. Freighters, 232 F. 2d 663 230
Passenger Cases, 7 How. 283 195
Patton v. Mississippi, 332 U. S. 463 585, 587
Pendergast v. United States, 317 U. S. 412 191, 202
Penney v. Warren, 217 Ala. 120 646
Pennsylvania v. Nelson, 350 U. S. 497 625
People v. Garbutt, 17 Mich. 9 215
People v. Grzesczak, 77 Misc. 202 476, 479

Page

People v. Rogers, 102 Misc. 437 472
Pequignot v. Detroit, 16 F. 211 70
Perez v. Brownell, 356 U. S. 44 87, 91, 93, 102–107, 130, 133, 138, 147, 197
Perkins v. Elg, 307 U. S. 325 58, 80, 136
Perri v. Dulles, 206 F. 2d 586 134, 143
Petition of. See name of party.
Pettibone v. United States, 148 U. S. 197 174, 223
Phelps Dodge Corp. v. Board, 313 U. S. 177 289, 306, 641–643
Pierce v. Carskadon, 16 Wall. 234 96
Pierce v. United States, 314 U. S. 306 594
Pierce Engineering Co. v. Burlington, 221 F. 2d 607 538
Pierre v. Louisiana, 306 U. S. 354 585, 589
Pocatello Bldg. Council v. Elle Co., 352 U. S. 884 625
Powers v. United States, 223 U. S. 303 159
Prigg v. Pennsylvania, 16 Pet. 539 600
Progressive Mine Workers v. Board, 187 F. 2d 298 641
Prudential Ins. Co. v. Glasgow, 208 F. 2d 908 538
Queen v. Gyngall, [1893] 2 Q. B. 232 612
Rabang v. Boyd, 353 U. S. 427 62
Radio Cab, Inc., v. Houser, 76 U. S. App. D. C. 35 159
Ragan v. Merchants Co., 337 U. S. 530 530, 535, 550
Railroad Comm'n v. C., B. & Q. R. Co., 257 U. S. 563 431, 432, 439, 449
Rainwater v. United States, 356 U. S. 590 596, 598
Reagan v. United States, 157 U. S. 301 155
Real v. Curran, 285 App. Div. 552 629

Page

Reece v. Georgia, 350 U. S. 85 585, 587
Reid v. Covert, 354 U. S. 1 91
Repan v. Am. President Lines, 243 F. 2d 876 245
Republic Steel Corp. v. Board, 311 U. S. 7 646, 652
Retail Clerks v. Newberry Co., 352 U. S. 987 625
Rex Trailer Co. v. United States, 350 U. S. 148 602
Rice v. United States, 307 U. S. 610 443
Ringhiser v. C. & O. R. Co., 354 U. S. 901 41, 333
Riverside Oil Co. v. Dudley, 33 F. 2d 749 337
Robinson, Ex parte, 19 Wall. 505 184, 191, 192
Robinson v. B. & O. R. Co., 237 U. S. 84 331
Rogers v. Alabama, 192 U. S. 226 585
Rogers v. Graves, 299 U. S. 401 311
Rogers v. Missouri P. R. Co., 352 U. S. 500 41, 42, 271, 329, 332, 334
Rogers v. United States, 340 U. S. 367 158, 191
Rossman Corp. v. Comm'r, 175 F. 2d 711 35, 36
Rowe v. Pa. Greyhound Lines, 231 F. 2d 922 538
Rubenstein v. Kleven, 150 F. Supp. 47 163
Ruckgaber v. Moore, 104 F. 947 72
Ryles v. United States, 183 F. 2d 944 377
Sacher v. United States, 343 U. S. 1 161, 191, 194, 196, 199
Sacher v. United States, 354 U. S. 930 579
Sacher v. United States, 99 U. S. App. D. C. 360 577
St. Joe Paper Co. v. Atlantic Coast Line, 347 U. S. 298 417
Sampson v. Channell, 110 F. 2d 754 535
San Diego Trades Council v. Garmon, 353 U. S. 26 644

Page

Sartor v. Arkansas Gas Corp., 321 U. S. 620 19
Savin, Petitioner, 131 U. S. 267 169, 183, 184, 191, 210
Savorgnan v. United States, 338 U. S. 491 61, 67–69, 80, 126, 139
Savorgnan v. United States, 73 F. Supp. 109 61
Schneiderman v. United States, 320 U. S. 118 47, 66, 98, 124, 133, 134, 141, 663–667, 672
Schulz v. Pennsylvania R. Co., 350 U. S. 523 271
Schwabacher v. United States, 334 U. S. 182 417
Sealfon v. United States, 332 U. S. 575 471, 475, 476
Securities & Exchange Comm'n v. Ralston Co., 346 U. S. 119 287
Selective Draft Law Cases, 245 U. S. 366 121
Selma, R. & D. R. Co. v. United States, 139 U. S. 560 141
Senko v. LaCrosse Corp., 352 U. S. 370 253, 254, 271
Shanks v. Dupont, 3 Pet. 242 67, 72
Shaughnessy v. Mezei, 345 U. S. 206 102, 699
Shaw v. Atlantic Coast Line, 353 U. S. 920 41, 332
Sherman v. United States, 356 U. S. 369 386–389
Shreveport Case, 234 U. S. 342 430
Sibbach v. Wilson & Co., 312 U. S. 1 538
Sinclair v. United States, 279 U. S. 749 191
Skidmore v. Swift & Co., 323 U. S. 134 500
Skinner & Eddy v. McCarl, 275 U. S. 1 594
Smith v. Fulmer, 198 S. C. 91 528
Smith v. Texas, 311 U. S. 128 585
Snow, In re, 120 U. S. 274 411

Page

Sorrells v. United States, 287 U. S. 435 372–379, 385, 386
South Chicago Coal Co. v. Bassett, 309 U. S. 251 253, 254, 271
Southern R. Co. v. Sherrill, 232 Ala. 184 658
Spector Motor Co. v. McLaughlin, 323 U. S. 101 608
Spiegel Estate v. Comm'r, 335 U. S. 701 555
Stack v. Boyle, 342 U. S. 1; 192 F. 2d 56 364
Stack v. United States, 193 F. 2d 875 364
Stafford v. Wallace, 258 U. S. 495 286, 289, 301
Standard Oil Co. v. United States, 221 U. S. 1 5, 13, 288
Standard Oil Co. v. United States, 337 U. S. 293 6, 9, 18
Stapf v. Corsi, 287 U. S. 129 697, 699
State. See also name of State.
State v. Cooper, 13 N. J. L. 361 479
State v. Di Giosia, 3 N. J. 413 467
State v. Dorsey, 207 La. 928 586
State v. Erwin, 101 Utah 365 472
State v. Johnson, 69 Ariz. 203 401
State v. Labato, 7 N. J. 137 467, 479
State v. Pierre, 198 La. 619 589
State v. Shepard, 7 Conn. 54 479
State v. Symonds, 57 Me. 148 108, 117
State ex rel. Atty. Gen. re Ashbaugh v. Circuit Court, 97 Wis. 1 194
Stauder v. West Virginia, 100 U. S. 303 585
Stein v. New York, 346 U. S. 156 393, 568, 569
Sterling v. Steam Fitters, 207 Md. 132 629
Stinson v. Atlantic Coast Line, 355 U. S. 62 333
Stoner v. N. Y. Life Ins. Co., 311 U. S. 464 540

Page

Story v. C. & M. R. Co., 70 N. H. 364 329
Stroble v. California, 343 U. S. 181 561
Sugar Institute v. United States, 297 U. S. 553 287
Summers, In re, 325 U. S. 561 83
Sutera v. Sutera, 1 App. Div. 2d 356 608
Swan, In re, 150 U. S. 637 191
Swanson v. Marra Bros., 328 U. S. 1 254
Swayne & Hoyt v. United States, 300 U. S. 297 499, 516
Swift v. Tyson, 16 Pet. 1 539
Swift & Co. v. Hocking V. R. Co., 243 U. S. 281 270
Swift & Co. v. United States, 316 U. S. 216 286, 301
Takahashi v. Comm'n, 334 U. S. 410 64
Talbot v. Janson, 3 Dall. 133 80
Tank Truck Rentals v. Comm'r, 356 U. S. 30 28, 29, 39, 40
Tedars v. Savannah River Co., 202 S. C. 363 535, 547
Tennant v. Dunn, 130 Tex. 285 264
Tennessee v. United States, 346 U. S. 891; 113 F. Supp. 634 445
Terry, Ex parte, 128 U. S. 289 184, 191
Texas & P. R. Co. v. Abilene Co., 204 U. S. 426 626
Texas & P. R. Co. v. G., C. & S. F. R. Co., 270 U. S. 266 521
Textile Mills Corp. v. Comm'r, 314 U. S. 326 28, 29, 34
Thompson v. Utah, 170 U. S. 343 215
Thomsen v. Cayser, 243 U. S. 66 681
Thomson v. T. & P. R. Co., 353 U. S. 926 41, 333
Thornhill v. Alabama, 310 U. S. 88 341

Page

Tiller v. Atlantic Coast Line, 318 U. S. 54 329
Times-Picayune Co. v. United States, 345 U. S. 594 6, 10–17
Toledo Newspaper Co. v. United States, 247 U. S. 402 191, 196, 217
Tot v. United States, 319 U. S. 463 76, 83, 139
Toth v. Quarles, 350 U. S. 11 91, 215
Trop v. Dulles, 356 U. S. 86 63, 130, 258
Tumey v. Ohio, 273 U. S. 510 199
Tunnel R. Co. v. Comm'r, 61 F. 2d 166 36
Twining v. New Jersey, 211 U. S. 78 468
United Auto. Workers v. Board, 351 U. S. 266 625, 640, 646
United Auto. Workers v. Russell, 356 U. S. 634 621
United Constr. Workers v. Laburnum Corp., 347 U. S. 656 620, 624, 625, 631–635, 643, 644, 654
United Constr. Workers v. Laburnum Corp., 194 Va. 872 655
United Mine Workers v. Ark. Floor. Co., 351 U. S. 62 644
United Mine Workers v. Coronado Co., 259 U. S. 344 619
United Public Workers v. Mitchell, 330 U. S. 75 83
United States. See also U. S. ex rel.
United States v. Addyston Pipe Co., 175 U. S. 211, 85 F. 271 5
United States v. Am. Asiatic Co., 242 U. S. 537 504
United States v. Anderson, 328 U. S. 699 408
United States v. Appel, 211 F. 495 153

Page

United States v. Babbitt, 104 U. S. 767 680
United States v. Becker, 62 F. 2d 1007 379
United States v. Bertelsen & Petersen Co., 306 U. S. 276 36
United States v. Borden Co., 308 U. S. 188 407
United States v. Bowman, 260 U. S. 94 593
United States v. Brandenburg, 162 F. 2d 980 377
United States v. Brown, 247 F. 2d 332 182
United States v. Cerone, 150 F. 2d 382 377
United States v. Cochran, 352 U. S. 941 600
United States v. Cochran, 235 F. 2d 131 600, 603
United States v. Cohn, 270 U. S. 339 600
United States v. Constantine, 296 U. S. 287 95
United States v. Cooke, 215 F. 2d 528 233, 234
United States v. Curtiss-Wright Corp., 299 U. S. 304 57
United States v. De Angelo, 138 F. 2d 466 476
United States v. Dennis, 183 F. 2d 201 175
United States v. Dotterweich, 320 U. S. 277 472
United States v. Du Pont & Co., 351 U. S. 377 16
United States v. F. & M. Schaefer Brewing Co., 356 U. S. 227 337
United States v. Gay, 264 U. S. 353 137
United States v. Griffith, 334 U. S. 100 6, 9
United States v. Halbrook, 36 F. Supp. 345 472
United States v. Hall, 198 F. 2d 726 171–174, 182, 207, 220–223
United States v. Hamburg-Am. Co., 239 U. S. 466 504

Page

United States v. Hamburg-Am. Line, 216 F. 971 504
United States v. Hark, 320 U. S. 531 232–235, 240, 243
United States v. Harriss, 347 U. S. 612 83
United States v. Higginson, 238 U. S. 439 230, 235, 246
United States v. Hudson, 7 Cranch 32 184
United States v. Jaffray, 97 F. 2d 488 36
United States v. Johnson, 319 U. S. 503 681, 682
United States v. Johnson, 323 U. S. 273 407, 408
United States v. Joint Traffic Assn., 171 U. S. 505 513
United States v. Ju Toy, 198 U. S. 253 65
United States v. Kissel, 218 U. S. 601 409
United States v. La Franca, 282 U. S. 568 95
United States v. Leslie Salt Co., 350 U. S. 383 266
United States v. Lindenfeld, 142 F. 2d 829 377
United States v. Louisiana, 290 U. S. 70 435, 457
United States v. Lovett, 328 U. S. 303 96
United States v. McNinch, 355 U. S. 808; 356 U. S. 595; 242 F. 2d 359 591
United States v. Minker, 350 U. S. 179 135
United States v. Missouri Pac. R. Co., 278 U. S. 269 420
United States v. Morgan, 307 U. S. 183 288, 519, 907–910
United States v. National Sugar Rfg. Co., 113 F. Supp. 157 229, 237
United States v. Northern Pac. R. Co., 256 U. S. 51; 311 U. S. 317 3
United States v. Oppenheimer, 242 U. S. 85 471
United States v. Oregon Medical Soc., 343 U. S. 326 689

Page

United States v. Paramount Pictures, 334 U. S. 131 6, 9
United States v. Prince Line, 220 F. 230 504
United States v. Raynor, 302 U. S. 540 593
United States v. Rose, 215 F. 2d 617 681, 687
United States v. Roth, 208 F. 2d 467 245
United States v. Sawyer, 210 F. 2d 169 377
United States v. Schaefer Brewing Co., 356 U. S. 227 337
United States v. Schneiderman, 102 F. Supp. 52; 106 F. Supp. 941 364
United States v. Sherman, 200 F. 2d 880 375, 377
United States v. Shipp, 203 U. S. 563 191
United States v. Socony-Vacuum Co., 310 U. S. 150 5, 683, 690
United States v. Sprague, 282 U. S. 716 210
United States v. Stafoff, 260 U. S. 477 593
United States v. Storer Broad. Co., 351 U. S. 192 287
United States v. Strang, 254 U. S. 491 594
United States v. Tavares (No. 9407 Crim.) 406, 411
United States v. Thompson, 214 F. 2d 545 173, 174, 182, 207, 220
United States v. Tieger, 352 U. S. 941 600
United States v. Tieger, 234 F. 2d 589 599, 600
United States v. Trans-Mo. Freight Assn., 166 U. S. 290 513
United States v. United Mine Workers, 330 U. S. 258 184, 188, 191, 197
United States v. Wallace & Tiernan Co., 336 U. S. 793 680
United States v. Walter, 263 U. S. 15 594

Page
United States v. Western Pac. R. Co., 352 U. S. 59 521
United States v. White, 322 U. S. 694 191, 619
United States v. Wiltberger, 5 Wheat. 76 598
United States v. Wissahickon Works, 200 F. 2d 936 244, 250
United States v. Wong Kim Ark, 169 U. S. 649 58, 66, 79–84, 138
United States v. Yates, 107 F. Supp. 408, 412 365
United States v. Yellow Cab Co., 338 U. S. 338 689
United States v. Zucca, 351 U. S. 91 257, 662
U. S. ex rel. Bilowkumsky v. Tod, 263 U. S. 149 159
U. S. ex rel. Brown v. Lederer, 140 F. 2d 136 182
U. S. ex rel. Chicago Gt. W. R. Co. v. Comm'n, 294 U. S. 50 318
U. S. ex rel. Claussen v. Day, 279 U. S. 398 697, 699, 703
U. S. ex rel. Marcus v. Hess, 317 U. S. 537 592, 598, 602
U. S. ex rel. McLennan v. Wilbur, 283 U. S. 414 317
U. S. ex rel. Milwaukee S. D. Pub. Co. v. Burleson, 255 U. S. 407 100
U. S. ex rel. Skinner & Eddy v. McCarl, 275 U. S. 1 594
U. S. ex rel. Stapf v. Corsi, 287 U. S. 129 697, 699
U. S. ex rel. Toth v. Quarles, 350 U. S. 11 91, 215
U. S. ex rel. Volpe v. Smith, 289 U. S. 422 697, 699, 703
U. S. Navigation Co. v. Cunard Co., 284 U. S. 474 496, 497, 517, 522–524
Uphaus v. Wyman, 355 U. S. 16 965
Urie v. Thompson, 337 U. S. 163 334
Virginia Electric Co. v. Board, 319 U. S. 533 641, 643
Virginian R. Co. v. System Federation, 300 U. S. 515 318
Page
Volpe v. Smith, 289 U. S. 422 697, 699, 703
Wabash, St. L. & P. R. Co. v. Peyton, 106 Ill. 534 329
Walder v. United States, 347 U. S. 62 156
Wall v. United States, 65 F. 2d 993 376, 377
Wallenberg v. Missouri Pac. R. Co., 159 F. 217 72
Walters v. Hall, 349 U. S. 953 649
Ward v. Texas, 316 U. S. 547 401, 403, 567
Warring v. Huff, 74 U. S. App. D. C. 302 182
Watkins v. United States, 354 U. S. 178 577–579
Watson v. Wannamaker & Wells, 212 S. C. 506 535, 547
Watts, In re, 190 U. S. 1 191
Watts v. Indiana, 338 U. S. 49 393, 401, 402, 471, 475, 561, 562, 567, 568
Weade v. Dichmann, Wright & Pugh, 337 U. S. 801 533
Webb v. Illinois Cent. R. Co., 352 U. S. 512 41, 332
Weber v. Anheuser-Busch, 348 U. S. 468 619, 624–627, 632, 633, 644
Weems v. United States, 217 U. S. 349 99, 100, 127
Welch v. Hall, 134 F. 2d 366 280
West v. Am. Tel. & Tel. Co., 311 U. S. 223 534
West v. Louisiana, 194 U. S. 258 468
Western Elect. Co. v. Pacent Corp., 37 F. 2d 14 337
Western Live Stock v. Bureau, 303 U. S. 250 339
Wilbur v. Kadrie, 281 U. S. 206 318
Wilkerson v. McCarthy, 336 U. S. 53 41
Wilkerson v. Utah, 99 U. S. 130 99, 100
Williamson v. United States, 184 F. 2d 280 175
Wilson v. North Carolina, 169 U. S. 586 191, 221

Page

Wilson v. United States, 149 U. S. 60 159
Wohlgemuth, In re, 35 F. 2d 1007 70, 72
Woods v. Interstate Co., 337 U. S. 535 535
Woo Wai v. United States, 223 F. 412 378
Work v. Rives, 267 U. S. 175 318
Wright, In re, 19 F. Supp. 224 72
Yates v. United States, 227 U. S. 844, 848, 851 365
Yates v. United States, 354 U. S. 298 365, 471, 513, 663–667, 673
Yates v. United States, 355 U. S. 66 163, 188, 191, 199, 365, 366
Yates v. United States, 225 F. 2d 146 365
Yep v. United States, 83 F. 2d 41 377
Yoemans v. Anheuser-Busch, 198 S. C. 65 555
Young, Ex parte, 209 U. S. 123 191
Youngdahl v. Rainfair, Inc., 355 U. S. 131 625, 640, 646
Younginer v. Jones Co., 215 S. C. 135 535, 548
Zogbaum, Petition of, 32 F. 2d 911 71, 72

TABLE OF STATUTES CITED

(A) Statutes of the United States.

	Page
1789, Sept. 24, c. 20, § 17, 1 Stat. 73	148, 165
1831, Mar. 2, c. 99, 4 Stat. 487	148, 165
1863, Mar. 2, c. 67, 12 Stat. 696	590
1864, July 2, c. 217, 13 Stat. 365	1
1865, Mar. 3, c. 79, 13 Stat. 487	86
1868, July 27, c. 249, 15 Stat. 223	44
1870, May 31, No. 67, 16 Stat. 378	1
1887, Feb. 4, c. 104, §§ 1, 3, 24 Stat. 379	421
§ 5	481
§ 13	906
1890, July 2, c. 647, §§ 1, 2, 26 Stat. 209	1, 677
§ 4	1, 481, 677
1903, Feb. 11, c. 544, 32 Stat. 823	677
§ 2	1
Feb. 19, c. 708, 32 Stat. 847	405
1906, June 29, c. 3591, 34 Stat. 584	405
June 29, c. 3592, § 4, 34 Stat. 596	660
1907, Mar. 2, c. 2534, § 2, 34 Stat. 1228	129
§ 3	44
1908, Apr. 22, c. 149, §§ 1, 3, 4, 35 Stat. 65	326
1911, Mar. 3, c. 231, 36 Stat. 1087	148
1912, Aug. 22, c. 336, 37 Stat. 356	86
Aug. 24, c. 390, 37 Stat. 560	309
1913, Mar. 3, c. 114, 37 Stat. 731	677
1914, Oct. 15, c. 323, § 3, 38 Stat. 730	1
§§ 21, 22, 24	165
1916, Sept. 7, c. 451, 39 Stat. 728	590
§§ 14–17	481
1917, Feb. 5, c. 29, § 19, 39 Stat. 874	691
June 15, c. 30, 40 Stat. 217	86
1918, Oct. 16, c. 186, 40 Stat. 1012	660
§§ 1, 4	691
Oct. 23, c. 194, 40 Stat. 1015	590
1920, Feb. 28, c. 91, 41 Stat. 456	906
§ 5	412
§ 13	421
§ 407	481
§ 416	421
May 10, c. 174, 41 Stat. 593	86
June 4, c. 227, Arts. 28, 58, 41 Stat. 759	86
June 5, c. 250, 41 Stat. 988	271, 326
June 25, c. 251, 41 Stat. 1008	691
1921, Aug. 15, c. 64, §§ 301–304, 306, 307, 309, 310, 312, 42 Stat. 159	282
1922, Sept. 22, c. 411, 42 Stat. 1021	44
1926, Feb. 26, c. 27, § 302, 44 Stat. 9	274
1931, Mar. 3, c. 442, 46 Stat. 1511	44
1932, Mar. 23, c. 90, 47 Stat. 70	165
1933, May 27, c. 38, § 12, 48 Stat. 74	335

Page

1934, June 6, c. 404, 48 Stat. 881 165
§ 10 335
June 19, c. 652, 48 Stat. 1064..... 165
June 27, c. 847, 48 Stat. 1246 595
July 5, c. 372, §§ 2, 10, 49 Stat. 449..... 617
§ 8 ..... 342, 617
1935, Aug. 9, c. 498, 49 Stat. 543 421
§§ 5, 212..... 412
1937, Aug. 24, c. 752, 50 Stat. 750..... 309
1938, June 21, c. 556, 52 Stat. 821..... 165
June 25, c. 676, 52 Stat. 1060..... 165
1939, Feb. 10, c. 2, § 23, 53 Stat. 1..... 27, 30, 38
§§ 112, 117..... 260
1940, Apr. 4, c. 75, 54 Stat. 81 282
June 28, c. 439, 54 Stat. 670 ..... 165, 691
Sept. 18, c. 722, 54 Stat. 898..... 412, 421
§ 5 412
Oct. 14, c. 876, § 101, 54 Stat. 1137..... 44
§ 338 660
§ 401 ..... 44, 86, 129
§ 402 129
§ 503 ..... 44, 86
1942, Oct. 21, c. 619, 56 Stat. 798..... 27, 30, 38
§ 117 260
1944, Jan. 20, c. 2, 58 Stat. 4 86
Sept. 27, c. 418, 58 Stat. 746..... 44, 86
1945, Dec. 6, c. 557, 59 Stat. 597 ..... 309, 590
1946, June 11, c. 324, § 10, 60 Stat. 237..... 309
1947, June 23, c. 120, § 7, 61 Stat. 136 ..... 617, 634
§ 8 ..... 342, 617, 634
§ 9 342
§ 10 .... 342, 617, 634
§§ 201, 203, 209.... 342
§§ 303, 310..... 617

Page

1948, June 25, c. 646, 62 Stat. 869..... 677
June 29, c. 704, 62 Stat. 1070 590
June 29, c. 706, §§ 246, 248, 62 Stat. 1075.. 309
1949, Oct. 25, c. 720, § 7, 63 Stat. 891..... 274
1950, Sept. 8, c. 932, 64 Stat. 798 165
Sept. 23, c. 1024, § 22, 64 Stat. 987..... 691
Sept. 26, c. 1049, §§ 411, 412, 64 Stat. 1038 309
Dec. 29, c. 1189, 64 Stat. 1129..... 282
1952, June 27, c. 414, § 244. 269
§ 340 148
§ 349 129
June 27, c. 477, §§ 101, 212, 66 Stat. 163... 691
§§ 252, 275, 276, 279 405
§ 340 670
§ 349 ..... 44, 86
§ 360 86
§§ 403, 405..... 691
1953, July 28, c. 251, 67 Stat. 205..... 590
1954, Aug. 30, c. 1073, 68 Stat. 919..... 165
1955, June 30, c. 253, 69 Stat. 226..... 309
1956, June 4, c. 355, 70 Stat. 229 590
June 20, c. 415, 70 Stat. 314..... 309
1957, June 13, P. L. 85–52, 71 Stat. 70..... 309
Sept. 9, P. L. 85–315, § 151, 71 Stat. 634.. 165
Canal Zone Code, §§ 246, 248, 411, 412..... 309
Constitution. See Index at end of volume.
Criminal Code. See U. S. Code, Title 18.
Internal Revenue Code. See also U. S. Code, Title 26.
§ 23 ..... 27, 30, 260
§ 117 260

Page

Internal Revenue Code—Continued.
§ 811 274
§§ 3285, 3290..... 27
Judicial Code. See also U. S. Code, Title 28.
§ 268 148
Revised Statutes.
§ 102 576
§ 725 148
§§ 1996, 1998..... 86
§ 1999 44
§§ 3490, 5438..... 590, 595
Uniform Code of Military Justice, Art. 85..... 86
U. S. Code.
Title 2, § 192..... 576
Title 5,
§ 516a et seq..... 282
§ 1009 309
§ 1032 282
§ 1034 ..... 282, 481
Title 7, §§ 181 et seq., 205, 208..... 282
Title 8,
§ 137 691
§ 382 660
§ 1101 ..... 44, 691
§ 1182 691
§ 1251 44
§ 1254 269
§§ 1282, 1325, 1326, 1329 405
§ 1451 ..... 148, 670
§ 1481 ..... 44, 86, 129
§ 1503 86
Title 10, § 885 86
Title 12, §§ 1701 et seq., 1703 595
Title 15,
§ 1 1
§ 4 ..... 1, 4
§ 14 1
§ 29 ..... 1, 677
§ 30 677
§§ 77j, 77*l*..... 335
§ 78u 165
§ 714 et seq..... 590
§ 717s 165
Title 18,
§ 1 165
§ 2 386
§ 371 ..... 165, 363

Page

U. S. Code—Continued.
Title 18—Continued.
§ 401 ..... 148, 165
§ 402 165
§§ 659, 1073..... 405
§ 2385 ..... 165, 363
§ 3146 165
§§ 3236, 3237, 3239. 405
§ 3481 148
§§ 3691, 3692..... 165
§ 3731 ..... 227, 405
§ 4038 165
Title 21, § 174..... 369, 386
Title 26,
§ 23 27
§§ 2553, 2554..... 386
Title 28,
§ 1253 421
§ 1332 525
§ 1738 604
§ 1915 674
§ 2106 906
§ 2255 25
Title 29,
§ 141 ..... 617, 634
§§ 142–150 617
§ 151 ..... 617, 634
§§ 152–157 617
§ 158 .... 342, 617, 634
§ 159 ..... 342, 617
§ 160 ..... 617, 634
§§ 161–170 617
§ 171 ..... 342, 617
§ 172 617
§ 173 ..... 342, 617
§§ 174–178 617
§ 179 342
§§ 180–188 617
§ 217 165
Title 31,
§ 231 595
§ 841 et seq..... 590
§§ 850, 851..... 309
Title 33, §§ 901–950.... 252
Title 42,
§§ 1651–1654 252
§§ 1995, 2280..... 165
Title 45, §§ 51–60..... 326
Title 46,
§ 688 .... 252, 271, 326
§§ 812, 814..... 481
Title 47, § 401..... 165

	Page
U. S. Code—Continued.	
Title 49,	
§ 1 (and note preceding)	421
§ 2	1
§ 3	421
§ 5	412
§ 6	1
§ 13	421, 906
§ 15a	421
§ 41	1, 405
§ 312	412
Title 50,	
Appendix, § 2156	165
Administrative Procedure Act	309
Alien Act	44
Alien Registration Act	691
Anarchist Act	691
Antitrust Acts	481
Articles of War, 1776	86
Articles of War, 1920	86
Atomic Energy Act	165
Cable Act	44
Canal Zone Code	309
Chinese Exclusion Acts	44
Civil Rights Act	165
Clayton Act	1, 165
Commodity Credit Corporation Charter Act	590
Communications Act	165
Criminal Appeals Act	227
Defense Bases Act	252
Defense Production Act	165
Employers' Liability Act	326
Espionage Act	86
Expatriation Act	44, 86
Expediting Act	1
Fair Labor Standards Act	165
False Claims Act	590
Federal Communications Act	165
Federal Employers' Liability Act	326
Government Corporation Control Act	590
Immigration Act	691
Immigration & Nationality Act	44, 86, 129, 148, 269, 405, 670, 691
Internal Security Act	691
Interstate Commerce Act	405, 412, 421, 481, 906
Jones Act	252, 271, 326
Judiciary Act	165
Labor Management Relations Act	617, 634
Longshoremen's & Harbor Workers' Compensation Act	252
Nationality Act	44, 86, 129, 660
National Labor Relations Act	342, 634
Natural Gas Act	165
Naturalization Act	44
Norris-LaGuardia Act	165
Packers & Stockyards Act	282
Revenue Act, 1926	274
Securities Act	335
Securities Exchange Act	165, 335
Sedition Law	44
Sherman Act	1, 481, 677
Shipping Act	481
Smith Act	165, 363
Taft-Hartley Act	342, 617, 634
Transportation Act	412, 481
Wagner Act	342, 617

(B) Statutes of the States and Territories.

Alaska.	
2 Comp. Laws Ann., 1949, § 43–3–1 et seq.	320
Workmen's Compensation Act	320
Arizona.	
Const., § 5, Art. 18	525
Rev. Stat. Ann., 1956, § 12–863	165
§ 13–1418	390
Arkansas.	
1947 Stat., §§ 43–403, 43–601, 43–605	560
Delaware.	
1947 Laws, c. 86, § 2	30
Georgia.	
Code Ann., 1935, § 24–105	165
Illinois.	
Rev. Stat., 1945, c. 38, § 336	27

Page

Illinois—Continued.
Rev. Stat., 1957, c. 38, § 360 571
§ 826 42
Post-Conviction Hearing Act..... 42
Kentucky.
Rev. Stat., 1953, § 189.222 38
Rev. Stat. Ann., 1955, § 432.260 165
Louisiana.
Rev. Stat., 1950, Tit. 15, §§ 194, 196..... 584
Maryland.
Flack Ann. Code, 1939 (1947 Cum. Supp.), Art. 66½, § 254..... 30
Flack Ann. Code, 1951, Art. 66½, § 278..... 30
New Jersey.
Const., Art. I, ¶11..... 464
Rev. Stat., § 2:166–1.. 464
Rev. Stat., 1937, 39:3–84 30
Rev. Stat., 1937 (1948–1950 Cum. Supp.), 39:3–84.3 30
Stat. Ann., 1939, § 2:166–1 464
Stat. Ann., 1953, § 2A:141–1 464
New York.
Gilbert-Bliss Civ. Prac., 1944, Vol. 6A, § 1170. 604
North Carolina.
Gen. Stat. Ann., 1950, § 50–13 604

Page

Ohio.
Page Rev. Gen. Code Ann., 1938 (1952 Cum. Pocket Supp.), § 7248–1 30
Oklahoma.
Stat. Ann., 1936, Tit. 21, § 567..... 165
Pennsylvania.
Purdon Stat. Ann., 1930 (1957 Cum. Ann. Pocket Pt.), Tit. 17, § 2047 165
Purdon Stat. Ann., 1953, Tit. 75, § 453..... 30
Purdon Stat. Ann., 1953 (1957 Cum. Ann. Pocket Pt.), Tit. 75, § 453 30
South Carolina.
Code, 1952, 12–1001 et seq., 12–1025, §§ 72–1 et seq., 72–11, 72–12, 72–14, 72–66, 72–111, 72–113 to 72–116, 72–121, 72–123, 72–151 to 72–165, 72–356... 525
Rural Electric Cooperative Act..... 525
Workmen's Compensation Act..... 525
Tennessee.
Williams Code, 1934 (1952 Cum. Supp. to 1943 Repl. Vol.), § 1166.33 38
West Virginia.
Code Ann., 1949, § 1546. 30
Code Ann., 1949 (1953 Cum. Supp.), § 1721 (463) 30

(C) Proclamations.

1948, Mar. 26, No. 2775, 62 Stat. 1494..... 309
1950, Sept. 26, No. 2903, 64 Stat. A433..... 309

(D) Treaties and Other International Agreements.

1868, Feb. 2 (North German Confederation)..... 44
1901, Nov. 18, Art. III, 32 Stat. 1903 (Panama)..... 309

(E) Foreign Statutes.

	Page
England.	
1 Wm. & Mary, 2d Sess. (1689), c. 2	86
11 & 12 Geo. VI, c. 56, § 20	86
Declaration of Rights	86
8 Halsbury, Laws of England (3d ed. 1954), 3–4, 25–26	165
Magna Carta	86, 165
Nationality Act, 1948	86
Haiti.	
Nationality Law, 1907, Art. 17	86
Japan.	
Military Service Law	129
Philippines.	
1936, Oct. 21, Commonwealth Act, No. 63, § 1	86
1947, June 2, Republic Act, No. 106	86

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1957.

NORTHERN PACIFIC RAILWAY CO. ET AL. *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON.

No. 59. Argued January 7–8, 1958.—Decided March 10, 1958.

Under § 4 of the Sherman Act, the Government sued in a Federal District Court for a declaration that appellant railroad's "preferential routing" agreements are unlawful as unreasonable restraints of trade under § 1 of the Act. Such agreements were incorporated in deeds and leases to several million acres of land in several Northwestern States, originally granted to the railroad to facilitate its construction. They compel the grantees and lessees to ship over the railroad's lines all commodities produced or manufactured on the land, provided its rates (and in some instances its service) are equal to those of competing carriers. Many of the goods produced on such lands are shipped from one State to another. After various pretrial proceedings, the Government moved for summary judgment. The district judge made numerous findings based on pleadings, stipulations, depositions and answers to interrogatories; granted the Government's motion; and enjoined the railroad from enforcing such "preferential routing" clauses. *Held:* The judgment is affirmed. Pp. 2–12.

(a) A tying arrangement, whereby a party agrees to sell one product only on condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier, is *per se* unreasonable and unlawful under the Sherman Act whenever the seller has sufficient

economic power with respect to the tying product to restrain appreciably free competition in the market for the tied product, and a "not insubstantial" amount of interstate commerce is affected. Pp. 5–7.

(b) On the record in this case, the undisputed facts established beyond any genuine question that appellant possessed substantial economic power by virtue of its extensive landholdings which it used as leverage to induce large numbers of purchasers and lessees to give it preference, to the exclusion of its competitors, in carrying goods or produce from the land transferred to them, and that a "not insubstantial" amount of interstate commerce was and is affected. Pp. 7–8.

(c) The essential prerequisites for treating appellant's tying arrangements as unreasonable *per se* were conclusively established in the District Court, and appellant has offered to prove nothing there or here which would alter this conclusion. P. 8.

(d) The conclusion here reached is supported by *International Salt Co.* v. *United States*, 332 U. S. 392, which was not limited by *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594. Pp. 8–11.

(e) That appellant's "preferential routing" clauses are subject to certain exceptions and may have been administered leniently does not avoid their stifling effect on competition. Pp. 11–12.

142 F. Supp. 679, affirmed.

M. L. Countryman, Jr. argued the cause for appellants. With him on the brief was *Dean H. Eastman.*

Daniel M. Friedman argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Hansen, Henry Geller, Margaret H. Brass* and *W. Louise Florencourt.*

Mr. Justice Black delivered the opinion of the Court.

In 1864 and 1870 Congress granted the predecessor of the Northern Pacific Railway Company approximately forty million acres of land in several Northwestern States and Territories to facilitate its construction of a railroad

line from Lake Superior to Puget Sound.[1] In general terms, this grant consisted of every alternate section of land in a belt 20 miles wide on each side of the track through States and 40 miles wide through Territories. The granted lands were of various kinds; some contained great stands of timber, some iron ore or other valuable mineral deposits, some oil or natural gas, while still other sections were useful for agriculture, grazing or industrial purposes. By 1949 the Railroad had sold about 37,000,000 acres of its holdings, but had reserved mineral rights in 6,500,000 of those acres. Most of the unsold land was leased for one purpose or another. In a large number of its sales contracts and most of its lease agreements the Railroad had inserted "preferential routing" clauses which compelled the grantee or lessee to ship over its lines all commodities produced or manufactured on the land, provided that its rates (and in some instances its service) were equal to those of competing carriers.[2] Since many of the goods produced on the lands subject to these "preferential routing" provisions are shipped from one State to another the actual and potential amount of interstate commerce affected is substantial. Alternative means of transportation exist for a large portion of these shipments including the facilities of two other major railroad systems.

In 1949 the Government filed suit under § 4 of the Sherman Act seeking a declaration that the defendant's "preferential routing" agreements were unlawful as

---

[1] 13 Stat. 365, 16 Stat. 378. The details of these statutory grants are extensively set forth and discussed in *United States* v. *Northern Pacific R. Co.*, 256 U. S. 51, and *United States* v. *Northern Pacific R. Co.*, 311 U. S. 317.

[2] The volume and nature of these restrictive provisions are set forth in more detail hereafter. See note 6, *infra*.

unreasonable restraints of trade under § 1 of that Act.[3] After various pretrial proceedings the Government moved for summary judgment contending that on the undisputed facts it was entitled, as a matter of law, to the relief demanded. The district judge made numerous findings, as set forth in substance in the preceding paragraph, based on the voluminous pleadings, stipulations, depositions and answers to interrogatories filed in the case, and then granted the Government's motion (with an exception not relevant here). 142 F. Supp. 679. He issued an order enjoining the defendant from enforcing the existing "preferential routing" clauses or from entering into any future agreements containing them. The defendant took a direct appeal to this Court under § 2 of the Expediting Act of 1903, 32 Stat. 823, as amended, 15 U. S. C. § 29, and we noted probable jurisdiction. 352 U. S. 980.

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits "Every contract, combination . . . or

[3] 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 4. Actually there are two defendants here, the Northern Pacific Railway Company and its wholly owned subsidiary Northwestern Improvement Company which sells, leases and manages the Railroad's lands. For convenience and since Northwestern is completely controlled by the Railroad we shall speak of the two of them as a single "defendant" or as the "Railroad."

conspiracy, in restraint of trade or commerce among the several States." Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which "unreasonably" restrain competition. *Standard Oil Co. of New Jersey* v. *United States,* 221 U. S. 1; *Chicago Board of Trade* v. *United States,* 246 U. S. 231.

However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 210; division of markets, *United States* v. *Addyston Pipe & Steel Co.,* 85 F. 271, aff'd, 175 U. S. 211; group boycotts, *Fashion Originators' Guild* v. *Federal Trade Comm'n,* 312 U. S. 457; and tying arrangements, *International Salt Co.* v. *United States,* 332 U. S. 392.

For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not

purchase that product from any other supplier.[4] Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed "tying agreements serve hardly any purpose beyond the suppression of competition." *Standard Oil Co. of California* v. *United States,* 337 U. S. 293, 305–306.[5] They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons "tying agreements fare harshly under the laws forbidding restraints of trade." *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594, 606. They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected. *International Salt Co.* v. *United States,* 332 U. S. 392. Cf. *United States* v. *Paramount Pictures,* 334 U. S. 131, 156–159; *United States* v. *Griffith,* 334 U. S. 100. Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most. As

[4] Of course where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price.

[5] As this Court has previously pointed out such nonanticompetitive purposes as these arrangements have been asserted to possess can be adequately accomplished by other means much less inimical to competition. See, *e. g., International Business Machines Corp.* v. *United States,* 298 U. S. 131; *International Salt Co.* v. *United States,* 332 U. S. 392.

a simple example, if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself.

In this case we believe the district judge was clearly correct in entering summary judgment declaring the defendant's "preferential routing" clauses unlawful restraints of trade. We wholly agree that the undisputed facts established beyond any genuine question that the defendant possessed substantial economic power by virtue of its extensive landholdings which it used as leverage to induce large numbers of purchasers and lessees to give it preference, to the exclusion of its competitors, in carrying goods or produce from the land transferred to them. Nor can there be any real doubt that a "not insubstantial" amount of interstate commerce was and is affected by these restrictive provisions.

As pointed out before, the defendant was initially granted large acreages by Congress in the several Northwestern States through which its lines now run. This land was strategically located in checkerboard fashion amid private holdings and within economic distance of transportation facilities. Not only the testimony of various witnesses but common sense makes it evident that this particular land was often prized by those who purchased or leased it and was frequently essential to their business activities. In disposing of its holdings the defendant entered into contracts of sale or lease covering at least several million acres of land which included "preferential routing" clauses.[6] The very existence of

[6] The district judge found (and his findings are not challenged here) that as of 1949 there were (1) over 1,000 grazing leases covering more than 1,000,000 acres of land, (2) at least 72 contracts for the sale of timberland covering 1,244,137 acres, (3) at least 31 timber sale contracts covering 100,585 acres, (4) at least 19 oil and gas

this host of tying arrangements is itself compelling evidence of the defendant's great power, at least where, as here, no other explanation has been offered for the existence of these restraints. The "preferential routing" clauses conferred no benefit on the purchasers or lessees. While they got the land they wanted by yielding their freedom to deal with competing carriers, the defendant makes no claim that it came any cheaper than if the restrictive clauses had been omitted. In fact any such price reduction in return for rail shipments would have quite plainly constituted an unlawful rebate to the shipper.[7] So far as the Railroad was concerned its purpose obviously was to fence out competitors, to stifle competition. While this may have been exceedingly beneficial to its business, it is the very type of thing the Sherman Act condemns. In short, we are convinced that the essential prerequisites for treating the defendant's tying arrangements as unreasonable *"per se"* were conclusively established below and that the defendant has offered to prove nothing there or here which would alter this conclusion.

In our view *International Salt Co.* v. *United States,* 332 U. S. 392, which has been unqualifiedly approved by subsequent decisions, is ample authority for affirming the judgment below. In that case the defendant refused

---

leases covering 135,000 acres, (5) at least 16 iron ore leases covering 5,261 acres, (6) 12 coal leases (acreage not specified), and (7) at least 17 other mineral leases covering 6,810 acres which contained "preferential routing" clauses.

The grazing leases, timber sales contracts, timberland sales contracts and in some instances the mineral land leases obligated the vendee or lessee to ship its products by way of the defendant's lines unless rates of competitors were lower; the oil and gas leases, coal leases and the remainder of the mineral land leases, unless the rates were lower or the service better; the iron ore leases, unless the defendant's rates, service and facilities were equal to those of any competing line.

[7] 49 U. S. C. §§ 2, 6 (7), 41 (3)

to lease its salt-dispensing machines unless the lessee also agreed to purchase all the salt it used in the machines from the defendant. It was established that the defendant had made about 900 leases under such conditions and that in the year in question it had sold about $500,000 worth of salt for use in the leased machines. On that basis we affirmed unanimously a summary judgment finding the defendant guilty of violating § 1 of the Sherman Act. The Court ruled that it was "unreasonable, *per se,* to foreclose competitors from any substantial market" by tying arrangements. As we later analyzed the decision, "it was not established that equivalent machines were unobtainable, it was not indicated what proportion of the business of supplying such machines was controlled by defendant, and it was deemed irrelevant that there was no evidence as to the actual effect of the tying clauses upon competition." *Standard Oil Co. of California* v. *United States,* 337 U. S. 293, 305.

The defendant attempts to evade the force of *International Salt* on the ground that the tying product there was patented while here it is not. But we do not believe this distinction has, or should have, any significance. In arriving at its decision in *International Salt* the Court placed no reliance on the fact that a patent was involved nor did it give the slightest intimation that the outcome would have been any different if that had not been the case. If anything, the Court held the challenged tying arrangements unlawful *despite* the fact that the tying item was patented, not because of it. "By contracting to close this market for salt against competition, International has engaged in a restraint of trade for which its patents afford no immunity from the antitrust laws." 332 U. S., at 396. Nor have subsequent cases confined the rule of *per se* unreasonableness laid down in *International Salt* to situations involving patents. Cf. *United States* v. *Griffith,* 334 U. S. 100; *United*

458778 O—58——5

States v. *Paramount Pictures,* 334 U. S. 131, 156; *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594.[8]

The defendant argues that the holding in *International Salt* was limited by the decision in *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594. There the Court held that a unit system of advertising in two local newspapers did not violate § 1 of the Sherman Act. On the facts before it the majority found there was no tying problem at all since only one product was involved and that, in any event, the defendant did not possess sufficient economic power in the advertising market to bring its unit rule within the principle of *per se* unreasonableness. But the Court was extremely careful to confine its decision to the narrow record before it. *Id.,* at 627–628. And far from repudiating any of the principles set forth in *International Salt* it vigorously reasserted them by broadly condemning tying arrangements as wholly inconsistent with the fundamental principles of the antitrust laws. In the Court's forceful terms, "Tying arrangements . . . flout the Sherman Act's policy that competition rule the marts of trade. . . . By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market. But any intrinsic superiority of the 'tied' product would convince

---

[8] Of course it is common knowledge that a patent does not always confer a monopoly over a particular commodity. Often the patent is limited to a unique form or improvement of the product and the economic power resulting from the patent privileges is slight. As a matter of fact the defendant in *International Salt* offered to prove that competitive salt machines were readily available which were satisfactory substitutes for its machines (a fact the Government did not controvert), but the Court regarded such proof as irrelevant.

freely choosing buyers to select it over others, anyway." *Id.*, at 605.

While there is some language in the *Times-Picayune* opinion which speaks of "monopoly power" or "dominance" over the tying product as a necessary precondition for application of the rule of *per se* unreasonableness to tying arrangements, we do not construe this general language as requiring anything more than sufficient economic power to impose an appreciable restraint on free competition in the tied product (assuming all the time, of course, that a "not insubstantial" amount of interstate commerce is affected). To give it any other construction would be wholly out of accord with the opinion's cogent analysis of the nature and baneful effects of tying arrangements and their incompatibility with the policies underlying the Sherman Act. *Times-Picayune*, of course, must be viewed in context with *International Salt* and our other decisions concerning tying agreements. There is no warrant for treating it as a departure from those cases. Nor did it purport to be any such thing; rather it simply made an effort to restate the governing considerations in this area as set forth in the prior cases. And in so doing it makes clear, as do those cases, that the vice of tying arrangements lies in the use of economic power in one market to restrict competition on the merits in another, regardless of the source from which the power is derived and whether the power takes the form of a monopoly or not.

The defendant contends that its "preferential routing" clauses are subject to so many exceptions and have been administered so leniently that they do not significantly restrain competition. It points out that these clauses permit the vendee or lessee to ship by competing carrier if its rates are lower (or in some instances if its service is better) than the defendant's.[9] Of course if these re-

[9] See note 6, *supra*.

strictive provisions are merely harmless sieves with no tendency to restrain competition, as the defendant's argument seems to imply, it is hard to understand why it has expended so much effort in obtaining them in vast numbers and upholding their validity, or how they are of any benefit to anyone, even the defendant. But however that may be, the essential fact remains that these agreements are binding obligations held over the heads of vendees which deny defendant's competitors access to the fenced-off market on the same terms as the defendant. In *International Salt* the defendants similarly argued that their tying arrangements were inoffensive restraints because they allowed lessees to buy salt from other suppliers when they offered a lower price than International. The Court's answer there is equally apt here.

> "[This exception] does, of course, afford a measure of protection to the lessee, but it does not avoid the stifling effect of the agreement on competition. The appellant had at all times a priority on the business at equal prices. A competitor would have to undercut appellant's price to have any hope of capturing the market, while appellant could hold that market by merely meeting competition. We do not think this concession relieves the contract of being a restraint of trade, albeit a less harsh one than would result in the absence of such a provision." 332 U. S., at 397.

All of this is only aggravated, of course, here in the regulated transportation industry where there is frequently no real rate competition at all and such effective competition as actually thrives takes other forms.

Affirmed.

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

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

The Court affirms summary judgment for the Government by concluding that "the essential prerequisites for treating the defendant's tying arrangements as unreasonable *'per se'* were conclusively established below . . . ." In my view, these prerequisites were not established, and this case should be remanded to the District Court for a trial on the issue whether appellants' landholdings gave them that amount of control over the relevant market for land necessary under this Court's past decisions to make the challenged tying clauses violative *per se* of the Sherman Act. Further, in light of the Court's disposition of the case and the nature of the findings made below, I think that the Court's discussion of *International Salt Co.* v. *United States,* 332 U. S. 392, is apt to produce confusion as to what proof is necessary to show *per se* illegality of tying clauses in future Sherman Act cases.

Because the Government necessarily based its complaint on § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, rather than on § 3 of the Clayton Act,[1] it was required to show that the challenged tying clauses constituted *unreasonable* restraints of trade, see *Standard Oil Co. of New Jersey* v. *United States,* 221 U. S. 1. As a result, these tying clauses raise legal issues different from those presented by the legislatively defined tying clauses invalidated under the more pointed prohibitions of the Clayton Act. *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594, has made it clear beyond dispute that both *proof* of dominance in the market for the tying product *and* a showing that an appreciable volume of business in the tied product is restrained are

[1] The tying arrangements proscribed by § 3 of the Clayton Act relate only to "goods, wares, merchandise, machinery, supplies or other commodities . . . ." 38 Stat. 731, 15 U. S. C. § 14.

essential conditions to judicial condemnation of a tying clause as a *per se* violation of the Sherman Act.[2] 345 U. S., at 608–611. These firm requirements derive from an awareness that the vice apt to exist in tying agreements "is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next." 345 U. S., at 611. It is not, as the Court intimates at one point in its opinion, that under the Sherman Act the tying clause is illegal *per se;* the *per se* illegality results from its use by virtue of a vendor's dominance over the tying interest to foreclose competitors from a substantial market in the tied interest.

My primary difficulty with the Court's affirmance of the judgment below is that the District Court made no finding that the appellants had a "dominant position" or, as this Court now puts it, "sufficient economic power," in the relevant land market. Such a finding would indicate that those requiring land of the character owned by the appellants would be driven to them for it, thereby putting appellants in a position to foreclose competing carriers, through the medium of tying clauses, from shipping the produce from the lands sold or leased. The District Court seems to have conceived that no more need be shown on this score than that the appellants owned the *particular* tracts of land sold or leased subject to a tying clause. Thus it said:

> "Defendants argue that the first tying element, i. e., market domination over the tying product, is not established because the record does not show the proportion of N. P. [Northern Pacific] lands of various types to the total of the lands of the same types sold and leased in the area of defendants' operations.

---

[2] The Court there stated that the presence of *either* factor is sufficient for invalidation of a tying clause under the Clayton Act. 345 U. S., at 608–609.

> This contention ignores the plain language of the cited decisions ["tying clause" cases in this Court], providing that market dominance of 'the tying commodity' is required. *The tying commodity need only be the particular property or product to which forced purchase of the second commodity is tied; certainly it does not necessarily include all of the similar and competing commodities which may be in the market.* . . .
>
> "The tying commodity in the present case is the land presently or formerly owned by N. P. *Unrestricted fee-simple title to land vests in the owner absolute domination of the market in such land.* By the ownership of the lands and resulting dominance in the market therefor defendants were able to impose the traffic clauses in question on the grantees and lessees of the land." (Italics added.) 142 F. Supp. 679, 684.

In conformity with these views the ultimate findings of the District Court on the issue of "control" were only these:

> "37. Defendants, as sellers and as lessors, *by reason of title in fee simple,* have dominance in the lands now owned by them and had dominance in the lands formerly owned at the time of sale of such lands. [Italics added.]
>
> "38. Defendants have used their dominance in the lands sold and leased to require purchasers and lessees to purchase and use Northern Pacific's transportation service, under the conditions stated in finding 10." (Finding 10 relates to the terms of the tying clauses.)

I do not think that these findings as to appellants' *ad hoc* "dominance" over the particular land sold or leased suffice to meet the showing of market control which *Times-Picayune* established as one of the essential pre-

requisites to holding tying clauses illegal *per se* under the Sherman Act. In effect the District Court's view bypassed that requirement and made the validity of these tying clauses depend entirely on the commercial restraint accomplished by them. The District Court should have taken evidence of the relative strength of appellants' landholdings *vis-à-vis* that of others in the appropriate market for land of the types now or formerly possessed by appellants,[3] of the "uniqueness" of appellants' landholdings in terms of quality or use to which they may have been put, and of the extent to which the location of the lands on or near the Northern Pacific's railroad line, or any other circumstances, put the appellants in a strategic position as against other sellers and lessors of land. Short of such an inquiry I do not see how it can be determined whether the appellants occupied such a dominant position in the relevant land market, cf. *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377, as to make these tying clauses illegal *per se* under the Sherman Act.

Explanation for the Court's failure to remand with instructions to pursue such an inquiry apparently lies in part in its statement that the "very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power" over the land market. I do not deny that there may be instances where economic coercion by a vendor may be inferred, without any direct showing of market dominance, from the mere existence of the tying arrangements themselves, as where the vendee

---

[3] The findings entered by the District Court make no reference to appellants' percentage ownership of a proper market for land, and indeed the record contains in only one instance statistics bearing on this problem. In the period between 1935 and 1942, it appears that appellants' holdings of merchantable timber in Montana, Idaho, and Washington constituted approximately 5% of the total merchantable timber in those States.

is apt to suffer economic detriment from the tying clause because precluded from purchasing a tied product at better terms or of a better quality elsewhere. But the tying clauses here are not cast in such absolute terms. The record indicates that a large majority of appellants' lands were close to the Northern Pacific lines and thus vendees or lessees of these lands might be expected to utilize Northern Pacific as a matter of course. Further, substantially all the tying clauses, as found by the District Court, contained provisos leaving the vendee or lessee free to ship by other railroads when offered either lower rates *or* lower rates or superior service. In these circumstances it would appear that the inclusion of the tying clauses in contracts or leases might have been largely a matter of indifference to at least many of the purchasers or lessees of appellants' land, and hence that more is needed than the tying clauses themselves to warrant the inference that acceptance of the tying clauses resulted from coercion exercised by appellants through their position in the land market.

Particularly in view of the Court's affirmance of a judgment based on so inadequate a record, I have further difficulty with the opinion in its treatment of *International Salt,* the decision on which the Court principally relies. The Court regards that case as making irrelevant *proof* of market dominance in the tying interest, but it seems to me that *Times-Picayune* has laid to rest all doubt as to the need for clear proof on this issue. In fact that case considered that in *International Salt* the required element of proof was supplied by the patents themselves which "conferred monopolistic, albeit lawful, market control" over the tying product, 345 U. S., at 608, as indeed the Court in *International Salt* itself suggested by prefacing its holding with the statement that "[defendant's] patents confer a limited monopoly of the invention they

reward." 332 U. S., at 395. Still the Court today states that the tying clauses were there struck down *despite* the fact that the tying product was patented. In short, insofar as the Sherman Act is concerned, it appears that *International Salt* simply treated a patent as the equivalent of proof of market control—a view further supported by what was said about *International Salt* in *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, at 304, 307.

The reliance on *International Salt* with the new scope the Court now gives it is puzzling in light of the Court's express recognition that a finding of sufficient economic power over land to restrict competition in freight services is an essential element here. The Court heightens this paradox by its effort to satisfy this requirement with the assertion that "undisputed facts" conclusively established the existence of this power. But in so concluding, it could hardly rely on the market-dominance findings below which, as I have tried to show, rested upon the District Court's evident misconception of *Times-Picayune*.

I do not understand the Court to excuse findings as to control by adopting the Government's argument that this case should be brought within *International Salt* by analogy of the ownership of land to that of a patent, so that the particular tract of land involved in each purchase or lease itself constitutes the relevant market. The record in any event is without support for such a theory. No findings were made below as to the uniqueness of any of appellants' lands either because of their location [4] or

[4] Affidavits before the District Court did indicate that certain landholdings of appellants, particularly grazing lands, were in a checkerboard pattern among private holdings, thereby giving appellants a strategic position with respect to these lands since the private landholders often found it necessary to acquire appellants' lands to fill

because of their peculiar qualities enabling production of superior mineral, timber, or agricultural products. Without such an inquiry, I do not see how appellants' supposed dominance of the land market can be based on the theory that their lands were "unique."

Finally, the Court leaves in unsettling doubt the future effect of its statement that the use of the word "dominance" in *Times-Picayune* implies no more of a showing of market dominance than "sufficient economic power to impose an appreciable restraint on free competition in the tied product." As an abstraction one can hardly quarrel with this piece of surgery, for I do not claim that a monopoly in the sense of § 2 of the Sherman Act must be shown over a tying product. As already indicated, I should think that a showing of "sufficient economic power" in cases of this kind could be based upon a variety of factors, such as significant percentage control of the relevant market, desirability of the product to the purchaser, use of tying clauses which would be likely to result in economic detriment to vendees or lessees, and such uniqueness of the tying product as to suggest comparison with a monopoly by patent. But I venture to predict that the language of the Court, taken in conjunction with its approval of the summary disposition of this case, will leave courts and lawyers in confusion as to what the proper standards now are for judging tying clauses under the Sherman Act.

The Court's action in affirming the judgment below sanctions what I deem to be a serious abuse of the summary judgment procedures. Cf. *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620. A record barren of facts adequate to support either a finding of economic

---

gaps in existing ranges. The amount of such land does not appear, and I do not think that these affidavits justify short-circuiting an inquiry into the broad issue of market dominance.

power over a relevant land market or a finding that the land involved is so unique as to constitute in itself the relevant market is remedied by this Court's reliance upon "common sense" and judicial notice of appellants' commanding position. But these are poor substitutes for the proof to which the Government should be put. I would remand to the District Court for a trial and findings on the issue of "dominance."

AMERICAN MOTORS CORP. ET AL. *v.* CITY OF KENOSHA.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 343. Decided March 10, 1958.

274 Wis. 315, 80 N. W. 2d 363, affirmed.

Solicitor General Rankin, Assistant Attorney General Rice, John N. Stull, A. F. Prescott and *H. Eugene Heine, Jr.* for the United States, and *Alfred E. LaFrance* for the American Motors Corporation, appellants.

Wm. J. P. Abert and *Robert V. Baker* for appellee.

PER CURIAM.

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

MR. JUSTICE FRANKFURTER, MR. JUSTICE BURTON, MR. JUSTICE HARLAN, and MR. JUSTICE WHITTAKER dissent for the reasons set forth in their dissenting opinions in *City of Detroit* v. *Murray Corp.*, 355 U. S. 489, 495, 505, 511, decided March 3, 1958.

ZIVNOSTENSKA BANKA, NATIONAL CORPORATION, *v.* STEPHEN, FORMERLY KNOWN AS AUGSTEIN, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 717. Decided March 10, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: 3 N. Y. 2d 862, 145 N. E. 2d 24.

Lemuel Skidmore for appellant.

Sigmund Timberg for appellees.

PER CURIAM.

The motion for leave to file brief of Frank Petschek et al., as *amici curiae,* is granted. The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

HOUSTON BELT & TERMINAL RAILWAY CO. ET AL. *v.* UNITED STATES ET AL.

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

No. 730. Decided March 10, 1958.

153 F. Supp. 3, affirmed.

R. S. Outlaw, T. R. Ware, G. W. Holmes and *C. M. Spence* for appellants.

Solicitor General Rankin, Assistant Attorney General Hansen, Henry Geller, Robert W. Ginnane and *B. Franklin Taylor, Jr.* for the United States and the Interstate Commerce Commission, and *C. Brien Dillon* for the Texas & New Orleans Railroad Co., appellees.

PER CURIAM.

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

MARSHALL *v.* BRUCKER, SECRETARY OF THE ARMY.

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

No. 41, Misc. Decided March 10, 1958.

Certiorari granted; judgment reversed; and case remanded to District Court for appropriate relief in the light of *Harmon* v. *Brucker*, 355 U. S. 579.

Reported below: 100 U. S. App. D. C. 256, 243 F. 2d 834.

Petitioner *pro se*.

Solicitor General Rankin for respondent.

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 reversed and the case is remanded to the District Court for appropriate relief in the light of *Harmon* v. *Brucker* and *Abramowitz* v. *Brucker*, 355 U. S. 579, decided March 3, 1958.

MR. JUSTICE CLARK dissents from this disposition of the case for the reasons stated in his dissenting opinion in these cases.

HOWARD *v.* UNITED STATES.

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

No. 186, Misc. Decided March 10, 1958.

On representations of the Solicitor General and examination of the record, certiorari granted, judgment of Court of Appeals vacated, and case remanded to District Court with directions to afford petitioner a hearing on his motion under 28 U. S. C. § 2255.

Reported below: 101 U. S. App. D. C. 131, 247 F. 2d 537.

Petitioner *pro se.*

Solicitor General Rankin, Warren Olney, III, then Assistant Attorney General, *Beatrice Rosenberg* and *Julia P. Cooper* 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 memorandum, and an examination of the record, 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 cause is remanded to the District Court with directions to afford petitioner a hearing on his motion under 28 U. S. C. § 2255.

458778 O—58——6

SHELTON *v.* UNITED STATES.

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

No. 223, Misc. Decided March 10, 1958.

Certiorari granted; on consideration of the record and confession of error by the Solicitor General that the plea of guilty may have been improperly obtained, judgment of the Court of Appeals reversed and case remanded to the District Court for further proceedings.

Reported below: 246 F. 2d 571.

Petitioner *pro se.*

Solicitor General Rankin for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. Upon consideration of the entire record and confession of error by the Solicitor General that the plea of guilty may have been improperly obtained, the judgment of the United States Court of Appeals for the Fifth Circuit is reversed and the case is remanded to the District Court for further proceedings.

COMMISSIONER OF INTERNAL REVENUE *v.* SULLIVAN ET AL.

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

No. 119. Argued January 30, 1958.—Decided March 17, 1958.

Amounts expended to lease premises and hire employees for the conduct of gambling enterprises, illegal under state law, are deductible as ordinary and necessary business expenses within the meaning of § 23 (a) (1) (A) of the Internal Revenue Code of 1939. Pp. 27–29.

241 F. 2d 46, 242 F. 2d 558, affirmed.

Solicitor General Rankin argued the cause for petitioner. With him on the brief were *Assistant Attorney General Rice, Joseph F. Goetten* and *Meyer Rothwacks.*

Eugene Bernstein argued the cause for respondents. On the brief were *Mr. Bernstein* and *E. J. Blair* for Sullivan et al., and *Howard R. Slater* for Mesi, respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question is whether amounts expended to lease premises and hire employees for the conduct of alleged illegal gambling enterprises are deductible as ordinary and necessary business expenses within the meaning of § 23 (a) (1) (A) of the Internal Revenue Code of 1939.[1]

---

[1] Section 23 (a) (1) (A) provides:

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

. . . . . .

"All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; . . . and rentals or other payments

The taxpayers received income from bookmaking establishments in Chicago, Ill. The Tax Court found that these enterprises were illegal under Illinois law,[2] that the acts performed by the employees constituted violations of that law, and that the payment of rent for the use of the premises for the purpose of bookmaking was also illegal under that law. The Tax Court accordingly held that the amount paid for wages and for rent could not be deducted from gross income since those deductions were for expenditures made in connection with illegal acts. 15 CCH TC Mem. Dec. 23, 25 T. C. 513. The Court of Appeals reversed, 241 F. 2d 46, 242 F. 2d 558, on the basis of its prior decision in *Commissioner* v. *Doyle,* 231 F. 2d 635. The case is here on a petition for certiorari, 354 U. S. 920, for consideration in connection with the companion cases *Hoover Motor Express Co.* v. *United States, post,* p. 38, and *Tank Truck Rentals, Inc.,* v. *Commissioner, post,* p. 30, decided this day.

Deductions are a matter of grace and Congress can, of course, disallow them as it chooses. At times the policy to disallow expenses in connection with certain condemned activities is clear. It was made so by the Regulations in *Textile Mills Corp.* v. *Commissioner,* 314 U. S. 326. Any inference of disapproval of these expenses as deductions is absent here. The Regulations, indeed, point the other way, for they make the federal excise tax on wagers deductible as an ordinary and necessary business expense.[3] This seems to us to be recognition of a

---

required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity." 53 Stat. 12, as amended, 56 Stat. 819, 26 U. S. C. § 23 (a) (1) (A).

[2] Ill. Rev. Stat., 1945, c. 38, § 336.

[3] Treas. Reg. 118, § 39.23 (a)–1, Rev. Rul. 54–219, 1954–1 Cum. Bull. 51:

"The Federal excise tax on wagers under section 3285 (d) of the

gambling enterprise as a business for federal tax purposes. The policy that allows as a deduction the tax paid to conduct the business seems sufficiently hospitable to allow the normal deductions of the rent and wages necessary to operate it. We said in *Commissioner* v. *Heininger,* 320 U. S. 467, 474, that the "fact that an expenditure bears a remote relation to an illegal act" does not make it nondeductible. And see *Lilly* v. *Commissioner,* 343 U. S. 90. If we enforce as federal policy the rule espoused by the Commissioner in this case, we would come close to making this type of business taxable on the basis of its gross receipts, while all other business would be taxable on the basis of net income. If that choice is to be made, Congress should do it. The amounts paid as wages to employees and to the landlord as rent are "ordinary and necessary expenses" in the accepted meaning of the words. That is enough to permit the deduction, unless it is clear that the allowance is a device to avoid the consequence of violations of a law, as in *Hoover Motor Express Co.* v. *United States, supra,* and *Tank Truck Rentals, Inc.,* v. *Commissioner, supra,* or otherwise contravenes the federal policy expressed in a statute or regulation, as in *Textile Mills Corp.* v. *Commissioner, supra.*

Affirmed.

Internal Revenue Code and the special tax under section 3290 of the Code paid by persons engaged in receiving wagers are deductible, for Federal income tax purposes, as ordinary and necessary business expenses under section 23 (a) of the Internal Revenue Code, provided the taxpayer is engaged in the business of accepting wagers or conducting wagering pools or lotteries, or is engaged in receiving wagers for or on behalf of any person liable for the tax under section 3285 (d) of the Code."

TANK TRUCK RENTALS, INC., *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 109. Argued January 29–30, 1958.—Decided March 17, 1958.

Fines imposed on, and paid by, the owners of tank trucks (and their drivers, who are reimbursed by the owners) for violations of state maximum weight laws are not deductible by the truck owners as "ordinary and necessary" business expenses under § 23 (a) (1) (A) of the Internal Revenue Code of 1939, either (a) when commercial practicalities cause the truck owners to violate such state laws deliberately at the calculated risk of being detected and fined, or (b) when the violations are unintentional. Pp. 31–37.

(a) A finding that an expense is "necessary" cannot be made if allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof. Pp. 33–34.

(b) The fines here concern the policy of several States, "evidenced" by penal statutes enacted to protect their highways from damage and to insure the safety of all persons using them. P. 34.

(c) Assessment of the fines here involved was punitive action and not a mere toll for the use of the highways. Pp. 34, 36.

(d) In allowing deductions for income tax purposes, Congress did not intend to encourage business enterprises to violate the declared policy of a State. P. 35.

(e) The rule as to frustration of sharply defined national or state policies is not absolute. Each case turns on its own facts, and the test of nondeductibility is the severity and immediacy of the frustration resulting from allowance of the deduction. P. 35.

(f) To permit the deduction of fines and penalties imposed by a State for violations of its laws would frustrate state policy in severe and direct fashion by reducing the "sting" of the penalties. Pp. 35–36.

(g) Since the maximum weight statutes make no distinction between innocent and willful violators, state policy is as much thwarted in the case of unintentional violations as it is in the case of willful violations. Pp. 36–37.

242 F. 2d 14, affirmed.

Leonard Sarner argued the cause for petitioner. With him on the brief was *Paul A. Wolkin.*

Solicitor General Rankin argued the cause for respondent. With him on the brief were *Assistant Attorney General Rice, Joseph F. Goetten* and *Meyer Rothwacks.*

MR. JUSTICE CLARK delivered the opinion of the Court.

In 1951 petitioner Tank Truck Rentals paid several hundred fines imposed on it and its drivers for violations of state maximum weight laws. This case involves the deductibility of those payments as "ordinary and necessary" business expenses under § 23 (a)(1)(A) of the Internal Revenue Code of 1939.[1] Prior to 1950 the Commissioner had permitted such deductions,[2] but a change of policy that year [3] caused petitioner's expenditures to be disallowed. The Tax Court, reasoning that allowance of the deduction would frustrate sharply defined state policy expressed in the maximum weight laws, upheld the Commissioner. 26 T. C. 427. The Court of Appeals affirmed on the same ground, 242 F. 2d 14, and we granted

---

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

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

"(a) EXPENSES.—

"(1) TRADE OR BUSINESS EXPENSES.—

"(A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ." 53 Stat. 12, as amended, 56 Stat. 819.

[2] Letter ruling by Commissioner Helvering, dated September 10, 1942 (IT:P:2–WTL), 5 CCH 1950 Fed. Tax Rep. ¶ 6134.

[3] 1951—1 Cum. Bull. 15.

certiorari. 354 U. S. 920 (1957). In our view, the deductions properly were disallowed.

Petitioner, a Pennsylvania corporation, owns a fleet of tank trucks which it leases, with drivers, to motor carriers for transportation of bulk liquids. The lessees operate the trucks throughout Pennsylvania and the surrounding States of New Jersey, Ohio, Delaware, West Virginia, and Maryland, with nearly all the shipments originating or terminating in Pennsylvania. In 1951, the tax year in question, each of these States imposed maximum weight limits for motor vehicles operating on its highways.[4] Pennsylvania restricted truckers to 45,000 pounds, however, while the other States through which petitioner operated allowed maximum weights approximating 60,000 pounds. It is uncontested that trucking operations were so hindered by this situation that neither petitioner nor other bulk liquid truckers could operate profitably and also observe the Pennsylvania law. Petitioner's equipment consisted largely of 4,500- to 5,000-gallon tanks, and the industry rate structure generally was predicated on fully loaded use of equipment of that capacity. Yet only one of the commonly carried liquids weighed little enough that a fully loaded truck could satisfy the Pennsylvania statute. Operation of partially loaded trucks, however, not only would have created safety hazards, but also would have been economically impossible for any carrier so long as the rest of the industry continued capacity loading. And the industry as a whole could not operate on a partial load basis without driving shippers to competing forms

---

[4] Delaware, Del. Laws 1947, c. 86, § 2; Maryland, Flack's Md. Ann. Code, 1939 (1947 Cum. Supp.), Art. 66½, § 254, and Flack's Md. Ann. Code, 1951, Art. 66½, § 278; New Jersey, N. J. Rev. Stat., 1937, 39:3–84; Ohio, Page's Ohio Gen. Code Ann., 1938 (Cum. Pocket Supp. 1952), § 7248–1; Pennsylvania, Purdon's Pa. Stat. Ann., 1953, Tit. 75, § 453; West Virginia, W. Va. Code Ann., 1949, § 1546, and 1953 Cum. Supp., § 1721(463).

of transportation. The only other alternative, use of smaller tanks, also was commercially impracticable, not only because of initial replacement costs but even more so because of reduced revenue and increased operating expense, since the rates charged were based on the number of gallons transported per mile.

Confronted by this dilemma, the industry deliberately operated its trucks overweight in Pennsylvania in the hope, and at the calculated risk, of escaping the notice of the state and local police. This conduct also constituted willful violations in New Jersey, for reciprocity provisions of the New Jersey statute subjected trucks registered in Pennsylvania to Pennsylvania weight restrictions while traveling in New Jersey.[5] In the remainder of the States in which petitioner operated, it suffered overweight fines for several unintentional violations, such as those caused by temperature changes in transit. During the tax year 1951, petitioner paid a total of $41,060.84 in fines and costs for 718 willful and 28 innocent violations. Deduction of that amount in petitioner's 1951 tax return was disallowed by the Commissioner.

It is clear that the Congress intended the income tax laws "to tax earnings and profits less expenses and losses," *Higgins* v. *Smith,* 308 U. S. 473, 477 (1940), carrying out a broad basic policy of taxing "net, not . . . gross, income . . . ." *McDonald* v. *Commissioner,* 323 U. S. 57, 66–67 (1944). Equally well established is the rule that deductibility under § 23 (a)(1)(A) is limited to expenses that are both ordinary and necessary to carrying on the taxpayer's business. *Deputy* v. *du Pont,* 308 U. S. 488, 497 (1940). A finding of "necessity" cannot be made, however, if allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some govern-

[5] N. J. Rev. Stat., 1937 (Cum. Supp. 1948–1950), 39:3–84.3.

mental declaration thereof. *Commissioner* v. *Heininger,* 320 U. S. 467, 473 (1943); see *Lilly* v. *Commissioner,* 343 U. S. 90, 97 (1952). This rule was foreshadowed in *Textile Mills Securities Corp.* v. *Commissioner,* 314 U. S. 326 (1941), where the Court, finding no congressional intent to the contrary, upheld the validity of an income tax regulation reflecting an administrative distinction "between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction." 314 U. S., at 339. Significant reference was made in *Heininger* to the very situation now before us; the Court stated, "Where a taxpayer has violated a federal or a state statute and incurred a fine or penalty he has not been permitted a tax deduction for its payment." 320 U. S., at 473.

Here we are concerned with the policy of several States "evidenced" by penal statutes enacted to protect their highways from damage and to insure the safety of all persons using them.[6] Petitioner and its drivers have violated these laws and have been sentenced to pay the fines here claimed as income tax deductions.[7] It is clear that assessment of the fines was punitive action and not a mere toll for use of the highways: the fines occurred only in the exceptional instance when the overweight run was detected by the police. Petitioner's failure to comply with the state laws obviously was based on a balancing of the

---

[6] Because state policy in this case was evidenced by specific legislation, it is unnecessary to decide whether the requisite "governmental declaration" might exist other than in an Act of the Legislature. See Schwartz, Business Expenses Contrary To Public Policy, 8 Tax L. Rev. 241, 248.

[7] Unlike the rest of the States, Pennsylvania imposed the fines on the driver rather than on the owner of the trucks. In each instance, however, the driver was petitioner's employee, and petitioner paid the fines as a matter of course, being bound to do so by its collective bargaining agreement with the union representing the drivers.

cost of compliance against the chance of detection. Such a course cannot be sanctioned, for judicial deference to state action requires, whenever possible, that a State not be thwarted in its policy. We will not presume that the Congress, in allowing deductions for income tax purposes, intended to encourage a business enterprise to violate the declared policy of a State. To allow the deduction sought here would but encourage continued violations of state law by increasing the odds in favor of noncompliance. This could only tend to destroy the effectiveness of the State's maximum weight laws.

This is not to say that the rule as to frustration of sharply defined national or state policies is to be viewed or applied in any absolute sense. "It has never been thought . . . that the mere fact that an expenditure bears a remote relation to an illegal act makes it nondeductible." *Commissioner* v. *Heininger, supra,* at 474. Although each case must turn on its own facts, *Jerry Rossman Corp.* v. *Commissioner,* 175 F. 2d 711, 713, the test of nondeductibility always is the severity and immediacy of the frustration resulting from allowance of the deduction. The flexibility of such a standard is necessary if we are to accommodate both the congressional intent to tax only net income, and the presumption against congressional intent to encourage violation of declared public policy.

Certainly the frustration of state policy is most complete and direct when the expenditure for which deduction is sought is itself prohibited by statute. See *Boyle, Flagg & Seaman, Inc.,* v. *Commissioner,* 25 T. C. 43. If the expenditure is not itself an illegal act, but rather the payment of a penalty imposed by the State because of such an act, as in the present case, the frustration attendant upon deduction would be only slightly less remote, and would clearly fall within the line of disallowance. Deduction of fines and penalties uniformly has been held

to frustrate state policy in severe and direct fashion by reducing the "sting" of the penalty prescribed by the state legislature.[8]

There is no merit to petitioner's argument that the fines imposed here were not penalties at all, but merely a revenue toll. It is true that the Pennsylvania statute provides for purchase of a single-trip permit by an overweighted trucker; that its provision for forcing removal of the excess weight at the discretion of the police authorities apparently was never enforced; and that the fines were devoted by statute to road repair within the municipality or township where the trucker was apprehended. Moreover, the Pennsylvania statute was amended in 1955,[9] raising the maximum weight restriction to 60,000 pounds, making mandatory the removal of the excess, and graduating the amount of the fine by the number of pounds that the truck was overweight. These considerations, however, do not change the fact that the truckers were fined by the State as a penal measure when and if they were apprehended by the police.

Finally, petitioner contends that deduction of the fines at least for the innocent violations will not frustrate state policy. But since the maximum weight statutes make no distinction between innocent and willful violators, state policy is as much thwarted in the one instance as in the other. Petitioner's reliance on *Jerry Rossman Corp.* v. *Commissioner, supra,* is misplaced. Deductions were

---

[8] See, *e. g., United States* v. *Jaffray,* 97 F. 2d 488, aff'd on other grounds, *sub nom. United States* v. *Bertelsen & Petersen Engineering Co.,* 306 U. S. 276 (1939); *Tunnel R. Co.* v. *Commissioner,* 61 F. 2d 166; *Chicago, R. I. & P. R. Co.* v. *Commissioner,* 47 F. 2d 990; *Burroughs Bldg. Material Co.* v. *Commissioner,* 47 F. 2d 178; *Great Northern R. Co.* v. *Commissioner,* 40 F. 2d 372; *Davenshire, Inc.,* v. *Commissioner,* 12 T. C. 958.

[9] Purdon's Pa. Stat. Ann., 1953 (1957 Cum. Ann. Pocket Part), Tit. 75, § 453.

allowed the taxpayer in that case for amounts inadvertently collected by him as OPA overcharges and then paid over to the Government, but the allowance was based on the fact that the Administrator, in applying the Act, had differentiated between willful and innocent violators. No such differentiation exists here, either in the application or the literal language of the state maximum weight laws.

Affirmed.

HOOVER MOTOR EXPRESS CO., INC., *v.* UNITED STATES.

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

No. 95. Argued January 29–30, 1958.—Decided March 17, 1958.

Fines paid by a truck owner for inadvertent violations of state maximum weight laws are not deductible as "ordinary and necessary" business expenses under § 23 (a)(1)(A) of the Internal Revenue Code of 1939. Pp. 38–40.

(a) In this case, it does not appear that the truck owner took all reasonable precautions to avoid the fines. Pp. 39–40.

(b) Even assuming all due care and no willful intent, allowance of the deduction would severely and directly frustrate state policy. P. 40.

241 F. 2d 459, affirmed.

Judson Harwood 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 Rice, Joseph F. Goetten* and *Meyer Rothwacks.*

MR. JUSTICE CLARK delivered the opinion of the Court.

The sole issue here—the deductibility for tax purposes [1] of fines paid by a trucker for *inadvertent* violations of state maximum weight laws—is identical to one of the

---

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

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

"(a) EXPENSES.—

"(1) TRADE OR BUSINESS EXPENSES.—

"(A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ." 53 Stat. 12, as amended, 56 Stat. 819.

issues decided today in No. 109, *Tank Truck Rentals, Inc.*, v. *Commissioner, ante,* p. 30.

Most of the overweight fines paid by petitioner during 1951–1953 inclusive, the tax years in question, were incurred in Tennessee and Kentucky, two of the nine States in which petitioner operated. During the relevant period, both Tennessee and Kentucky imposed maximum weight limitations of 42,000 pounds over-all and 18,000 pounds per axle,[2] considerably less than those in the other seven States. Petitioner's fines resulted largely from violations of the axle-weight limits rather than violations of the over-all truck weight limits. The District Court found that such violations usually occurred because of a shifting of the freight load during transit.

After paying the taxes imposed, petitioner sued in the District Court for a refund, claiming that no frustration of state policy would result from allowance of the deductions because (1) the violations had not been willful, and (2) all reasonable precautions had been taken to avoid the violations. The District Court held that even if petitioner had acted innocently and had taken all reasonable precautions, allowance of the deductions would frustrate clearly defined state policy. Judgment was entered for the Commissioner, 135 F. Supp. 818, and the Court of Appeals affirmed on the same reasoning. 241 F. 2d 459. We granted certiorari, 354 U. S. 920 (1957), in conjunction with the grant in *Tank Truck Rentals, Inc.*, v. *Commissioner, supra,* and *Commissioner* v. *Sullivan, ante,* p. 27, both decided today.

Wholly apart from possible frustration of state policy, it does not appear that payment of the fines in question was "necessary" to the operation of petitioner's business. This, of course, prevents any deduction. *Deputy* v.

---

[2] Ky. Rev. Stat., 1953, § 189.222; Williams' Tenn. Code, 1934 (1952 Cum. Supp. to 1943 Repl. Vol.), § 1166.33.

du Pont, 308 U. S. 488 (1940). The violations usually resulted from a shifting of the load during transit, but there is nothing in the record to indicate that the shifting could not have been controlled merely by tying down the load or compartmentalizing the trucks. Other violations occurred because petitioner relied on the weight stated in the bill of lading when picking up goods in small communities having no weighing facilities. It would seem that this situation could have been alleviated by carrying a scale in the truck.

Even assuming that petitioner acted with all due care and without willful intent, it is clear that allowance of the deduction sought by petitioner would severely and directly frustrate state policy. *Tank Truck Rentals, Inc.,* v. *Commissioner, supra.* As in *Tank Truck,* the statutes involved here do not differentiate between innocent and willful violators.

Affirmed.

FERGUSON *v.* ST. LOUIS-SAN FRANCISCO RAILWAY CO.

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

No. 799. Decided March 17, 1958.

In this case arising under the Federal Employers' Liability Act, *held:* The proofs were sufficient to submit to the jury the question whether employer negligence played a part in producing petitioner's injury. Therefore, certiorari is granted, the judgment below is reversed, and the case is remanded for further proceedings.

Reported below: 307 S. W. 2d 385.

Jo B. Gardner for petitioner.

James L. Homire and *Frank C. Mann* for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. We hold that the proofs were sufficient to submit to the jury the question whether employer negligence played a part in producing the petitioner's injury. *Wilkerson* v. *McCarthy,* 336 U. S. 53; *Rogers* v. *Missouri Pacific R. Co.,* 352 U. S. 500; *Webb* v. *Illinois Central R. Co.,* 352 U. S. 512; *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; *Gibson* v. *Thompson,* 355 U. S. 18; *Honeycutt* v. *Wabash R. Co.,* 355 U. S. 424. The judgment of the Supreme Court of Missouri is

458778 O—58——7

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

MR. JUSTICE HARLAN 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.

MR. JUSTICE WHITTAKER dissents.

HURLEY *v.* RAGEN, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF WILL COUNTY, ILLINOIS.

No. 225, Misc. Decided March 17, 1958.

Certiorari denied without consideration of questions raised and without prejudice to institution of proceedings in an Illinois state court under the Illinois Post-Conviction Hearing Act of August 4, 1949.

Petitioner *pro se.*

Latham Castle, Attorney General of Illinois, for respondent.

PER CURIAM.

The petition for writ of certiorari is denied without consideration of the questions raised therein and without prejudice to the institution by petitioner of proceedings in any Illinois state court of competent jurisdiction under the Illinois Post-Conviction Hearing Act of August 4, 1949. Ill. Rev. Stat., 1957, c. 38, § 826.

COLUMBIA BROADCASTING SYSTEM, INC., ET AL. *v.* LOEW'S INC. ET AL.

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

No. 90. Argued January 29, 1958.—Decided March 17, 1958.

239 F. 2d 532, affirmed by an equally divided Court.

W. B. Carman argued the cause for petitioners. With him on the brief were *Homer I. Mitchell, Warren M. Christopher, Loyd Wright* and *Dudley K. Wright.*

Herman F. Selvin argued the cause for respondents. With him on the brief was *Joseph P. Loeb.*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

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

FORMAN ET UX. *v.* APFEL, LIQUIDATING RECEIVER, ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

No. 726. Decided March 17, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: 390 Pa. 161, 134 A. 2d 662.

Thomson F. Edwards for appellants.

A. D. Caesar and *Nathan I. Miller* for appellees.

PER CURIAM.

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

PEREZ *v.* BROWNELL, ATTORNEY GENERAL.

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

No. 44. Argued May 1, 1957.—Restored to the calendar for reargument June 24, 1957.—Reargued October 28, 1957.—Decided March 31, 1958.*

In proceedings to deport a person born in the United States, the Government denied that he was an American citizen on the ground that, by voting in a Mexican political election and remaining outside of the United States in wartime to avoid military service, he had lost his citizenship under § 401 (e) and (j) of the Nationality Act of 1940, as amended. He sued for a judgment declaring him to be a citizen but was denied relief. *Held:* It was within the authority of Congress, under its power to regulate the relations of the United States with foreign countries, to provide in § 401 (e) that anyone who votes in a foreign political election shall lose his American citizenship; and the judgment is affirmed. Pp. 45–62.

(a) The power of Congress to regulate foreign relations may reasonably be deemed to include a power to deal with voting by American citizens in foreign political elections, since Congress could find that such activities, because they might give rise to serious international embarrassment, relate to the conduct of foreign relations. Pp. 57–60.

(b) Since withdrawal of the citizenship of Americans who vote in foreign political elections is reasonably calculated to effect the avoidance of embarrassment in the conduct of foreign relations, such withdrawal is within the power of Congress, acting under the Necessary and Proper Clause. Pp. 60–62.

(c) There is nothing in the language, the context, the history or the manifest purpose of the Fourteenth Amendment to warrant drawing from it a restriction upon the power otherwise possessed by Congress to withdraw citizenship. P. 58, n. 3.

---

*[On the same day, an order was entered substituting Attorney General Rogers for former Attorney General Brownell as the party respondent. See *post*, p. 915.]

(d) No opinion is expressed with respect to the constitutionality of § 401 (j) relating to persons who remain outside the United States to avoid military service. P. 62.

235 F. 2d 364, affirmed.

Charles A. Horsky argued the cause for petitioner. With him on the briefs were *Fred Okrand, A. L. Wirin, Jack Wasserman* and *Salvatore C. J. Fusco.*

Oscar H. Davis argued the cause for respondent on the original argument, and *Solicitor General Rankin* on the reargument. With them on the briefs were *Warren Olney, III,* then Assistant Attorney General, and *J. F. Bishop. Beatrice Rosenberg* was also with them on the brief on the reargument.

John W. Willis filed a brief for Mendoza-Martinez, as *amicus curiae.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Petitioner, a national of the United States by birth, has been declared to have lost his American citizenship by operation of the Nationality Act of 1940, 54 Stat. 1137, as amended by the Act of September 27, 1944, 58 Stat. 746. Section 401 of that Act [1] provided that

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> . . . . . .
>
> "(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or
>
> . . . . . .

[1] Incorporated into § 349 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 267–268, 8 U. S. C. § 1481.

> "(j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States."

He seeks a reversal of the judgment against him on the ground that these provisions were beyond the power of Congress to enact.

Petitioner was born in Texas in 1909. He resided in the United States until 1919 or 1920, when he moved with his parents to Mexico, where he lived, apparently without interruption, until 1943. In 1928 he was informed that he had been born in Texas. At the outbreak of World War II, petitioner knew of the duty of male United States citizens to register for the draft, but he failed to do so. In 1943 he applied for admission to the United States as an alien railroad laborer, stating that he was a native-born citizen of Mexico, and was granted permission to enter on a temporary basis. He returned to Mexico in 1944 and shortly thereafter applied for and was granted permission, again as a native-born Mexican citizen, to enter the United States temporarily to continue his employment as a railroad laborer. Later in 1944 he returned to Mexico once more. In 1947 petitioner applied for admission to the United States at El Paso, Texas, as a citizen of the United States. At a Board of Special Inquiry hearing (and in his subsequent appeals to the Assistant Commissioner and the Board of Immigration Appeals), he admitted having remained outside of the United States to avoid military service and having voted in political elections in Mexico. He was ordered excluded on the ground that he had expatriated himself; this order was affirmed on appeal. In 1952 petitioner, claiming to be a native-born citizen of Mexico,

was permitted to enter the United States as an alien agricultural laborer. He surrendered in 1953 to immigration authorities in San Francisco as an alien unlawfully in the United States but claimed the right to remain by virtue of his American citizenship. After a hearing before a Special Inquiry Officer, he was ordered deported as an alien not in possession of a valid immigration visa; this order was affirmed on appeal to the Board of Immigration Appeals.

Petitioner brought suit in 1954 in a United States District Court for a judgment declaring him to be a national of the United States.[2] The court, sitting without a jury, found (in addition to the undisputed facts set forth above) that petitioner had remained outside of the United States from November 1944 to July 1947 for the purpose of avoiding service in the armed forces of the United States and that he had voted in a "political election" in Mexico in 1946. The court, concluding that he had thereby expatriated himself, denied the relief sought by the petitioner. The United States Court of Appeals for the Ninth Circuit affirmed. 235 F. 2d 364. We granted certiorari because of the constitutional questions raised by the petitioner. 352 U. S. 908.

---

[2] Petitioner proceeded under § 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171, which authorizes an individual to bring suit for a declaration of nationality in a United States District Court against the head of any government agency that denies him a right or privilege of United States nationality on the ground that he is not a United States national. The judicial hearing in such an action is a trial *de novo* in which the individual need make only a *prima facie* case establishing his citizenship by birth or naturalization. See *Pandolfo* v. *Acheson*, 202 F. 2d 38, 40–41. The Government must prove the act of expatriation on which the denial was based by " 'clear, unequivocal, and convincing' evidence which does not leave 'the issue in doubt'." *Gonzales* v. *Landon*, 350 U. S. 920; see *Schneiderman* v. *United States*, 320 U. S. 118, 158.

Statutory expatriation, as a response to problems of international relations, was first introduced just a half century ago. Long before that, however, serious friction between the United States and other nations had stirred consideration of modes of dealing with the difficulties that arose out of the conflicting claims to the allegiance of foreign-born persons naturalized in the United States, particularly when they returned to the country of their origin.

As a starting point for grappling with this tangle of problems, Congress in 1868 formally announced the traditional policy of this country that it is the "natural and inherent right of all people" to divest themselves of their allegiance to any state, 15 Stat. 223, R. S. § 1999. Although the impulse for this legislation had been the refusal by other nations, notably Great Britain, to recognize a right in naturalized Americans who had been their subjects to shed that former allegiance, the Act of 1868 was held by the Attorney General to apply to divestment by native-born and naturalized Americans of their United States citizenship. 14 Op. Atty. Gen. 295, 296. In addition, while the debate on the Act of 1868 was proceeding, negotiations were completed on the first of a series of treaties for the adjustment of some of the disagreements that were constantly arising between the United States and other nations concerning citizenship. These instruments typically provided that each of the signatory nations would regard as a citizen of the other such of its own citizens as became naturalized by the other. *E. g.*, Treaty with the North German Confederation, Feb. 22, 1868, 2 Treaties, Conventions, International Acts, etc. (comp. Malloy, 1910), 1298. This series of treaties initiated this country's policy of automatic divestment of citizenship for specified conduct affecting our foreign relations.

On the basis, presumably, of the Act of 1868 and such treaties as were in force, it was the practice of the Department of State during the last third of the nineteenth century to make rulings as to forfeiture of United States citizenship by individuals who performed various acts abroad. See Borchard, Diplomatic Protection of Citizens Abroad, §§ 319, 324. Naturalized citizens who returned to the country of their origin were held to have abandoned their citizenship by such actions as accepting public office there or assuming political duties. See Davis to Weile, Apr. 18, 1870, 3 Moore, Digest of International Law, 737; Davis to Taft, Jan. 18, 1883, 3 *id.*, at 739. Native-born citizens of the United States (as well as naturalized citizens outside of the country of their origin) were generally deemed to have lost their American citizenship only if they acquired foreign citizenship. See Bayard to Suzzara-Verdi, Jan. 27, 1887, 3 *id.*, at 714; see also *Comitis* v. *Parkerson,* 56 F. 556, 559.

No one seems to have questioned the necessity of having the State Department, in its conduct of the foreign relations of the Nation, pass on the validity of claims to American citizenship and to such of its incidents as the right to diplomatic protection. However, it was recognized in the Executive Branch that the Department had no specific legislative authority for nullifying citizenship, and several of the Presidents urged Congress to define the acts by which citizens should be held to have expatriated themselves. *E. g.,* Message of President Grant to Congress, Dec. 7, 1874, 7 Messages and Papers of the Presidents (Richardson ed. 1899) 284, 291–292. Finally in 1906, during the consideration of the bill that became the Naturalization Act of 1906, a Senate resolution and a recommendation of the House Committee on Foreign Affairs called for an examination of the problems relating to American citizenship, expatriation and protection

abroad. In response to these suggestions the Secretary of State appointed the Citizenship Board of 1906, composed of the Solicitor of the State Department, the Minister to the Netherlands and the Chief of the Passport Bureau. The board conducted a study and late in 1906 made an extensive report with recommendations for legislation.

Among the recommendations of the board were that expatriation of a citizen "be assumed" when, in time of peace, he became naturalized in a foreign state, engaged in the service of a foreign state where such service involved the taking of an oath of allegiance to that state, or domiciled in a foreign state for five years with no intention to return. Citizenship of the United States, Expatriation, and Protection Abroad, H. R. Doc. No. 326, 59th Cong., 2d Sess. 23. It also recommended that an American woman who married a foreigner be regarded as losing her American citizenship during coverture. *Id.*, at 29. As to the first two recommended acts of expatriation, the report stated that "no man should be permitted deliberately to place himself in a position where his services may be claimed by more than one government and his allegiance be due to more than one." *Id.*, at 23. As to the third, the board stated that more and more Americans were going abroad to live "and the question of their protection causes increasing embarrassment to this Government in its relations with foreign powers." *Id.*, at 25.

Within a month of the submission of this report a bill was introduced in the House by Representative Perkins of New York based on the board's recommendations. Perkins' bill provided that a citizen would be "deemed to have expatriated himself" when, in peacetime, he became naturalized in a foreign country or took an oath of allegiance to a foreign state; it was presumed that a naturalized citizen who resided for five years in a foreign state had

ceased to be an American citizen, and an American woman who married a foreigner would take the nationality of her husband. 41 Cong. Rec. 1463–1464. Perkins stated that the bill was designed to discourage people from evading responsibilities both to other countries and to the United States and "to save our Government [from] becoming involved in any trouble or question with foreign countries where there is no just reason." *Id.*, at 1464. What little debate there was on the bill centered around the foreign domicile provision; no constitutional issue was canvassed. The bill passed the House, and, after substantially no debate and the adoption of a committee amendment adding a presumption of termination of citizenship for a naturalized citizen who resided for two years in the country of his origin, 41 Cong. Rec. 4116, the Senate passed it and it became the Expatriation Act of 1907. 34 Stat. 1228.

The question of the power of Congress to enact legislation depriving individuals of their American citizenship was first raised in the courts by *Mackenzie* v. *Hare,* 239 U. S. 299. The plaintiff in that action, Mrs. Mackenzie, was a native-born citizen and resident of the United States. In 1909 she married a subject of Great Britain and continued to reside with him in the United States. When, in 1913, she applied to the defendants, members of a board of elections in California, to be registered as a voter, her application was refused on the ground that by reason of her marriage she had ceased to be a citizen of the United States. Her petition for a writ of mandamus was denied in the state courts of California, and she sued out a writ of error here, claiming that if the Act of 1907 was intended to apply to her it was beyond the power of Congress. The Court, through Mr. Justice McKenna, after finding that merging the identity of husband and wife, as Congress had done in this instance, had

a "purpose and, it may be, necessity, in international policy," continued:

> "As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers. . . . We concur with counsel that citizenship is of tangible worth, and we sympathize with plaintiff in her desire to retain it and in her earnest assertion of it. But there is involved more than personal considerations. As we have seen, the legislation was urged by conditions of national moment. . . . It is the conception of the legislation under review that such an act may bring the Government into embarrassments and, it may be, into controversies. . . ." 239 U. S., at 311–312.

The Court observed that voluntary marriage of an American woman with a foreigner may have the same consequences, and "involve national complications of like kind," as voluntary expatriation in the traditional sense. It concluded: "This is no arbitrary exercise of government." 239 U. S., at 312. See also *Ex parte Griffin,* 237 F. 445; *Ex parte Ng Fung Sing,* 6 F. 2d 670.

By the early 1930's, the American law on nationality, including naturalization and denationalization, was expressed in a large number of provisions scattered throughout the statute books. Some of the specific laws enacted at different times seemed inconsistent with others, some problems of growing importance had emerged that Congress had left unheeded. At the request of the House Committee on Immigration and Naturalization, see 86 Cong. Rec. 11943, President Franklin D. Roosevelt established a Committee composed of the Secretary of State,

the Attorney General and the Secretary of Labor to review the nationality laws of the United States, to recommend revisions and to codify the nationality laws into one comprehensive statute for submission to Congress; he expressed particular concern about "existing discriminations" in the law. Exec. Order No. 6115, Apr. 25, 1933. The necessary research for such a study was entrusted to specialists representing the three departments. Five years were spent by these officials in the study and formulation of a draft code. In their letter submitting the draft code to the President after it had been reviewed within the Executive Branch, the Cabinet Committee noted the special importance of the provisions concerning loss of nationality and asserted that none of these provisions was "designed to be punitive or to interfere with freedom of action"; they were intended to deprive of citizenship those persons who had shown that "their real attachment is to the foreign country and not to the United States." Codification of the Nationality Laws of the United States, H. R. Comm. Print, Pt. 1, 76th Cong., 1st Sess. v–vii.

The draft code of the Executive Branch was an omnibus bill in five chapters. The chapter relating to "Loss of Nationality" provided that any citizen should "lose his nationality" by becoming naturalized in a foreign country; taking an oath of allegiance to a foreign state; entering or serving in the armed forces of a foreign state; being employed by a foreign government in a post for which only nationals of that country are eligible; voting in a foreign political election or plebiscite; using a passport of a foreign state as a national thereof; formally renouncing American citizenship before a consular officer abroad; deserting the armed forces of the United States in wartime (upon conviction by court martial); if a naturalized citizen, residing in the state of his former nationality or birth for two years if he thereby acquires the nationality of that state; or, if a naturalized citizen,

residing in the state of his former nationality or birth for three years. *Id.*, at 66–76.

In support of the recommendation of voting in a foreign political election as an act of expatriation, the Committee reported:

> "Taking an active part in the political affairs of a foreign state by voting in a political election therein is believed to involve a political attachment and practical allegiance thereto which is inconsistent with continued allegiance to the United States, whether or not the person in question has or acquires the nationality of the foreign state. In any event it is not believed that an American national should be permitted to participate in the political affairs of a foreign state and at the same time retain his American nationality. The two facts would seem to be inconsistent with each other." *Id.*, at 67.

As to the reference to plebiscites in the draft language, the report states: "If this provision had been in effect when the Saar Plebiscite was held, Americans voting in it would have been expatriated." *Ibid.* It seems clear that the most immediate impulse for the entire voting provision was the participation by many naturalized Americans in the plebiscite to determine sovereignty over the Saar in January 1935. H. R. Rep. No. 216, 74th Cong., 1st Sess. 1. Representative Dickstein of New York, Chairman of the House Committee on Immigration and Naturalization, who had called the plebiscite an "international dispute" in which naturalized American citizens could not properly participate, N. Y. Times, Jan. 4, 1935, p. 12, col. 3, had introduced a bill in the House in 1935 similar in language to the voting provisions in the draft code, 79 Cong. Rec. 2050, but, although it was favorably reported, the House did not pass it.

In June 1938 the President submitted the Cabinet Committee's draft code and the supporting report to Congress. In due course, Chairman Dickstein introduced the code as H. R. 6127, and it was referred to his committee. In early 1940 extensive hearings were held before both a subcommittee and the full committee at which the interested Executive Branch agencies and others testified. With respect to the voting provision, Chairman Dickstein spoke of the Americans who had voted in the Saar plebiscite and said, "If they are American citizens they had no right to vote, to interfere with foreign matters or political subdivision." Hearings before the House Committee on Immigration and Naturalization on H. R. 6127, 76th Cong., 1st Sess. 287. Mr. Flournoy, Assistant Legal Adviser of the State Department, said that the provision would be "particularly applicable" to persons of dual nationality, *id.*, at 132; however, a suggestion that the provision be made applicable only to dual nationals, *id.*, at 398, was not adopted.

Upon the conclusion of the hearings in June 1940 a new bill was drawn up and introduced as H. R. 9980. The only changes from the Executive Branch draft with respect to the acts of expatriation were the deletion of using a foreign passport and the addition of residence by a naturalized citizen for five years in any foreign country as acts that would result in loss of nationality. 86 Cong. Rec. 11960–11961. The House debated the bill for a day in September 1940. In briefly summarizing the loss of nationality provisions of the bill, Chairman Dickstein said that "this bill would put an end to dual citizenship and relieve this country of the responsibility of those who reside in foreign lands and only claim citizenship when it serves their purpose." *Id.*, at 11944. Representative Rees of Kansas, who had served as chairman of the subcommittee that studied the draft code, said that clarifying

legislation was needed, among other reasons, "because of the duty of the Government to protect citizens abroad." *Id.*, at 11947. The bill passed the House that same day. *Id.*, at 11965.

In the Senate also, after a favorable report from the Committee on Immigration, the bill was debated very briefly. Committee amendments were adopted making the provision on foreign military service applicable only to dual nationals, making treason an act of expatriation and providing a procedure by which persons administratively declared to have expatriated themselves might obtain judicial determinations of citizenship. The bill as amended was passed. *Id.*, at 12817–12818. The House agreed to these and all other amendments on which the Senate insisted, *id.*, at 13250, and, on October 14, the Nationality Act of 1940 became law. 54 Stat. 1137.

The loss of nationality provisions of the Act constituted but a small portion of a long omnibus nationality statute. It is not surprising, then, that they received as little attention as they did in debate and hearings and that nothing specific was said about the constitutional basis for their enactment. The bill as a whole was regarded primarily as a codification—and only secondarily as a revision—of statutes that had been in force for many years, some of them, such as the naturalization provisions, having their beginnings in legislation 150 years old. It is clear that, as is so often the case in matters affecting the conduct of foreign relations, Congress was guided by and relied very heavily upon the advice of the Executive Branch, and particularly the State Department. See, *e. g.*, 86 Cong. Rec. 11943–11944. In effect, Congress treated the Cabinet Committee as it normally does its own committees charged with studying a problem and formulating legislation. These considerations emphasize the importance, in the inquiry into congressional power in this field, of keeping in mind the historical background

of the challenged legislation, for history will disclose the purpose fairly attributable to Congress in enacting the statute.

The first step in our inquiry must be to answer the question: what is the source of power on which Congress must be assumed to have drawn? Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation. See *United States* v. *Curtiss-Wright Export Corp.,* 299 U. S. 304, 318; *Mackenzie* v. *Hare,* 239 U. S. 299, 311–312. The States that joined together to form a single Nation and to create, through the Constitution, a Federal Government to conduct the affairs of that Nation must be held to have granted that Government the powers indispensable to its functioning effectively in the company of sovereign nations. The Government must be able not only to deal affirmatively with foreign nations, as it does through the maintenance of diplomatic relations with them and the protection of American citizens sojourning within their territories. It must also be able to reduce to a minimum the frictions that are unavoidable in a world of sovereigns sensitive in matters touching their dignity and interests.

The inference is fairly to be drawn from the congressional history of the Nationality Act of 1940, read in light of the historical background of expatriation in this country, that, in making voting in foreign elections (among other behavior) an act of expatriation, Congress was seeking to effectuate its power to regulate foreign affairs. The legislators, counseled by those on whom they rightly relied for advice, were concerned about actions by citizens in foreign countries that create problems of protection and are inconsistent with American allegiance. Moreover, we cannot ignore the fact that embarrassments

458778 O—58——8

in the conduct of foreign relations were of primary concern in the consideration of the Act of 1907, of which the loss of nationality provisions of the 1940 Act are a codification and expansion.

Broad as the power in the National Government to regulate foreign affairs must necessarily be, it is not without limitation. The restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations. Since Congress may not act arbitrarily, a rational nexus must exist between the content of a specific power in Congress and the action of Congress in carrying that power into execution. More simply stated, the means—in this case, withdrawal of citizenship—must be reasonably related to the end—here, regulation of foreign affairs. The inquiry—and, in the case before us, the sole inquiry—into which this Court must enter is whether or not Congress may have concluded not unreasonably that there is a relevant connection between this fundamental source of power and the ultimate legislative action.[3]

---

[3] The provision of the Fourteenth Amendment that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . ." sets forth the two principal modes (but by no means the only ones) for acquiring citizenship. Thus, in *United States* v. *Wong Kim Ark*, 169 U. S. 649 (Chief Justice Fuller and Mr. Justice Harlan dissenting), it was held that a person of Chinese parentage born in this country was among "all persons born . . . in the United States" and therefore a citizen to whom the Chinese Exclusion Acts did not apply. But there is nothing in the terms, the context, the history or the manifest purpose of the Fourteenth Amendment to warrant drawing from it a restriction upon the power otherwise possessed by Congress to withdraw citizenship. The limit of the operation of that provision was clearly enunciated in *Perkins* v. *Elg*, 307 U. S. 325, 329: "As at birth she became a citizen of the United States, that citizenship must

Our starting point is to ascertain whether the power of Congress to deal with foreign relations may reasonably be deemed to include a power to deal generally with the active participation, by way of voting, of American citizens in foreign political elections. Experience amply attests that, in this day of extensive international travel, rapid communication and widespread use of propaganda, the activities of the citizens of one nation when in another country can easily cause serious embarrassments to the government of their own country as well as to their fellow citizens. We cannot deny to Congress the reasonable belief that these difficulties might well become acute, to the point of jeopardizing the successful conduct of international relations, when a citizen of one country chooses to participate in the political or governmental affairs of another country. The citizen may by his action unwittingly promote or encourage a course of conduct contrary to the interests of his own government; moreover, the people or government of the foreign country may regard his action to be the action of his government, or at least as a reflection if not an expression of its policy. Cf. Preuss, International Responsibility for Hostile Propaganda Against Foreign States, 28 Am. J. Int'l L. 649, 650.

It follows that such activity is regulable by Congress under its power to deal with foreign affairs. And it must be regulable on more than an *ad hoc* basis. The subtle influences and repercussions with which the Government must deal make it reasonable for the generalized, although clearly limited, category of "political election" to be used in defining the area of regulation. That description carries with it the scope and meaning of its context and purpose; classes of elections—nonpolitical in the col-

---

be deemed to continue unless she has been deprived of it through the operation of a treaty or congressional enactment or by her voluntary action in conformity with applicable legal principles."

loquial sense—as to which participation by Americans could not possibly have any effect on the relations of the United States with another country are excluded by any rational construction of the phrase. The classification that Congress has adopted cannot be said to be inappropriate to the difficulties to be dealt with. Specific applications are of course open to judicial challenge, as are other general categories in the law, by a "gradual process of judicial inclusion and exclusion." *Davidson* v. *New Orleans,* 96 U. S. 97, 104.[4]

The question must finally be faced whether, given the power to attach some sort of consequence to voting in a foreign political election, Congress, acting under the Necessary and Proper Clause, Art. I, § 8, cl. 18, could attach loss of nationality to it. Is the means, withdrawal of citizenship, reasonably calculated to effect the end that is within the power of Congress to achieve, the avoidance of embarrassment in the conduct of our foreign relations attributable to voting by American citizens in foreign political elections? The importance and extreme delicacy of the matters here sought to be regulated demand that Congress be permitted ample scope in selecting appropriate modes for accomplishing its purpose. The critical connection between this conduct and loss of citizenship is the fact that it is the possession of American citizenship by a person committing the act that makes the act potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations. The termination of citizenship terminates the problem. Moreover, the fact is not without significance that Congress has interpreted

[4] Petitioner in the case before us did not object to the characterization of the election in which he voted as a "political election." It may be noted that, in oral argument, counsel for the petitioner expressed his understanding that the election involved was the election for Mexico's president.

this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship.

Of course, Congress can attach loss of citizenship only as a consequence of conduct engaged in voluntarily. See *Mackenzie* v. *Hare,* 239 U. S. 299, 311–312. But it would be a mockery of this Court's decisions to suggest that a person, in order to lose his citizenship, must intend or desire to do so. The Court only a few years ago said of the person held to have lost her citizenship in *Mackenzie* v. *Hare, supra:* "The woman had not intended to give up her American citizenship." *Savorgnan* v. *United States,* 338 U. S. 491, 501. And the latter case sustained the denationalization of Mrs. Savorgnan although it was not disputed that she "had no intention of endangering her American citizenship or of renouncing her allegiance to the United States." 338 U. S., at 495.[5] What both women did do voluntarily was to engage in conduct to which Acts of Congress attached the consequence of denationalization irrespective of—and, in those cases, absolutely contrary to—the intentions and desires of the individuals. Those two cases mean nothing—indeed, they are deceptive—if their essential significance is not rejection of the notion that the power of Congress to terminate citizenship depends upon the citizen's assent. It is a distortion of those cases to explain them away on a theory that a citizen's assent to denationalization may be inferred from his having engaged in conduct that amounts to an "abandonment of citizenship" or a "trans-

[5] The District Court in *Savorgnan* stated: "I am satisfied from the proofs submitted that at the time plaintiff signed Exhibits 1 and 2 [application for Italian citizenship and oath of allegiance to Italian Government] she had no present or fixed intention in her mind to expatriate herself." 73 F. Supp. 109, 111.

fer of allegiance." Certainly an Act of Congress cannot be invalidated by resting decisive precedents on a gross fiction—a fiction baseless in law and contradicted by the facts of the cases.

It cannot be said, then, that Congress acted without warrant when, pursuant to its power to regulate the relations of the United States with foreign countries, it provided that anyone who votes in a foreign election of significance politically in the life of another country shall lose his American citizenship. To deny the power of Congress to enact the legislation challenged here would be to disregard the constitutional allocation of governmental functions that it is this Court's solemn duty to guard.

Because of our view concerning the power of Congress with respect to § 401 (e) of the Nationality Act of 1940, we find it unnecessary to consider—indeed, it would be improper for us to adjudicate—the constitutionality of § 401 (j), and we expressly decline to rule on that important question at this time.

Judgment affirmed.

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join, dissenting.

The Congress of the United States has decreed that a citizen of the United States shall lose his citizenship by performing certain designated acts.[1] The petitioner in

[1] Section 401 of the Nationality Act of 1940, 54 Stat. 1137, 1168–1169, as amended, 8 U. S. C. § 1481.

The fact that the statute speaks in terms of loss of nationality does not mean that it is not petitioner's citizenship that is being forfeited. He is a national by reason of his being a citizen, § 101 (b), Nationality Act of 1940, 54 Stat. 1137, 8 U. S. C. § 1101 (a)(22). Hence he loses his citizenship when he loses his status as a national of the United States. In the context of this opinion, the terms nationality and citizenship can be used interchangeably. Cf. *Rabang* v. *Boyd*, 353 U. S. 427.

this case, a native-born American,[2] is declared to have lost his citizenship by voting in a foreign election.[3] Whether this forfeiture of citizenship exceeds the bounds of the Constitution is the issue before us. The problem is fundamental and must be resolved upon fundamental considerations.

Generally, when congressional action is challenged, constitutional authority is found in the express and implied powers with which the National Government has been invested or in those inherent powers that are necessary attributes of a sovereign state. The sweep of those powers is surely broad. In appropriate circumstances, they are adequate to take away life itself. The initial

---

[2] Petitioner was born in El Paso, Texas, in 1909, a fact of which he was apprised in 1928. His Mexican-born parents took him to Mexico when he was 10 or 11 years old. In 1932 petitioner married a Mexican national; they have seven children. In 1943 and 1944 petitioner sought and received permission to enter this country for brief periods as a wartime railroad laborer. In 1952 petitioner again entered this country as a temporary farm laborer. After he had been ordered deported as an alien illegally in the United States, he brought this action for a declaratory judgment of citizenship, relying upon his birth in this country.

[3] Section 401 (e) of the Nationality Act of 1940, 54 Stat. 1169, 8 U. S. C. § 1481 (5).

The courts below concluded that petitioner had lost his citizenship for the additional reason specified in § 401 (j) of the Nationality Act, which was added in 1944, 58 Stat. 746, 8 U. S. C. § 1481 (10): "Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States."

The majority expressly declines to rule on the constitutional questions raised by § 401 (j). My views on a statute of this sort are set forth in my opinion in *Trop* v. *Dulles*, *post*, p. 86, decided this day, involving similar problems raised by § 401 (g) of the Nationality Act, 54 Stat. 1169, as amended, 8 U. S. C. § 1481 (8).

question here is whether citizenship is subject to the exercise of these general powers of government.

What is this Government, whose power is here being asserted? And what is the source of that power? The answers are the foundation of our Republic. To secure the inalienable rights of the individual, "Governments are instituted among Men, deriving their just powers from the consent of the governed." I do not believe the passage of time has lessened the truth of this proposition. It is basic to our form of government. This Government was born of its citizens, it maintains itself in a continuing relationship with them, and, in my judgment, it is without power to sever the relationship that gives rise to its existence. I cannot believe that a government conceived in the spirit of ours was established with power to take from the people their most basic right.

Citizenship *is* man's basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen. He has no lawful claim to protection from any nation, and no nation may assert rights on his behalf.[4] His very existence is at the sufferance of the state within whose borders he happens to be. In this country the expatriate would presumably enjoy, at most, only the limited rights and privileges of aliens,[5] and like the alien he might even

---

[4] See Borchard, Diplomatic Protection of Citizens Abroad (1916), § 8; 1 Oppenheim, International Law (7th ed., Lauterpacht, 1948), §§ 291–294; Holborn, The Legal Status of Political Refugees, 1920–1938, 32 Am. J. Int'l L. 680 (1938); Preuss, International Law and Deprivation of Nationality, 23 Geo. L. J. 250 (1934); Study on Statelessness, U. N. Doc. No. E/1112 (1949); 64 Yale L. J. 1164 (1955).

[5] See Konvitz, The Alien and the Asiatic in American Law (1946); Comment, 20 U. of Chi. L. Rev. 547 (1953). Cf. *Takahashi* v. *Fish & Game Commission*, 334 U. S. 410; *Oyama* v. *California*, 332 U. S. 633.

be subject to deportation and thereby deprived of the right to assert any rights.[6] This government was not established with power to decree this fate.

The people who created this government endowed it with broad powers. They created a sovereign state with power to function as a sovereignty. But the citizens themselves are sovereign, and their citizenship is not subject to the general powers of their government. Whatever may be the scope of its powers to regulate the conduct and affairs of all persons within its jurisdiction, a government *of* the people cannot take away their citizenship simply because one branch of that government can be said to have a conceivably rational basis for wanting to do so.

The basic constitutional provision crystallizing the right of citizenship is the first sentence of section one of the Fourteenth Amendment. It is there provided that "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the

---

[6] *Harisiades* v. *Shaughnessy,* 342 U. S. 580; *Fong Yue Ting* v. *United States,* 149 U. S. 698.

Even if Congress can divest United States citizenship, it does not necessarily follow that an American-born expatriate can be deported. He would be covered by the statutory definition of "alien," 8 U. S. C. § 1101 (a)(3), but he would not necessarily have come "from a foreign port or place" and hence may not have effected the "entry," 8 U. S. C. § 1101 (a)(13), specified in the deportation provisions, 8 U. S. C. § 1251. More fundamentally, since the deporting power has been held to be derived from the power to exclude, *Fong Yue Ting* v. *United States, supra,* it may well be that this power does not extend to persons born in this country. As to them, deportation would perhaps find its justification only as a punishment, indistinguishable from banishment. See dissenting opinions in *United States* v. *Ju Toy,* 198 U. S. 253, 264; *Fong Yue Ting* v. *United States, supra,* at 744.

Since this action for a declaratory judgment does not involve the validity of the deportation order against petitioner, it is unnecessary, as the Government points out, to resolve the question of whether this petitioner may be deported.

United States and of the State wherein they reside." United States citizenship is thus the constitutional birthright of every person born in this country. This Court has declared that Congress is without power to alter this effect of birth in the United States, *United States* v. *Wong Kim Ark*, 169 U. S. 649, 703. The Constitution also provides that citizenship can be bestowed under a "uniform Rule of Naturalization," [7] but there is no corresponding provision authorizing divestment. Of course, naturalization unlawfully procured can be set aside.[8] But apart from this circumstance, the status of the naturalized citizen is secure. As this Court stated in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 827:

> "[The naturalized citizen] becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. *The constitution does not authorize Congress to enlarge or abridge those rights.* The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual." (Emphasis added.)

Under our form of government, as established by the Constitution, the citizenship of the lawfully naturalized and the native-born cannot be taken from them.

There is no question that citizenship may be voluntarily relinquished. The right of voluntary expatriation was recognized by Congress in 1868.[9] Congress declared that "the right of expatriation is a natural and inherent

---

[7] U. S. Const., Art. I, § 8, cl. 4.

[8] See, *e. g.*, *Knauer* v. *United States*, 328 U. S. 654; *Baumgartner* v. *United States*, 322 U. S. 665; *Schneiderman* v. *United States*, 320 U. S. 118.

[9] Act of July 27, 1868, 15 Stat. 223.

right of all people . . . ." [10] Although the primary purpose of this declaration was the protection of our naturalized citizens from the claims of their countries of origin, the language was properly regarded as establishing the reciprocal right of American citizens to abjure their allegiance.[11] In the early days of this Nation the right of expatriation had been a matter of controversy. The common-law doctrine of perpetual allegiance was evident in the opinions of this Court.[12] And, although impressment of naturalized American seamen of British birth was a cause of the War of 1812, the executive officials of this Government were not unwavering in their support of the right of expatriation.[13] Prior to 1868 all efforts to obtain congressional enactments concerning expatriation failed.[14] The doctrine of perpetual allegiance, however, was so ill-suited to the growing nation whose doors were open to immigrants from abroad that it could not last. Nine years before Congress acted Attorney General Black stated the American position in a notable opinion: [15]

> "Here, in the United States, the thought of giving it [the right of expatriation] up cannot be entertained for a moment. Upon that principle this country was populated. We owe to it our existence as a nation.

---

[10] *Ibid.*

[11] See *Savorgnan* v. *United States*, 338 U. S. 491, 498 and n. 11; Foreign Relations, 1873, H. R. Exec. Doc. No. 1, 43d Cong., 1st Sess., Pt. 1, Vol. II, 1186–1187, 1204, 1210, 1213, 1216, 1222 (views of President Grant's Cabinet members); 14 Op. Atty. Gen. 295; Tsiang, The Question of Expatriation in America Prior to 1907, 97–98, 108–109.

[12] See *Shanks* v. *Dupont*, 3 Pet. 242; *Inglis* v. *Trustees of Sailor's Snug Harbour*, 3 Pet. 99.

[13] 3 Moore, Digest of International Law, §§ 434–437; Tsiang, 45–55, 71–86, 110–112.

[14] Tsiang, 55–61.

[15] 9 Op. Atty. Gen. 356, 359.

> Ever since our independence we have upheld and maintained it by every form of words and acts. We have constantly promised full and complete protection to all persons who should come here and seek it by renouncing their natural allegiance and transferring their fealty to us. We stand pledged to it in the face of the whole world."

It has long been recognized that citizenship may not only be voluntarily renounced through exercise of the right of expatriation but also by other actions in derogation of undivided allegiance to this country.[16] While the essential qualities of the citizen-state relationship under our Constitution preclude the exercise of governmental power to divest United States citizenship, the establishment of that relationship did not impair the principle that conduct of a citizen showing a voluntary transfer of allegiance is an abandonment of citizenship. Nearly all sovereignties recognize that acquisition of foreign nationality ordinarily shows a renunciation of citizenship.[17] Nor is this the only act by which the citizen may show a voluntary abandonment of his citizenship. Any action by which he manifests allegiance to a foreign state may be so inconsistent with the retention of citizenship as to result in loss of that status.[18] In recognizing the consequence of such action, the Government is not taking away United States citizenship to implement its general regulatory powers, for, as previously indicated, in my judgment citizenship is immune from divestment under these

---

[16] See, *e. g., Savorgnan* v. *United States,* 338 U. S. 491; *Mackenzie* v. *Hare,* 239 U. S. 299; *Bauer* v. *Clark,* 161 F. 2d 397, cert. denied, 332 U. S. 839. Cf. *Acheson* v. *Maenza,* 92 U. S. App. D. C. 85, 202 F. 2d 453.

[17] See Laws Concerning Nationality, U. N. Doc. No. ST/LEG/SER.B/4 (1954).

[18] See, generally, Laws Concerning Nationality, *op. cit. supra,* note 17.

powers. Rather, the Government is simply giving formal recognition to the inevitable consequence of the citizen's own voluntary surrender of his citizenship.

Twice before, this Court has recognized that certain voluntary conduct results in an impairment of the status of citizenship. In *Savorgnan* v. *United States,* 338 U. S. 491, an American citizen had renounced her citizenship and acquired that of a foreign state. This Court affirmed her loss of citizenship, recognizing that "From the beginning, one of the most obvious and effective forms of expatriation has been that of naturalization under the laws of another nation." 338 U. S., at 498. *Mackenzie* v. *Hare,* 239 U. S. 299, involved an American woman who had married a British national. That decision sustained an Act of Congress which provided that her citizenship was suspended for the duration of her marriage. Since it is sometimes asserted that this case is authority for the broad proposition that Congress can take away United States citizenship, it is necessary to examine precisely what the case involved.

The statute which the Court there sustained did not divest Mrs. Mackenzie of her citizenship.[19] It provided that "any American woman who marries a foreigner shall take the nationality of her husband." [20] "At the termina-

---

[19] Act of March 2, 1907, 34 Stat. 1228–1229. The full text is as follows:

"SEC. 3. That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein."

[20] This clause merely expressed the well-understood principle that a wife's nationality "merged" with that of her husband's. Cockburn, Nationality, 24; 3 Moore, Digest of International Law, 450–451, 453; 3 Hackworth, Digest of International Law, 246–247. This was a

tion of the marital relation," the statute continues, "she may *resume* her American citizenship . . . ." (Emphasis added.) Her citizenship was not taken away; it was held in abeyance.

This view of the statute is borne out by its history. The 1907 Act was passed after the Department of State had responded to requests from both houses of Congress for a comprehensive study of our own and foreign nationality laws, together with recommendations for new legislation.[21] One of those recommendations, substantially incorporated in the 1907 Act, was as follows: [22]

> "That an American woman who marries a foreigner shall take *during coverture* the nationality of her husband; but upon termination of the marital relation by death or absolute divorce she may *revert* to her American citizenship by registering within one year as an American citizen at the most convenient American consulate or by returning to reside in the

---

consequence of the common-law fiction of a unity of interest in the marital community. During coverture the privileges and obligations of a woman's citizenship gave way to the dominance of her husband's. Prior to the Act of March 2, 1907, the Department of State declined to issue passports to American-born women who were married to aliens. 3 Moore, 454; 3 Hackworth, 247. The Attorney General ruled that a woman in such circumstances was not subject to an income tax imposed on all citizens of the United States residing abroad. 13 Op. Atty. Gen. 128. Several courts held that during the duration of a marriage consummated prior to the Act between an American-born woman and an alien, a court may entertain a petition for her naturalization. *In re Wohlgemuth,* 35 F. 2d 1007; *In re Krausmann,* 28 F. 2d 1004; *In re Page,* 12 F. 2d 135. Cf. *Pequignot* v. *Detroit,* 16 F. 211.

[21] S. Res. 30, 59th Cong., 1st Sess.; H. R. Rep. No. 4784, 59th Cong., 1st Sess.

[22] H. R. Doc. No. 326, 59th Cong., 2d Sess. 29. The Department's covering letter makes abundantly clear that marriage was not to result in "expatriation." *Id.,* at 3.

> United States if she is abroad; or if she is in the United States by continuing to reside therein." (Emphasis added.)

This principle of "reversion of citizenship" was a familiar one in our own law,[23] and the law of foreign states.[24] The statute was merely declarative of the law as it was then

---

[23] Consult, generally, 3 Moore, § 410 (2) ("Reversion of Nationality"); Van Dyne, Naturalization, 242–255. Numerous cases contain references to a woman's "reverting" to United States citizenship after the termination of her marriage to an alien. *E. g., Petition of Zogbaum,* 32 F. 2d 911, 913; *Petition of Drysdale,* 20 F. 2d 957, 958; *In re Fitzroy,* 4 F. 2d 541, 542. The Department of State adopted the same interpretation. In 1890 Secretary Blaine declared the view of the Department that:

"The marriage of an American woman to a foreigner does not completely divest her of her original nationality. *Her American citizenship is held for most purposes to be in abeyance during coverture,* but to be susceptible of revival by her return to the jurisdiction and allegiance of the United States." (Emphasis added.) Foreign Rel. U. S. 1890, 301.

In 1906 Secretary Root stated:

"Under the practice of the Department of State a widow or a woman who has obtained an absolute divorce, being an American citizen and who has married an alien, must return to the United States, or must have her residence here in order to have her American citizenship revert on becoming *femme sole.*" Foreign Rel. U. S. 1906, Pt. 2, 1365.

[24] Consult, generally, 3 Moore, 458–462. H. R. Doc. No. 326, 59th Cong., 2d Sess. 269–538, a report by the Department of State which Congress requested prior to its Act of March 2, 1907, contains a digest of the nationality laws of forty-four countries. Twenty-five of those provided in widely varying terms that upon marriage a woman's citizenship should follow that of her husband. Of these twenty-five, all but two made special provision for the woman to recover her citizenship upon termination of the marriage by compliance with certain formalities demonstrative of the proper intent, and in every instance wholly different from the ordinary naturalization procedures.

understood.[25] Although the opinion in *Mackenzie* v. *Hare* contains some reference to termination of citizenship, the reasoning is consistent with the terms of the statute that was upheld. Thus, the Court speaks of Mrs. Mackenzie's having entered a "condition," 239 U. S., at 312, not as having surrendered her citizenship. "Therefore," the Court concludes, *"as long as the relation lasts* it is made tantamount to expatriation." *Ibid.* (Emphasis added.)

A decision sustaining a statute that relies upon the unity of interest in the marital community—a common-law fiction now largely a relic of the past—may itself be outdated.[26] However that may be, the foregoing demon-

---

[25] *In re Wohlgemuth,* 35 F. 2d 1007; *In re Krausmann,* 28 F. 2d 1004; *Petition of Drysdale,* 20 F. 2d 957; *In re Page,* 12 F. 2d 135.

In fact, Congressman Perkins, supporting the bill on the floor of the House, explained its effect in these words:

"The courts have decided that a woman takes the citizenship of her husband, only the decisions of the courts provide no means by which she may retake the citizenship of her own country on the expiration of the marital relation. This bill contains nothing new in that respect, except a provision that when the marital relation is terminated the woman may then retake her former citizenship." 41 Cong. Rec. 1465.

Cases discussing the pre-1907 law generally held that a woman did not lose her citizenship by marriage to an alien, although she might bring about that result by other acts (such as residing abroad after the death of her husband) demonstrating an intent to relinquish that citizenship. *E. g., Shanks* v. *Dupont,* 3 Pet. 242; *In re Wright,* 19 F. Supp. 224; *Petition of Zogbaum,* 32 F. 2d 911; *In re Lynch,* 31 F. 2d 762; *Petition of Drysdale,* 20 F. 2d 957; *In re Fitzroy,* 4 F. 2d 541; *Wallenburg* v. *Missouri Pacific R. Co.,* 159 F. 217; *Ruckgaber* v. *Moore,* 104 F. 947; *Comitis* v. *Parkerson,* 56 F. 556. This was also the view of the Department of State. 3 Moore, 449–450; 3 Hackworth, 247–248.

[26] The marriage provisions of the 1907 legislation were substantially repealed by the 1922 Cable Act, 42 Stat. 1021, and the last remnants of the effect of marriage on loss of citizenship were eliminated in 1931. 46 Stat. 1511. See Roche, The Loss of American Nationality, 99 U. of Pa. L. Rev. 25, 47–49.

strates that *Mackenzie* v. *Hare* should not be understood to sanction a power to divest citizenship. Rather this case, like *Savorgnan,* simply acknowledges that United States citizenship can be abandoned, temporarily or permanently, by conduct showing a voluntary transfer of allegiance to another country.

The background of the congressional enactment pertinent to this case indicates that Congress was proceeding generally in accordance with this approach. After the initial congressional designation in 1907 of certain actions that were deemed to be an abandonment of citizenship, it became apparent that further clarification of the problem was necessary. In 1933 President Roosevelt, acting at the request of the House Committee on Immigration and Naturalization,[27] established a Committee of Cabinet members to prepare a codification and revision of the nationality laws.[28] The Committee, composed of the Secretary of State, the Attorney General and the Secretary of Labor, spent five years preparing the codification that became the Nationality Act of 1940 and submitted their draft in 1938. It is evident that this Committee did not believe citizenship could be divested under the Government's general regulatory powers. Rather, it adopted the position that the citizen abandons his status by compromising his allegiance. In its letter submitting the proposed codification to the President, the Committee described the loss-of-nationality provisions in these words: [29]

> "They are merely intended to deprive persons of American nationality when such persons, *by their own acts, or inaction, show that their real attachment is to the foreign country and not to the United States.*" (Emphasis added.)

---

[27] See 86 Cong. Rec. 11943.

[28] Exec. Order No. 6115, April 25, 1933.

[29] Codification of the Nationality Laws of the United States, H. R. Comm. Print, Pt. 1, 76th Cong., 1st Sess. VII.

458778 O—58——9

Furthermore, when the draft code was first discussed by the House Committee on Immigration and Naturalization—the only legislative group that subjected the codification to detailed examination [30]—it was at once recognized that the status of citizenship was protected from congressional control by the Fourteenth Amendment. In considering the situation of a native-born child of alien parentage, Congressmen Poage and Rees, members of the committee, and Richard Flournoy, the State Department representative, engaged in the following colloquy: [31]

"Mr. POAGE. Isn't that based on the constitutional provision that all persons born in the United States are citizens thereof?

"Mr. FLOURNOY. Yes.

"Mr. POAGE. In other words, it is not a matter we have any control over.

"Mr. FLOURNOY. No; and no one wants to change that.

"Mr. POAGE. No one wants to change that, of course.

"Mr. FLOURNOY. We have control over citizens born abroad, and we also have control over the question of expatriation. We can provide for expatriation. No one proposes to change the constitutional provisions.

"Mr. REES. We cannot change the citizenship of a man who went abroad, who was born in the United States.

"Mr. FLOURNOY. You can make certain acts of his result in a loss of citizenship.

"Mr. REES. Surely, that way."

---

[30] The bill was considered by the House Committee on Immigration and Naturalization and its subcommittee. Hearings before the House Committee on Immigration and Naturalization on H. R. 6127, 76th Cong., 1st Sess. The Senate did not hold hearings on the bill.

[31] Hearings, at 37–38.

It is thus clear that the purpose governing the formulation of most of the loss-of-nationality provisions of the codification was the specification of acts that would of themselves show a voluntary abandonment of citizenship. Congress did not assume it was empowered to use denationalization as a weapon to aid in the exercise of its general powers. Nor should we.

Section 401 (e) of the 1940 Act added a new category of conduct that would result in loss of citizenship:

> "Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory . . . ."

The conduct described was specifically represented by Mr. Flournoy to the House Committee as indicative of "a choice of the foreign nationality," just like "using a passport of a foreign state as a national thereof." [32]

The precise issue posed by Section 401 (e) is whether the conduct it describes invariably involves a dilution of undivided allegiance sufficient to show a voluntary abandonment of citizenship. Doubtless under some circumstances a vote in a foreign election would have this effect. For example, abandonment of citizenship might result if the person desiring to vote had to become a foreign national or represent himself to be one.[33] Conduct of this sort is apparently what Mr. Flournoy had in mind when he discussed with the committee the situation of an American-born youth who had acquired Canadian citizenship through the naturalization of his parents. Mr. Flournoy suggested that the young man might manifest

---

[32] *Id.*, at 132. The passport provision was apparently deleted by the subcommittee, for it does not appear in the version of the bill that was printed when hearings resumed before the full committee on May 2, 1940. *Id.*, at 207.

[33] Cf. *In the Matter of P————*, 1 I. & N. Dec. 267 (this particular election in Canada was open only to British subjects).

an election of nationality by taking advantage of his Canadian citizenship and voting "as a Canadian." [34] And even the situation that bothered Committee Chairman Dickstein—Americans voting in the Saar plebiscite—might under some circumstances disclose conduct tantamount to dividing allegiance. Congressman Dickstein expressed his concern as follows: [35]

> "I know we have had a lot of Nazis, so-called American citizens, go to Europe who have voted in the Saar for the annexation of territory to Germany, and Germany says that they have the right to participate and to vote, and yet they are American citizens."

There might well be circumstances where an American shown to have voted at the behest of a foreign government to advance its territorial interests would compromise his native allegiance.

The fatal defect in the statute before us is that its application is not limited to those situations that may rationally be said to constitute an abandonment of citizenship. In specifying that any act of voting in a foreign political election results in loss of citizenship, Congress has employed a classification so broad that it encompasses conduct that fails to show a voluntary abandonment of American citizenship.[36] "The connection between the fact proved and that presumed is not sufficient." *Manley* v. *Georgia,* 279 U. S. 1, 7; see also *Tot* v. *United States,* 319 U. S. 463; *Bailey* v. *Alabama,* 219 U. S. 219. The

[34] Hearings, at 98.

[35] *Id.,* at 286–287.

[36] The broad sweep of the statute was specifically called to the attention of the committee by Mr. Henry F. Butler. Hearings, at 286–287. Mr. Butler also submitted a brief, suggesting that the coverage of the statute be limited to those voting "in a manner in which only nationals of such foreign state or territory are eligible to vote or participate." *Id.,* at 387.

reach of this statute is best indicated by a decision of a former attorney general, holding that an American citizen lost her citizenship under Section 401 (e) by voting in an election in a Canadian town on the issue of whether beer and wine should be sold.[37] Voting in a foreign election may be a most equivocal act, giving rise to no implication that allegiance has been compromised. Nothing could demonstrate this better than the political history of this country. It was not until 1928 that a presidential election was held in this country in which no alien was eligible to vote.[38] Earlier in our history at least 22 States had extended the franchise to aliens. It cannot be seriously contended that this Nation understood the vote of each alien who previously took advantage of this privilege to be an act of allegiance to this country, jeopardizing the alien's native citizenship. How then can we attach such significance to any vote of a United States citizen in a foreign election? It is also significant that of 84 nations whose nationality laws have been compiled by the United Nations, only this country specifically designates foreign voting as an expatriating act.[39]

My conclusions are as follows. The Government is without power to take citizenship away from a native-born or lawfully naturalized American. The Fourteenth

---

[37] *In the Matter of F————*, 2 I. & N. Dec. 427.

[38] Aylsworth, The Passing of Alien Suffrage, 25 Am. Pol. Sci. Rev. 114.

[39] Laws Concerning Nationality, U. N. Doc. No. ST/LEG/SER. B/4 (1954). The statutes of Andorra (191 sq. mi.; 5,231 pop.) provide for loss of nationality for a citizen who "exercises political rights in another country," *id.*, at 10, and this very likely includes voting.

Of course, it should be noted that two nations, Romania and Russia, have statutes providing that upon decree of the government citizenship can be withdrawn, apparently for any reason. *Id.*, at 396, 463.

Amendment recognizes that this priceless right is immune from the exercise of governmental powers. If the Government determines that certain conduct by United States citizens should be prohibited because of anticipated injurious consequences to the conduct of foreign affairs or to some other legitimate governmental interest, it may within the limits of the Constitution proscribe such activity and assess appropriate punishment. But every exercise of governmental power must find its source in the Constitution. The power to denationalize is not within the letter or the spirit of the powers with which our Government was endowed. The citizen may elect to renounce his citizenship, and under some circumstances he may be found to have abandoned his status by voluntarily performing acts that compromise his undivided allegiance to his country. The mere act of voting in a foreign election, however, without regard to the circumstances attending the participation, is not sufficient to show a voluntary abandonment of citizenship. The record in this case does not disclose any of the circumstances under which this petitioner voted. We know only the bare fact that he cast a ballot. The basic right of American citizenship has been too dearly won to be so lightly lost.

I fully recognize that only the most compelling considerations should lead to the invalidation of congressional action, and where legislative judgments are involved, this Court should not intervene. But the Court also has its duties, none of which demands more diligent performance than that of protecting the fundamental rights of individuals. That duty is imperative when the citizenship of an American is at stake—that status, which alone, assures him the full enjoyment of the precious rights conferred by our Constitution. As I see my duty in this case, I must dissent.

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

While I join the opinion of THE CHIEF JUSTICE, I wish to add a word. The philosophy of the opinion that sustains this statute is foreign to our constitutional system. It gives supremacy to the Legislature in a way that is incompatible with the scheme of our written Constitution. A decision such as this could be expected in England where there is no written constitution, and where the House of Commons has the final say. But with all deference, this philosophy has no place here. By proclaiming it we forsake much of our constitutional heritage and move closer to the British scheme. That may be better than ours or it may be worse. Certainly it is not ours.

We deal here with the right of citizenship created by the Constitution. Section 1, cl. 1, of the Fourteenth Amendment states "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." As stated by the Court in the historic decision *United States* v. *Wong Kim Ark,* 169 U. S. 649, 702, "Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution."

What the Constitution grants the Constitution can take away. But there is not a word in that document that covers expatriation. The numerous legislative powers granted by Art. I, § 8, do not mention it. I do not know of any legislative power large enough and powerful enough to modify or wipe out rights granted or created by § 1, cl. 1, of the Fourteenth Amendment.

Our decisions have never held that expatriation can be imposed. To the contrary, they have assumed that

expatriation was a voluntary relinquishment of loyalty to one country and attachment to another. Justice Paterson spoke of expatriation in *Talbot* v. *Janson,* 3 Dall. 133, 153, as "a departure with intention to leave this country, and settle in another." The loss of citizenship in this country without its acquisition in another country was to him the creation of "a citizen of the world"—a concept that is "a creature of the imagination, and far too refined for any republic of ancient or modern times." *Ibid.*

So far as I can find, we have, prior to this day, never sustained the loss of a native-born American citizenship unless another citizenship was voluntarily acquired. That was true both in *Mackenzie* v. *Hare,* 239 U. S. 299, and *Savorgnan* v. *United States,* 338 U. S. 491. We should look to their facts, not to loose statements unnecessary for the decisions. In the *Mackenzie* case it was the marriage of a native-born woman to an alien that caused the loss of one nationality and the acquisition of another. In the *Savorgnan* case the native-born American citizen became naturalized in Italy. In this case Perez did vote in a foreign election of some kind. But as THE CHIEF JUSTICE has clearly shown, § 401 (e) of the Nationality Act of 1940 "is not limited to those situations that may rationally be said to constitute an abandonment of citizenship." *Ante,* p. 76.

Our landmark decision on expatriation is *Perkins* v. *Elg,* 307 U. S. 325, where Chief Justice Hughes wrote for the Court. The emphasis of that opinion is that "Expatriation is the voluntary renunciation or abandonment of nationality and allegiance." *Id.,* at 334.

Today's decision breaks with that tradition. It allows Congress to brand an ambiguous act as a "voluntary renunciation" of citizenship when there is no requirement and no finding that the citizen transferred his loyalty from this country to another. This power is found in the

power of Congress to regulate foreign affairs. But if voting abroad is so pregnant with danger that Congress can penalize it by withdrawing the voter's American citizenship, all citizens should be filled with alarm. Some of the most heated political discussions in our history have concerned foreign policy. I had always assumed that the First Amendment, written in terms absolute, protected those utterances, no matter how extreme, no matter how unpopular they might be. Yet if the power to regulate foreign affairs can be used to deprive a person of his citizenship because he voted abroad, why may not it be used to deprive him of his citizenship because his views on foreign policy are unorthodox or because he disputed the position of the Secretary of State or denounced a Resolution of the Congress or the action of the Chief Executive in the field of foreign affairs? It should be remembered that many of our most heated controversies involved assertion of First Amendment rights respecting foreign policy. The hated Alien and Sedition Laws grew out of that field.[1] More recently the rise of fascism and com-

[1] Miller, Crisis in Freedom (1951), 167–168, states the Federalist case for those laws:

"As in the case of the Alien Act, the Federalists justified the Sedition Law by citing the power of Congress to provide for the common defense and general welfare, and the inherent right of every government to act in self-preservation. It was passed at a time of national emergency when, as a member of Congress said, 'some gentlemen say we are at war, and when all believe we must have war.' 'Threatened by *faction,* and actually at *hostility* with a foreign and perfidious foe abroad,' the Sedition Act was held to be 'necessary for the safety, perhaps the existence of the Government.' Congress could not permit subversive newspapers to 'paralyze the public arm, and weaken the efforts of Government for the defense of the country.' The wiles of France and its adherents were as dangerous as its armies: 'Do not the Jacobin fiends of France use falsehood and all the arms of hell,' asked William Cobbett, 'and do they not run like half famished

munism has had profound repercussions here. Could one who advocated recognition of Soviet Russia in the 1920's be deprived of his citizenship? Could that fate befall one who was a Bundist [2] in the late 1930's or early 1940's and extolled Hitler? Could it happen in the 1950's to one who pleaded for recognition of Red China or who proclaimed against the Eisenhower Doctrine in the Middle East? No doubt George F. Kennan "embarrassed" our foreign relations when he recently spoke over the British radio.[3] Does the Constitution permit Congress to cancel his citizenship? Could an American who violated his passport restrictions and visited Red China be deprived of his citizenship? Or suppose he trades with those under a ban. To many people any of those acts would seem much more heinous than the fairly innocent act of voting abroad. If casting a ballot abroad is sufficient to deprive an American of his citizenship, why could not like penalties be imposed on the citizen who expresses disagreement with his Nation's foreign policy in any of the ways enumerated?

The fact that First Amendment rights may be involved in some cases and not in others seems irrelevant. For the grant of citizenship by the Fourteenth Amendment is clear and explicit and should withstand any invasion of the legislative power.

What the Court does is to make it possible for any one of the many legislative powers to be used to wipe out or modify specific rights granted by the Constitution, provided the action taken is moderate and does not do violence to the sensibilities of a majority of this Court. The examples where this concept of Due Process has been

---

wolves to accomplish the destruction of this country?' If Congress had failed to take every precautionary measure against such danger, the blood of the Republic would have been upon its hands."

[2] Cf. *Keegan* v. *United States*, 325 U. S. 478.

[3] See Kennan, Russia, The Atom and the West (1957).

used to sustain state action [4] as well as federal action,[5] which modifies or dilutes specific constitutional guarantees, are numerous. It is used today drastically to revise the express command of the first Clause of § 1 of the Fourteenth Amendment. A right granted by the Constitution—whether it be the right to counsel or the right to citizenship—may be waived by the citizen.[6] But the waiver must be *first* a voluntary act and *second* an act consistent with a surrender of the right granted. When Perez voted he acted voluntarily. But, as shown, § 401 (e) does not require that his act have a sufficient relationship to the relinquishment of citizenship—nor a sufficient quality of adhering to a foreign power. Nor did his voting abroad have that quality.

The decision we render today exalts the Due Process Clause of the Fifth Amendment above all others. Of course any power exercised by the Congress must be asserted in conformity with the requirements of Due Process. *Tot* v. *United States,* 319 U. S. 463; *United States* v. *Harriss,* 347 U. S. 612; *Lambert* v. *California,* 355 U. S. 225. But the requirement of Due Process is a limitation on powers granted, not the means whereby rights granted by the Constitution may be wiped out or watered down. The Fourteenth Amendment grants citizenship to the native-born, as explained in *United States* v. *Wong Kim Ark, supra.* That right may be waived or surrendered by the citizen. But I see no constitutional

---

[4] See *Betts* v. *Brady,* 316 U. S. 455; *In re Summers,* 325 U. S. 561; *Adamson* v. *California,* 332 U. S. 46; *Bute* v. *Illinois,* 333 U. S. 640; *Feiner* v. *New York,* 340 U. S. 315; *Breard* v. *Alexandria,* 341 U. S. 622; *Adler* v. *Board of Education,* 342 U. S. 485; *Beauharnais* v. *Illinois,* 343 U. S. 250; *In re Groban,* 352 U. S. 330; *Breithaupt* v. *Abram,* 352 U. S. 432.

[5] *United Public Workers* v. *Mitchell,* 330 U. S. 75; *American Communications Assn.* v. *Douds,* 339 U. S. 382; *Dennis* v. *United States,* 341 U. S. 494.

[6] *E. g., Adams* v. *McCann,* 317 U. S. 269, 275.

method by which it can be taken from him. Citizenship, like freedom of speech, press, and religion, occupies a preferred position in our written Constitution, because it is a grant absolute in terms. The power of Congress to withhold it, modify it, or cancel it does not exist. One who is native-born may be a good citizen or a poor one. Whether his actions be criminal or charitable, he remains a citizen for better or for worse, except and unless he voluntarily relinquishes that status. While Congress can prescribe conditions for voluntary expatriation, Congress cannot turn white to black and make any act an act of expatriation. For then the right granted by the Fourteenth Amendment becomes subject to regulation by the legislative branch. But that right has no such infirmity. It is deeply rooted in history, as *United States* v. *Wong Kim Ark, supra,* shows. And the Fourteenth Amendment put it above and beyond legislative control.

That may have been an unwise choice. But we made it when we adopted the Fourteenth Amendment and provided that the native-born is an American citizen. Once he acquires that right there is no power in any branch of our Government to take it from him.

Memorandum of MR. JUSTICE WHITTAKER.

Though I agree with the major premise of the majority's opinion—that Congress may expatriate a citizen for an act which it may reasonably find to be fraught with danger of embroiling our Government in an international dispute or of embarrassing it in the conduct of foreign affairs—I cannot agree with the result reached, for it seems plain to me that § 401 (e) is too broadly written to be sustained upon that ground. That section, so far as here pertinent, expatriates an American citizen simply for "voting in a political election in a foreign state." Voting in a political election in a particular foreign state may be open to aliens under the law of that state, as it was in presidential elec-

tions in the United States until 1928 as the dissenting opinion of THE CHIEF JUSTICE observes. Where that is so—and this record fails to show that petitioner's act of voting in a political election in Mexico in 1946 was not entirely lawful under the law of that state—such legalized voting by an American citizen cannot reasonably be said to be fraught with danger of embroiling our Government in an international dispute or of embarrassing it in the conduct of foreign affairs, nor, I believe, can such an act—entirely legal under the law of the foreign state—be reasonably said to constitute an abandonment or any division or dilution of allegiance to the United States. Since these are my convictions, I dissent from the majority's opinion and join in so much of the dissenting opinion of THE CHIEF JUSTICE as expresses the view that the act of a citizen of the United States in voting in a foreign political election which is legally open to aliens under the law of that state cannot reasonably be said to constitute abandonment or any division or dilution of allegiance to the United States.

This leaves open the question presented respecting the constitutionality of § 401 (j), but inasmuch as the majority have found it unnecessary to adjudicate the constitutionality of that section in this case, it would be wholly fruitless for me now to reach a conclusion on that question, and I neither express nor imply any views upon it. Limiting myself to the issue decided by the majority, I dissent.

TROP *v.* DULLES, SECRETARY OF STATE, ET AL.

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

No. 70. Argued May 2, 1957.—Restored to the calendar for reargument June 24, 1957.—Reargued October 28–29, 1957.—Decided March 31, 1958.

At least as applied in this case to a native-born citizen of the United States who did not voluntarily relinquish or abandon his citizenship or become involved in any way with a foreign nation, § 401 (g) of the Nationality Act of 1940, as amended, which provides that a citizen "shall lose his nationality" by "deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as a result of such conviction is dismissed or dishonorably discharged from the service," is unconstitutional. Pp. 87–114.

239 F. 2d 527, reversed.

THE CHIEF JUSTICE, in an opinion joined by MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE WHITTAKER, concluded that:

1. Citizenship is not subject to the general powers of the National Government and therefore cannot be divested in the exercise of those powers. Pp. 91–93.

2. Even if citizenship could be divested in the exercise of some governmental power, § 401 (g) violates the Eighth Amendment, because it is penal in nature and prescribes a "cruel and unusual" punishment. Pp. 93–104.

MR. JUSTICE BLACK, in an opinion joined by MR. JUSTICE DOUGLAS, concurred in the opinion of THE CHIEF JUSTICE and expressed the view that, even if citizenship could be involuntarily divested, the power to denationalize may not be placed in the hands of military authorities. Pp. 104–105.

MR. JUSTICE BRENNAN, while agreeing with the Court, in *Perez* v. *Brownell, ante,* p. 44, that there is no constitutional infirmity in § 401 (e) which expatriates the citizen who votes in a foreign political election, concluded in this case that § 401 (g) lies beyond the power of Congress to enact. Pp. 105–114.

For dissenting opinion of MR. JUSTICE FRANKFURTER, joined by MR. JUSTICE BURTON, MR. JUSTICE CLARK and MR. JUSTICE HARLAN, see *post*, p. 114.

Osmond K. Fraenkel argued the cause and filed the briefs for petitioner.

Oscar H. Davis argued the cause for respondents on the original argument, and *Solicitor General Rankin* on the reargument. With them on the briefs were *Warren Olney, III,* then Assistant Attorney General, and *J. F. Bishop. Beatrice Rosenberg* was also with them on the brief on the reargument.

MR. CHIEF JUSTICE WARREN announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE WHITTAKER join.

The petitioner in this case, a native-born American, is declared to have lost his United States citizenship and become stateless by reason of his conviction by court-martial for wartime desertion. As in *Perez* v. *Brownell, ante,* p. 44, the issue before us is whether this forfeiture of citizenship comports with the Constitution.

The facts are not in dispute. In 1944 petitioner was a private in the United States Army, serving in French Morocco. On May 22, he escaped from a stockade at Casablanca, where he had been confined following a previous breach of discipline. The next day petitioner and a companion were walking along a road towards Rabat, in the general direction back to Casablanca, when an Army truck approached and stopped. A witness testified that petitioner boarded the truck willingly and that no words were spoken. In Rabat petitioner was turned over to military police. Thus ended petitioner's "desertion." He had been gone less than a day and had willingly surrendered to an officer on an Army vehicle while he was walking back towards his base. He testified that at the

time he and his companion were picked up by the Army truck, "we had decided to return to the stockade. The going was tough. We had no money to speak of, and at the time we were on foot and we were getting cold and hungry." A general court-martial convicted petitioner of desertion and sentenced him to three years at hard labor, forfeiture of all pay and allowances and a dishonorable discharge.

In 1952 petitioner applied for a passport. His application was denied on the ground that under the provisions of Section 401 (g) of the Nationality Act of 1940, as amended,[1] he had lost his citizenship by reason of his conviction and dishonorable discharge for wartime desertion. In 1955 petitioner commenced this action in the District Court, seeking a declaratory judgment that he is a citizen. The Government's motion for summary judgment was granted, and the Court of Appeals for the Second Circuit affirmed, Chief Judge Clark dissenting. 239 F. 2d 527. We granted certiorari. 352 U. S. 1023.

---

[1] 54 Stat. 1168, 1169, as amended, 58 Stat. 4, 8 U. S. C. § 1481 (a) (8):

"A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

. . . . . .

"(g) Deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces: *Provided,* That notwithstanding loss of nationality or citizenship or civil or political rights under the terms of this or previous Acts by reason of desertion committed in time of war, restoration to active duty with such military or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military or naval authority, prior or subsequent to the effective date of this Act, shall be deemed to have the immediate effect of restoring such nationality or citizenship and all civil and political rights heretofore or hereafter so lost and of removing all civil and political disabilities resulting therefrom . . ."

Section 401 (g), the statute that decrees the forfeiture of this petitioner's citizenship, is based directly on a Civil War statute, which provided that a deserter would lose his "rights of citizenship." [2] The meaning of this phrase was not clear.[3] When the 1940 codification and revision of the nationality laws was prepared, the Civil War statute was amended to make it certain that what a convicted deserter would lose was nationality itself.[4] In 1944 the

[2] Act of March 3, 1865, 13 Stat. 487, 490.

[3] See Roche, The Loss of American Nationality—The Development of Statutory Expatriation, 99 U. of Pa. L. Rev. 25, 60–62. Administratively the phrase "rights of citizenship" was apparently taken to mean "citizenship." See Foreign Relations 1873, H. R. Exec. Doc. No. 1, 43d Cong., 1st Sess., Pt. 1, Vol. II, p. 1187 (view of Secretary of State Fish); H. R. Doc. No. 326, 59th Cong., 2d Sess. 159 (State Department Board); Hearings before the House Committee on Immigration and Naturalization on H. R. 6127, 76th Cong., 1st Sess. 132–133 (testimony of Richard Flournoy, State Department representative).

[4] Hearings, at 133.

But it is not entirely clear, however, that the Congress fully appreciated the fact that Section 401 (g) rendered a convicted deserter stateless. In this regard, the following colloquy, which occurred during hearings in 1943 before the House Committee on Immigration and Naturalization between Congressmen Allen and Kearney, members of the Committee, and Edward J. Shaughnessy, then Deputy Commissioner of Immigration, is illuminating:

"Mr. ALLEN. If he is convicted [of desertion] by court martial in time of war, he loses his citizenship?

"Mr. SHAUGHNESSY. That is correct.

"Mr. ALLEN. In other words, that is the same thing as in our civil courts. When one is convicted of a felony and is sent to the penitentiary, one loses his citizenship.

"Mr. SHAUGHNESSY. He loses his rights of citizenship.

"Mr. KEARNEY. There is a difference between losing citizenship and losing civil rights.

"Mr. SHAUGHNESSY. He loses his civil rights, not his citizenship. Here he loses his citizenship.

"Mr. ALLEN. He loses his rights derived from citizenship.

[*Footnote 4 continued on p. 90.*]

458778 O—58——10

statute was further amended to provide that a convicted deserter would lose his citizenship only if he was dismissed from the service or dishonorably discharged.[5] At the same time it was provided that citizenship could be regained if the deserter was restored to active duty in wartime with the permission of the military authorities.

Though these amendments were added to ameliorate the harshness of the statute,[6] their combined effect produces a result that poses far graver problems than the ones that were sought to be solved. Section 401 (g) as amended now gives the military authorities complete discretion to decide who among convicted deserters shall continue to be Americans and who shall be stateless. By deciding whether to issue and execute a dishonorable discharge and whether to allow a deserter to re-enter the armed forces, the military becomes the arbiter of citizenship. And the domain given to it by Congress is not as narrow as might be supposed. Though the crime of desertion is one of the most serious in military law, it is by no means a rare event for a soldier to be convicted of this crime. The elements of desertion are simply absence from duty plus the intention not to return.[7] Into this

---

"Mr. SHAUGHNESSY. Yes; it almost amounts to the same thing. It is a technical difference.

"Mr. ALLEN. He is still an American citizen, but he has no rights.

"Mr. SHAUGHNESSY. No rights of citizenship."

Hearings before the House Committee on Immigration and Naturalization on H. R. 2207, 78th Cong., 1st Sess. 2–3.

See also *id.*, at 7: "Mr. ELMER. Is it not true that this loss of citizenship for desertion is a State matter and that the Government has nothing to do with it?"

[5] Act of January 20, 1944, 58 Stat. 4.

[6] See S. Rep. No. 382, 78th Cong., 1st Sess. 1, 3; H. R. Rep. No. 302, 78th Cong., 1st Sess. 1; 89 Cong. Rec. 3241, 10135.

[7] Articles of War 58, 41 Stat. 800; Article 85, Uniform Code of Military Justice, 10 U. S. C. (Supp. V) § 885; Winthrop, Military Law and Precedents (2d ed., Reprint 1920), 637.

category falls a great range of conduct, which may be prompted by a variety of motives—fear, laziness, hysteria or any emotional imbalance. The offense may occur not only in combat but also in training camps for draftees in this country.[8] The Solicitor General informed the Court that during World War II, according to Army estimates, approximately 21,000 soldiers and airmen were convicted of desertion and given dishonorable discharges by the sentencing courts-martial and that about 7,000 of these were actually separated from the service and thus rendered stateless when the reviewing authorities refused to remit their dishonorable discharges. Over this group of men, enlarged by whatever the corresponding figures may be for the Navy and Marines, the military has been given the power to grant or withhold citizenship. And the number of youths subject to this power could easily be enlarged simply by expanding the statute to cover crimes other than desertion. For instance, a dishonorable discharge itself might in the future be declared to be sufficient to justify forfeiture of citizenship.

Three times in the past three years we have been confronted with cases presenting important questions bearing on the proper relationship between civilian and military authority in this country.[9] A statute such as Section 401 (g) raises serious issues in this area, but in our view of this case it is unnecessary to deal with those problems. We conclude that the judgment in this case must be reversed for the following reasons.

I.

In *Perez* v. *Brownell, supra,* I expressed the principles that I believe govern the constitutional status of United

[8] The Solicitor General stated in his argument that § 401 (g) would apply to desertion from such camps.

[9] *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11; *Reid* v. *Covert,* 354 U. S. 1; *Harmon* v. *Brucker,* 355 U. S. 579.

States citizenship. It is my conviction that citizenship is not subject to the general powers of the National Government and therefore cannot be divested in the exercise of those powers. The right may be voluntarily relinquished or abandoned either by express language or by language and conduct that show a renunciation of citizenship.

Under these principles, this petitioner has not lost his citizenship. Desertion in wartime, though it may merit the ultimate penalty, does not necessarily signify allegiance to a foreign state. Section 401 (g) is not limited to cases of desertion to the enemy, and there is no such element in this case. This soldier committed a crime for which he should be and was punished, but he did not involve himself in any way with a foreign state. There was no dilution of his allegiance to this country. The fact that the desertion occurred on foreign soil is of no consequence. The Solicitor General acknowledged that forfeiture of citizenship would have occurred if the entire incident had transpired in this country.

Citizenship is not a license that expires upon misbehavior. The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and well-being of the Nation. The citizen who fails to pay his taxes or to abide by the laws safeguarding the integrity of elections deals a dangerous blow to his country. But could a citizen be deprived of his nationality for evading these basic responsibilities of citizenship? In time of war the citizen's duties include not only the military defense of the Nation but also full participation in the manifold activities of the civilian ranks. Failure to perform any of these obligations may cause the Nation serious injury, and, in appropriate circumstances, the punishing power is available to deal with derelictions of duty. But citizenship is not lost every time a duty of citizenship is shirked. And the deprivation of citi-

zenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship, and this petitioner has done neither, I believe his fundamental right of citizenship is secure. On this ground alone the judgment in this case should be reversed.

II.

Since a majority of the Court concluded in *Perez* v. *Brownell* that citizenship may be divested in the exercise of some governmental power, I deem it appropriate to state additionally why the action taken in this case exceeds constitutional limits, even under the majority's decision in *Perez*. The Court concluded in *Perez* that citizenship could be divested in the exercise of the foreign affairs power. In this case, it is urged that the war power is adequate to support the divestment of citizenship. But there is a vital difference between the two statutes that purport to implement these powers by decreeing loss of citizenship. The statute in *Perez* decreed loss of citizenship—so the majority concluded—to eliminate those international problems that were thought to arise by reason of a citizen's having voted in a foreign election. The statute in this case, however, is entirely different. Section 401 (g) decrees loss of citizenship for those found guilty of the crime of desertion. It is essentially like Section 401 (j) of the Nationality Act, decreeing loss of citizenship for evading the draft by remaining outside the United States.[10] This provision

[10] 54 Stat. 1168, as amended, 58 Stat. 746, 8 U. S. C. § 1481 (a) (10): "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

. . . . . .

"(j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the

was also before the Court in *Perez,* but the majority declined to consider its validity. While Section 401 (j) decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed, Section 401 (g), the provision in this case, accords the accused deserter at least the safeguards of an adjudication of guilt by a court-martial.

The constitutional question posed by Section 401 (g) would appear to be whether or not denationalization may be inflicted as a punishment, even assuming that citizenship may be divested pursuant to some governmental power. But the Government contends that this statute does not impose a penalty and that constitutional limitations on the power of Congress to punish are therefore inapplicable. We are told this is so because a committee of Cabinet members, in recommending this legislation to the Congress, said it "technically is not a penal law." [11] How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them! Manifestly the issue of whether Section 401 (g) is a penal law cannot be thus determined. Of course it is relevant to know the classification employed by the Cabinet Committee that played such an important role in the preparation of the Nationality Act of 1940. But it is equally relevant to know that this very committee acknowledged that Section 401 (g) was based on the provisions of the 1865 Civil War statute, which the committee itself termed "distinctly penal in character." [12] Furthermore, the 1865

President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States."

[11] Codification of the Nationality Laws of the United States, H. R. Comm. Print, Pt. 1, 76th Cong., 1st Sess. 68.

[12] *Ibid.*

statute states in terms that deprivation of the rights of citizenship is "in addition to the other lawful penalties of the crime of desertion . . . ." [13] And certainly it is relevant to know that the reason given by the Senate Committee on Immigration as to why loss of nationality under Section 401 (g) can follow desertion only after conviction by court-martial was "because the penalty is so drastic." [14] Doubtless even a clear legislative classification of a statute as "non-penal" would not alter the fundamental nature of a plainly penal statute.[15] With regard to Section 401 (g) the fact is that the views of the Cabinet Committee and of the Congress itself as to the nature of the statute are equivocal, and cannot possibly provide the answer to our inquiry. Determination of whether this statute is a penal law requires careful consideration.

In form Section 401 (g) appears to be a regulation of nationality. The statute deals initially with the status of nationality and then specifies the conduct that will result in loss of that status. But surely form cannot provide the answer to this inquiry. A statute providing that "a person shall lose his liberty by committing bank robbery," though in form a regulation of liberty, would nonetheless be penal. Nor would its penal effect be altered by labeling it a regulation of banks or by arguing that there is a rational connection between safeguarding banks and imprisoning bank robbers. The inquiry must be directed to substance.

This Court has been called upon to decide whether or not various statutes were penal ever since 1798. *Calder* v. *Bull,* 3 Dall. 386. Each time a statute has been challenged as being in conflict with the constitutional prohibitions against bills of attainder and *ex post facto*

[13] Act of March 3, 1865, 13 Stat. 487.

[14] S. Rep. No. 2150, 76th Cong., 3d Sess. 3.

[15] *United States* v. *Constantine,* 296 U. S. 287, 294; *United States* v. *La Franca,* 282 U. S. 568, 572.

laws,[16] it has been necessary to determine whether a penal law was involved, because these provisions apply only to statutes imposing penalties.[17] In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute.[18] If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal.[19] But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.[20] The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature. The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote.[21] If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of

---

[16] U. S. Const., Art. I, § 9, cl. 3; § 10, cl. 1.

[17] *United States* v. *Lovett,* 328 U. S. 303; *Calder* v. *Bull,* 3 Dall. 386.

[18] Of course, the severity of the disability imposed as well as all the circumstances surrounding the legislative enactment is relevant to this decision. See, generally, Wormuth, Legislative Disqualifications as Bills of Attainder, 4 Vand. L. Rev. 603, 608–610; 64 Yale L. J. 712, 722–724.

[19] *E. g., United States* v. *Lovett, supra; Pierce* v. *Carskadon,* 16 Wall. 234; *Ex parte Garland,* 4 Wall. 333; *Cummings* v. *Missouri,* 4 Wall. 277.

[20] *E. g., Mahler* v. *Eby,* 264 U. S. 32; *Hawker* v. *New York,* 170 U. S. 189; *Davis* v. *Beason,* 133 U. S. 333; *Murphy* v. *Ramsey,* 114 U. S. 15.

[21] See Gathings, Loss of Citizenship and Civil Rights for Conviction of Crime, 43 Am. Pol. Sci. Rev. 1228.

the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise.[22]

The same reasoning applies to Section 401 (g). The purpose of taking away citizenship from a convicted deserter is simply to punish him. There is no other legitimate purpose that the statute could serve. Denationalization in this case is not even claimed to be a means of solving international problems, as was argued in *Perez*. Here the purpose is punishment, and therefore the statute is a penal law.

It is urged that this statute is not a penal law but a regulatory provision authorized by the war power. It cannot be denied that Congress has power to prescribe rules governing the proper performance of military obligations, of which perhaps the most significant is the performance of one's duty when hazardous or important service is required. But a statute that prescribes the consequence that will befall one who fails to abide by these regulatory provisions is a penal law. Plainly legislation prescribing imprisonment for the crime of desertion is penal in nature. If loss of citizenship is substituted for imprisonment, it cannot fairly be said that the use of this particular sanction transforms the fundamental nature of the statute. In fact, a dishonorable discharge with consequent loss of citizenship might be the only punishment meted out by a court-martial. During World War II the threat of this punishment was explicitly communicated by the Army to soldiers in the field.[23] If this statute taking away citizenship is a congressional exercise of the war power, then it cannot rationally be treated other than as a penal law, because it imposes the sanction of denational-

[22] Cf. *Davis* v. *Beason, supra; Murphy* v. *Ramsey, supra.*

[23] See War Department Circular No. 273, 1942, Compilation of War Department General Orders, Bulletins and Circulars (Government Printing Office 1943) 343.

ization for the purpose of punishing transgression of a standard of conduct prescribed in the exercise of that power.

The Government argues that the sanction of denationalization imposed by Section 401 (g) is not a penalty because deportation has not been so considered by this Court. While deportation is undoubtedly a harsh sanction that has a severe penal effect, this Court has in the past sustained deportation as an exercise of the sovereign's power to determine the conditions upon which an alien may reside in this country.[24] For example, the statute [25] authorizing deportation of an alien convicted under the 1917 Espionage Act [26] was viewed, not as designed to punish him for the crime of espionage, but as an implementation of the sovereign power to exclude, from which the deporting power is derived. *Mahler* v. *Eby,* 264 U. S. 32. This view of deportation may be highly fictional, but even if its validity is conceded, it is wholly inapplicable to this case. No one contends that the Government has, in addition to the power to exclude all aliens, a sweeping power to denationalize all citizens. Nor does comparison to denaturalization eliminate the penal effect of denationalization in this case. Denaturalization is not imposed to penalize the alien for having falsified his application for citizenship; if it were, it would be a punishment. Rather, it is imposed in the exercise of the power to make rules for the naturalization of aliens.[27] In short, the fact that deportation and denaturalization for fraudulent procurement of citizenship may be imposed for purposes other than punishment affords no

---

[24] *Mahler* v. *Eby, supra; Bugajewitz* v. *Adams,* 228 U. S. 585; *Fong Yue Ting* v. *United States,* 149 U. S. 698.

[25] Act of May 10, 1920, 41 Stat. 593.

[26] Act of June 15, 1917, 40 Stat. 217.

[27] See, *e. g., Baumgartner* v. *United States,* 322 U. S. 665; *Schneiderman* v. *United States,* 320 U. S. 118.

basis for saying that in this case denationalization is not a punishment.

Section 401 (g) is a penal law, and we must face the question whether the Constitution permits the Congress to take away citizenship as a punishment for crime. If it is assumed that the power of Congress extends to divestment of citizenship, the problem still remains as to this statute whether denationalization is a cruel and unusual punishment within the meaning of the Eighth Amendment.[28] Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime. The question is whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment.

At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. But it is equally plain that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.

The exact scope of the constitutional phrase "cruel and unusual" has not been detailed by this Court.[29] But the

---

[28] U. S. Const., Amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[29] See *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459; *Weems* v. *United States,* 217 U. S. 349; *Howard* v. *Fleming,* 191 U. S. 126; *O'Neil* v. *Vermont,* 144 U. S. 323; *In re Kemmler,* 136 U. S. 436; *Wilkerson* v. *Utah,* 99 U. S. 130.

basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688,[30] and the principle it represents can be traced back to the Magna Carta.[31] The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect. This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising. But when the Court was confronted with a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character. *Weems* v. *United States,* 217 U. S. 349. The Court recognized in that case that the words of the Amendment are not precise,[32] and that their

---

[30] 1 Wm. & Mary, 2d Sess. (1689), c. 2.

[31] See 34 Minn. L. Rev. 134; 4 Vand. L. Rev. 680.

[32] Whether the word "unusual" has any qualitative meaning different from "cruel" is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. See *Weems* v. *United States, supra; O'Neil* v. *Vermont, supra; Wilkerson* v. *Utah, supra.* These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word "unusual." But cf. *In re Kemmler, supra,* at 443; *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson,* 255 U. S. 407, 430 (Brandeis, J., dissenting). If the word "unusual" is to have any mean-

scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

We believe, as did Chief Judge Clark in the court below,[33] that use of denationalization as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination

---

ing apart from the word "cruel," however, the meaning should be the ordinary one, signifying something different from that which is generally done. Denationalization as a punishment certainly meets this test. It was never explicitly sanctioned by this Government until 1940 and never tested against the Constitution until this day.

[33] "Plaintiff-appellant has cited to us and obviously relied on the masterful analysis of expatriation legislation set forth in the Comment, The Expatriation Act of 1954, 64 Yale L. J. 1164, 1189–1199. I agree with the author's documented conclusions therein that punitive expatriation of persons with no other nationality constitutes cruel and unusual punishment and is invalid as such. Since I doubt if I can add to the persuasive arguments there made, I shall merely incorporate by reference. In my faith, the American concept of man's dignity does not comport with making even those we would punish completely 'stateless'—fair game for the despoiler at home and the oppressor abroad, if indeed there is any place which will tolerate them at all." 239 F. 2d 527, 530.

at any time by reason of deportation.[34] In short, the expatriate has lost the right to have rights.

This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies.[35] It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious.[36]

The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. It is true that several countries prescribe expatriation in the event that their nationals engage in conduct in derogation of native allegiance.[37] Even statutes of this sort are generally applicable primarily

---

[34] See discussion in *Perez* v. *Brownell, ante,* p. 44, at 64.

[35] See Study on Statelessness, U. N. Doc. No. E/1112; Seckler-Hudson, Statelessness: With Special Reference to the United States; Borchard, Diplomatic Protection of Citizens Abroad, §§ 262, 334.

[36] The suggestion that judicial relief will be available to alleviate the potential rigors of statelessness assumes too much. Undermining such assumption is the still fresh memory of *Shaughnessy* v. *United States ex rel. Mezei,* 345 U. S. 206, where an alien, resident in this country for 25 years, returned from a visit abroad to find himself barred from this country and from all others to which he turned. Summary imprisonment on Ellis Island was his fate, without any judicial examination of the grounds of his confinement. This Court denied relief, and the intolerable situation was remedied after four years' imprisonment only through executive action as a matter of grace. See N. Y. Times, Aug. 12, 1954, p. 10, col. 4.

[37] See Laws Concerning Nationality, U. N. Doc. No. ST/LEG/SER.B/4 (1954).

to naturalized citizens. But use of denationalization as punishment for crime is an entirely different matter. The United Nations' survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion.[38] In this country the Eighth Amendment forbids this to be done.

In concluding as we do that the Eighth Amendment forbids Congress to punish by taking away citizenship, we are mindful of the gravity of the issue inevitably raised whenever the constitutionality of an Act of the National Legislature is challenged. No member of the Court believes that in this case the statute before us can be construed to avoid the issue of constitutionality. That issue confronts us, and the task of resolving it is inescapably ours. This task requires the exercise of judgment, not the reliance upon personal preferences. Courts must not consider the wisdom of statutes but neither can they sanction as being merely unwise that which the Constitution forbids.

We are oath-bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights. When the Government acts to take away the fundamental right of citizenship, the safeguards of the Constitution should be examined with special diligence.

The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we

---

[38] *Id.*, at 379 and 461. Cf. Nationality Law of August 22, 1907, Art. 17 (2) (Haiti), *id.*, at 208.

do not, the words of the Constitution become little more than good advice.

When it appears that an Act of Congress conflicts with one of these provisions, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation. We must apply those limits as the Constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication. We do well to approach this task cautiously, as all our predecessors have counseled. But the ordeal of judgment cannot be shirked. In some 81 instances since this Court was established it has determined that congressional action exceeded the bounds of the Constitution. It is so in this case.

The judgment of the Court of Appeals for the Second Circuit is reversed and the cause is remanded to the District Court for appropriate proceedings.

Reversed and remanded.

MR. JUSTICE BLACK, whom MR. JUSTICE DOUGLAS joins, concurring.

While I concur in the opinion of THE CHIEF JUSTICE there is one additional thing that needs to be said.

Even if citizenship could be involuntarily divested, I do not believe that the power to denationalize may be placed in the hands of military authorities. If desertion or other misconduct is to be a basis for forfeiting citizenship, guilt should be determined in a civilian court of justice where all the protections of the Bill of Rights guard the fairness of the outcome. Such forfeiture should not rest on the findings of a military tribunal. Military courts may try soldiers and punish them for military offenses, but they should not have the last word on the soldier's right to citizenship. The statute held invalid

here not only makes the military's finding of desertion final but gives military authorities discretion to choose which soldiers convicted of desertion shall be allowed to keep their citizenship and which ones shall thereafter be stateless. Nothing in the Constitution or its history lends the slightest support for such military control over the right to be an American citizen.

MR. JUSTICE BRENNAN, concurring.

In *Perez* v. *Brownell, ante,* p. 44, also decided today, I agreed with the Court that there was no constitutional infirmity in § 401 (e), which expatriates the citizen who votes in a foreign political election. I reach a different conclusion in this case, however, because I believe that § 401 (g), which expatriates the wartime deserter who is dishonorably discharged after conviction by court-martial, lies beyond Congress' power to enact. It is, concededly, paradoxical to justify as constitutional the expatriation of the citizen who has committed no crime by voting in a Mexican political election, yet find unconstitutional a statute which provides for the expatriation of a soldier guilty of the very serious crime of desertion in time of war. The loss of citizenship may have as ominous significance for the individual in the one case as in the other. Why then does not the Constitution prevent the expatriation of the voter as well as the deserter?

Here, as in *Perez* v. *Brownell,* we must inquire whether there exists a relevant connection between the particular legislative enactment and the power granted to Congress by the Constitution. The Court there held that such a relevant connection exists between the power to maintain relations with other sovereign nations and the power to expatriate the American who votes in a foreign election. (1) Within the power granted to Congress to regulate the conduct of foreign affairs lies the power to deal with evils which might obstruct or embarrass our diplomatic

458778 O—58——11

interests. Among these evils, Congress might believe, is that of voting by American citizens in political elections of other nations.[1] Whatever the realities of the situation, many foreign nations may well view political activity on the part of Americans, even if lawful, as either expressions of official American positions or else as improper meddling in affairs not their own. In either event the reaction is liable to be detrimental to the interests of the United States. (2) Finding that this was an evil which Congress was empowered to prevent, the Court concluded that expatriation was a means reasonably calculated to achieve this end. Expatriation, it should be noted, has the advantage of acting automatically, for the very act of casting the ballot is the act of denationalization, which could have the effect of cutting off American responsibility for the consequences. If a foreign government objects, our answer should be conclusive—the voter is no longer one of ours. Harsh as the consequences may be to the individual concerned, Congress has ordained the loss of citizenship simultaneously with the act of voting because Congress might reasonably believe that in these circumstances there is no acceptable alternative to expatriation as a means of avoiding possible embarrassments to our relations with foreign nations.[2] And where Congress has determined that considerations of the highest national importance indicate a course of action for which an ade-

---

[1] Some indication of the problem is to be seen in the joint resolutions introduced in both houses of Congress to exempt the two or three thousand Americans who allegedly lost their citizenship by voting in certain Italian elections. See S. J. Res. 47 and H. J. Res. 30, 239, 375, 81st Cong., 1st Sess. All proposed "to suspend the operation of section 401 (e) of the Nationality Act of 1940 in certain cases." See also H. R. 6400, 81st Cong., 1st Sess.

[2] *Perez* v. *Brownell* did not raise questions under the First Amendment, which of course would have the effect in appropriate cases of limiting congressional power otherwise possessed.

quate substitute might rationally appear lacking, I cannot say that this means lies beyond Congress' power to choose. Cf. *Korematsu* v. *United States,* 323 U. S. 214.

In contrast to § 401 (e), the section with which we are now concerned, § 401 (g), draws upon the power of Congress to raise and maintain military forces to wage war. No pretense can here be made that expatriation of the deserter in any way relates to the conduct of foreign affairs, for this statute is not limited in its effects to those who desert in a foreign country or who flee to another land. Nor is this statute limited in its application to the deserter whose conduct imports "elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship." *Perez* v. *Brownell, supra,* at 61. The history of this provision, indeed, shows that the essential congressional purpose was a response to the needs of the military in maintaining discipline in the armed forces, especially during wartime. There can be no serious question that included in Congress' power to maintain armies is the power to deal with the problem of desertion, an act plainly destructive, not only of the military establishment as such, but, more importantly, of the Nation's ability to wage war effectively. But granting that Congress is authorized to deal with the evil of desertion, we must yet inquire whether expatriation is a means reasonably calculated to achieve this legitimate end and thereby designed to further the ultimate congressional objective—the successful waging of war.

Expatriation of the deserter originated in the Act of 1865, 13 Stat. 490, when wholesale desertion and draft-law violations seriously threatened the effectiveness of the Union armies.[3] The 1865 Act expressly provided

[3] A good description of the extent of the problem raised by desertions from the Union armies, and of the extreme measures taken to combat the problem, will be found in Pullen, The Twentieth Maine: A Volunteer Regiment of the Civil War (1957).

that expatriation was to be "in addition to the other lawful penalties of the crime of desertion . . . ." This was emphasized in the leading case under the 1865 Act, *Huber* v. *Reily,* 53 Pa. 112, decided by the Pennsylvania Supreme Court little more than a year after passage of the Act. The court said that "Its avowed purpose is to add to the penalties which the law had previously affixed to the offence of desertion from the military or naval service of the United States, and it denominates the additional sanctions provided as penalties." *Id.,* at 114–115.

But, although it imposed expatriation entirely as an added punishment for crime, the 1865 Act did not expressly make conviction by court-martial a prerequisite to that punishment, as was the case with the conventional penalties. The Pennsylvania Supreme Court felt that Huber was right in contending that this was a serious constitutional objection: "[T]he act proposes to inflict pains and penalties upon offenders before and without a trial and conviction by due process of law, and . . . it is therefore prohibited by the Bill of Rights." 53 Pa., at 115. The court, however, construed the statute so as to avoid these constitutional difficulties, holding that loss of citizenship, like other penalties for desertion, followed only upon conviction by court-martial.

This view of the 1865 Act was approved by this Court in *Kurtz* v. *Moffitt,* 115 U. S. 487, 501, and, as noted there, the same view "has been uniformly held by the civil courts as well as by the military authorities." See *McCafferty* v. *Guyer,* 59 Pa. 109; *State* v. *Symonds,* 57 Me. 148; *Gotcheus* v. *Matheson,* 58 Barb. (N. Y.) 152; 2 Winthrop, Military Law and Precedents (2d ed. 1896), 1001.[4] Of

[4] The opinion in *Huber* v. *Reily,* which was written by Mr. Justice Strong, later a member of this Court, suggested, if it did not hold, that the statutes and considerations of due process required that expatriation, to be accomplished, should be specifically included by

particular significance, moreover, is the fact that the Congress has confirmed the correctness of the view that it purposed expatriation of the deserter solely as additional punishment. The present § 401 (g) merely incorporates the 1865 provision in the codification which became the 1940 Nationality Act.[5] But now there is expressly stated what was omitted from the 1865 Act, namely, that the deserter shall be expatriated "if and when he is convicted thereof by court martial . . . ." 54 Stat. 1169, as amended, 8 U. S. C. § 1481 (a)(8).[6]

It is difficult, indeed, to see how expatriation of the deserter helps wage war except as it performs that function when imposed as punishment. It is obvious that expatriation cannot in any wise avoid the harm apprehended by Congress. After the act of desertion, only

---

the court-martial as part of the sentence. See 53 Pa., at 119–120. The court-martial, under military law, adjudges both guilt and the extent of initial sentence. *Jackson* v. *Taylor*, 353 U. S. 569, 574–575; and see Article of War 58 (1920), 41 Stat. 800. However, it has not been the practice specifically to include expatriation as part of the sentence. 2 Winthrop, Military Law and Precedents (2d ed. 1896), 1001.

[5] The provision was limited in 1912 to desertion in time of war, 37 Stat. 356, but otherwise was not revised until carried into the Nationality Act of 1940, 54 Stat. 1169. It was, however, first codified as part of the laws concerning citizenship as § 1998 of the 1874 Revised Statutes.

[6] The reason for the addition of the proviso is stated in a report, Codification of the Nationality Laws of the United States, H. R. Comm. Print, Pt. 1, 76th Cong., 1st Sess., prepared at the request of the President by the Secretary of State, the Attorney General, and the Secretary of Labor, proposing a revision and codification of the nationality laws: "The provisions of sections 1996 and 1998 of the Revised Statutes are distinctly penal in character. They must, therefore, be construed strictly, and the penalties take effect only upon conviction by a court martial (*Huber* v. *Reilly*, 1866, 53 Penn. St. 112; *Kurtz* v. *Moffitt*, 1885, 115 U. S. 487)." *Id.*, at 68.

The reference later in the report that § 401 "technically is not a penal law" is to the section as a whole and not to subdivision (g).

punishment can follow, for the harm has been done. The deserter, moreover, does not cease to be an American citizen at the moment he deserts. Indeed, even conviction does not necessarily effect his expatriation, for dishonorable discharge is the condition precedent to loss of citizenship. Therefore, if expatriation is made a consequence of desertion, it must stand together with death and imprisonment—as a form of punishment.

To characterize expatriation as punishment is, of course, but the beginning of critical inquiry. As punishment it may be extremely harsh, but the crime of desertion may be grave indeed. However, the harshness of the punishment may be an important consideration where the asserted power to expatriate has only a slight or tenuous relation to the granted power. In its material forms no one can today judge the precise consequences of expatriation, for happily American law has had little experience with this status, and it cannot be said hypothetically to what extent the severity of the status may be increased consistently with the demands of due process. But it can be supposed that the consequences of greatest weight, in terms of ultimate impact on the petitioner, are unknown and unknowable.[7] Indeed, in truth, he may live out his life with but minor inconvenience. He may perhaps live, work, marry, raise a family, and generally experience a satisfactorily happy life. Nevertheless it cannot be denied that the impact of expatriation—especially where statelessness is the upshot—may be severe. Expatriation, in this respect, constitutes an

---

[7] Adjudication of hypothetical and contingent consequences is beyond the function of this Court and the incidents of expatriation are altogether indefinite. Nonetheless, this very uncertainty of the consequences makes expatriation as punishment severe.

It is also unnecessary to consider whether the consequences would be different for the citizen expatriated under another section than § 401 (g).

especially demoralizing sanction. The uncertainty, and the consequent psychological hurt, which must accompany one who becomes an outcast in his own land must be reckoned a substantial factor in the ultimate judgment.

In view of the manifest severity of this sanction, I feel that we should look closely at its probable effect to determine whether Congress' imposition of expatriation as a penal device is justified in reason. Clearly the severity of the penalty, in the case of a serious offense, is not enough to invalidate it where the nature of the penalty is rationally directed to achieve the legitimate ends of punishment.

The novelty of expatriation as punishment does not alone demonstrate its inefficiency. In recent years we have seen such devices as indeterminate sentences and parole added to the traditional term of imprisonment. Such penal methods seek to achieve the end, at once more humane and effective, that society should make every effort to rehabilitate the offender and restore him as a useful member of that society as society's own best protection. Of course, rehabilitation is but one of the several purposes of the penal law. Among other purposes are deterrents of the wrongful act by the threat of punishment and insulation of society from dangerous individuals by imprisonment or execution. What then is the relationship of the punishment of expatriation to these ends of the penal law? It is perfectly obvious that it constitutes the very antithesis of rehabilitation, for instead of guiding the offender back into the useful paths of society it excommunicates him and makes him, literally, an outcast. I can think of no more certain way in which to make a man in whom, perhaps, rest the seeds of serious antisocial behavior more likely to pursue further a career of unlawful activity than to place on him the stigma of the derelict, uncertain of many of his basic rights. Similarly, it must be questioned whether expa-

triation can really achieve the other effects sought by society in punitive devices. Certainly it will not insulate society from the deserter, for unless coupled with banishment the sanction leaves the offender at large. And as a deterrent device this sanction would appear of little effect, for the offender, if not deterred by thought of the specific penalties of long imprisonment or even death, is not very likely to be swayed from his course by the prospect of expatriation.[8] However insidious and demoralizing may be the actual experience of statelessness, its contemplation in advance seems unlikely to invoke serious misgiving, for none of us yet knows its ramifications.

In the light of these considerations, it is understandable that the Government has not pressed its case on the basis of expatriation of the deserter as punishment for his crime. Rather, the Government argues that the necessary nexus to the granted power is to be found in the idea that legislative withdrawal of citizenship is justified in this case because Trop's desertion constituted a refusal to perform one of the highest duties of American citizenship—the bearing of arms in a time of desperate national peril. It cannot be denied that there is implicit in this a certain rough justice. He who refuses to act as an American should no longer be an American—what could be fairer? But I cannot see that this is anything other than forcing retribution from the offender—naked vengeance. But many acts of desertion certainly fall far short of a "refusal to perform this ultimate duty of American citizenship."

---

[8] A deterrent effect is certainly conjectural when we are told that during World War II as many as 21,000 soldiers were convicted of desertion and sentenced to be dishonorably discharged. From the fact that the reviewing authorities ultimately remitted the dishonorable discharges in about two-thirds of these cases it is possible to infer that the military itself had no firm belief in the deterrent effects of expatriation.

Desertion is defined as "absence without leave accompanied by the intention not to return." Army Manual for Courts-Martial (1928) 142. The offense may be quite technical, as where an officer, "having tendered his resignation and prior to due notice of the acceptance of the same, quits his post or proper duties without leave and with intent to absent himself permanently therefrom . . . ." Article of War 28 (1920), 41 Stat. 792. Desertion is also committed where a soldier, without having received a regular discharge, re-enlists in the same or another service. The youngster, for example, restive at his assignment to a supply depot, who runs off to the front to be in the fight, subjects himself to the possibility of this sanction. Yet the statute imposes the penalty coextensive with the substantive crime. Since many acts of desertion thus certainly fall far short of a "refusal to perform this ultimate duty of American citizenship," it stretches the imagination excessively to establish a rational relation of mere retribution to the ends purported to be served by expatriation of the deserter. I simply cannot accept a judgment that Congress is free to adopt any measure at all to demonstrate its displeasure and exact its penalty from the offender against its laws.

It seems to me that nothing is solved by the uncritical reference to service in the armed forces as the "ultimate duty of American citizenship." Indeed, it is very difficult to imagine, on this theory of power, why Congress cannot impose expatriation as punishment for any crime at all—for tax evasion, for bank robbery, for narcotics offenses. As citizens we are also called upon to pay our taxes and to obey the laws, and these duties appear to me to be fully as related to the nature of our citizenship as our military obligations. But Congress' asserted power to expatriate the deserter bears to the war powers precisely the same relation as its power to expatriate the tax evader would bear to the taxing power.

I therefore must conclude that § 401 (g) is beyond the power of Congress to enact. Admittedly Congress' belief that expatriation of the deserter might further the war effort may find some—though necessarily slender—support in reason. But here, any substantial achievement, by this device, of Congress' legitimate purposes under the war power seems fairly remote. It is at the same time abundantly clear that these ends could more fully be achieved by alternative methods not open to these objections. In the light of these factors, and conceding all that I possibly can in favor of the enactment, I can only conclude that the requisite rational relation between this statute and the war power does not appear—for in this relation the statute is not "really calculated to effect any of the objects entrusted to the government . . . ," *M'Culloch* v. *Maryland,* 4 Wheat. 316, 423—and therefore that § 401 (g) falls beyond the domain of Congress.

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

Petitioner was born in Ohio in 1924. While in the Army serving in French Morocco in 1944, he was tried by a general court-martial and found guilty of having twice escaped from confinement, of having been absent without leave, and of having deserted and remained in desertion for one day. He was sentenced to a dishonorable discharge, forfeiture of all pay and allowances and confinement at hard labor for three years. He subsequently returned to the United States. In 1952 he applied for a passport; this application was denied by the State Department on the ground that petitioner had lost his citizenship as a result of his conviction of and dishonorable discharge for desertion from the Army in time of war. The Department relied upon § 401 of the

Nationality Act of 1940, 54 Stat. 1137, 1168, as amended by the Act of January 20, 1944, 58 Stat. 4, which provided, in pertinent part,[1] that

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> . . . . . .
>
> "(g) Deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces: *Provided,* That notwithstanding loss of nationality or citizenship or civil or political rights under the terms of this or previous Acts by reason of desertion committed in time of war, restoration to active duty with such military or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military or naval authority, prior or subsequent to the effective date of this Act, shall be deemed to have the immediate effect of restoring such nationality or citizenship and all civil and political rights heretofore or hereafter so lost and of removing all civil and political disabilities resulting therefrom . . . ."

In 1955 petitioner brought suit in a United States District Court for a judgment declaring him to be a national of the United States. The Government's motion for summary judgment was granted and petitioner's denied.

---

[1] The substance of this provision now appears in § 349 (a) (8) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 268, 8 U. S. C. § 1481 (a) (8).

The Court of Appeals for the Second Circuit affirmed, one judge dissenting. 239 F. 2d 527.

At the threshold the petitioner suggests constructions of the statute that would avoid consideration of constitutional issues. If such a construction is precluded, petitioner contends that Congress is without power to attach loss of citizenship as a consequence of conviction for desertion. He also argues that such an exercise of power would violate the Due Process Clause of the Fifth Amendment to the Constitution and the prohibition against cruel and unusual punishments in the Eighth Amendment.

The subsection of § 401 of the Nationality Act of 1940, as amended, making loss of nationality result from a conviction for desertion in wartime is a direct descendant of a provision enacted during the Civil War. One section of "An Act to amend the several Acts heretofore passed to provide for the Enrolling and Calling out [of] the National Forces, and for other Purposes," 13 Stat. 487, 490, approved on March 3, 1865, provided that "in addition to the other lawful penalties of the crime of desertion from the military or naval service," all persons who desert such service "shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship and their rights to become citizens . . . ." Except as limited in 1912 to desertion in time of war, 37 Stat. 356, the provision remained in effect until absorbed into the Nationality Act of 1940. 54 Stat. 1137, 1169, 1172. Shortly after its enactment the 1865 provision received an important interpretation in *Huber* v. *Reily,* 53 Pa. 112 (1866). There, the Supreme Court of Pennsylvania, in an opinion by Mr. Justice Strong, later of this Court, held that the disabilities of the 1865 Act could attach only after the individual had been convicted of desertion by a court-martial. The requirement was drawn from the Due Process Clause of the Fifth Amendment to the Constitution. 53 Pa., at 116–118. This interpretation was

followed by other courts, *e. g., State* v. *Symonds,* 57 Me. 148, and was referred to approvingly by this Court in 1885 in *Kurtz* v. *Moffitt,* 115 U. S. 487, without discussion of its rationale.

When the nationality laws of the United States were revised and codified as the Nationality Act of 1940, 54 Stat. 1137, there was added to the list of acts that result in loss of American nationality, "Deserting the military or naval service of the United States in time of war, provided he [the deserter] is convicted thereof by a court martial." § 401 (g), 54 Stat. 1169. During the consideration of the Act, there was substantially no debate on this provision. It seems clear, however, from the report of the Cabinet Committee that had recommended its adoption that nothing more was intended in its enactment than to incorporate the 1865 provision into the 1940 codification, at the same time making it clear that nationality, and not the ambiguous "rights of citizenship," [2] was to be lost and that the provision applied to all nationals. Codification of the Nationality Laws of the United States, H. R. Comm. Print, Pt. 1, 76th Cong., 1st Sess. 68.

In 1944, at the request of the War Department, Congress amended § 401 (g) of the 1940 Act into the form in which it was when applied to the petitioner; this amendment required that a dismissal or dishonorable discharge result from the conviction for desertion before expatriation should follow and provided that restoration of a deserter to active duty during wartime should have the effect of restoring his citizenship. 58 Stat. 4. It is abundantly clear from the debate and reports that the

[2] The precise meaning of this phrase has never been clear, see Roche, The Loss of American Nationality—The Development of Statutory Expatriation, 99 U. of Pa. L. Rev. 25, 61–62. It appears, however, that the State Department regarded it to mean loss of citizenship, see, *e. g.,* Hearings before the House Committee on Immigration and Naturalization on H. R. 6127, 76th Cong., 1st Sess. 38.

sole purpose of this change was to permit persons convicted of desertion to regain their citizenship and continue serving in the armed forces, H. R. Rep. No. 302, 78th Cong., 1st Sess. 1; S. Rep. No. 382, 78th Cong., 1st Sess. 1; 89 Cong. Rec. 10135. Because it was thought unreasonable to require persons who were still in the service to fight and, perhaps, die for the country when they were no longer citizens, the requirement of dismissal or dishonorable discharge prior to denationalization was included in the amendment. See S. Rep. No. 382, *supra,* at 3; 89 Cong. Rec. 3241.

Petitioner advances two possible constructions of § 401 (g) that would exclude him from its operation and avoid constitutional determinations. It is suggested that the provision applies only to desertion to the enemy and that the sentence of a dishonorable discharge, without the imposition of which a conviction for desertion does not have an expatriating effect, must have resulted from a conviction solely for desertion. There is no support for the first of these constructions in a fair reading of § 401 (g) or in its congressional history. Rigorously as we are admonished to avoid consideration of constitutional issues if statutory disposition is available, it would do violence to what this statute compellingly conveys to draw from it a meaning other than what it spontaneously reveals.

Section 401 (g) imposes expatriation on an individual for desertion "provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces . . . ." Petitioner's argument is that the dishonorable discharge must be *solely* "the result of such conviction" and that § 401 (g) is therefore not applicable to him, convicted as he was of escape from confinement and absence without leave in addition to desertion. Since the invariable practice in military trials

is and has been that related offenses are tried together with but a single sentence to cover all convictions, see *Jackson* v. *Taylor,* 353 U. S. 569, 574, the effect of the suggested construction would be to force a break with the historic process of military law for which Congress has not in the remotest way given warrant. The obvious purpose of the 1944 amendment, requiring dishonorable discharge as a condition precedent to expatriation, was to correct the situation in which an individual who had been convicted of desertion, and who had thus lost his citizenship, was kept on duty to fight and sometimes die "for his country which disowns him." Letter from Secretary of War to Chairman, Senate Military Affairs Committee, S. Rep. No. 382, 78th Cong., 1st Sess. 3. There is not a hint in the congressional history that the requirement of discharge was intended to make expatriation depend on the seriousness of the desertion, as measured by the sentence imposed. If we are to give effect to the purpose of Congress in making a conviction for wartime desertion result in loss of citizenship, we must hold that the dishonorable discharge, in order for expatriation to follow, need only be "the result of" conviction for one or more offenses among which one must be wartime desertion.

Since none of petitioner's nonconstitutional grounds for reversal can be sustained, his claim of unconstitutionality must be faced. What is always basic when the power of Congress to enact legislation is challenged is the appropriate approach to judicial review of congressional legislation. All power is, in Madison's phrase, "of an encroaching nature." Federalist, No. 48 (Earle ed. 1937), at 321. Judicial power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint. When the power of Congress to pass a statute is challenged, the function

of this Court is to determine whether legislative action lies clearly outside the constitutional grant of power to which it has been, or may fairly be, referred. In making this determination, the Court sits in judgment on the action of a co-ordinate branch of the Government while keeping unto itself—as it must under our constitutional system—the final determination of its own power to act. No wonder such a function is deemed "the gravest and most delicate duty that this Court is called on to perform." Holmes, J., in *Blodgett* v. *Holden,* 275 U. S. 142, 148 (separate opinion). This is not a lip-serving platitude.

Rigorous observance of the difference between limits of power and wise exercise of power—between questions of authority and questions of prudence—requires the most alert appreciation of this decisive but subtle relationship of two concepts that too easily coalesce. No less does it require a disciplined will to adhere to the difference. It is not easy to stand aloof and allow want of wisdom to prevail, to disregard one's own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the Executive Branch do.

One of the principal purposes in establishing the Constitution was to "provide for the common defence." To that end the States granted to Congress the several powers of Article I, Section 8, clauses 11 to 14 and 18, compendiously described as the "war power." Although these specific grants of power do not specifically enumerate every factor relevant to the power to conduct war, there is no limitation upon it (other than what the Due Process

Clause commands). The scope of the war power has been defined by Chief Justice Hughes in *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 426: "[T]he war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation." See also Chief Justice Stone's opinion in *Hirabayashi* v. *United States,* 320 U. S. 81, 93.

Probably the most important governmental action contemplated by the war power is the building up and maintenance of an armed force for the common defense. Just as Congress may be convinced of the necessity for conscription for the effective conduct of war, *Selective Draft Law Cases,* 245 U. S. 366, Congress may justifiably be of the view that stern measures—what to some may seem overly stern—are needed in order that control may be had over evasions of military duty when the armed forces are committed to the Nation's defense, and that the deleterious effects of those evasions may be kept to the minimum. Clearly Congress may deal severely with the problem of desertion from the armed forces in wartime; it is equally clear—from the face of the legislation and from the circumstances in which it was passed—that Congress was calling upon its war powers when it made such desertion an act of expatriation. Cf. Winthrop, Military Law and Precedents (2d ed., Reprint 1920), 647.

Possession by an American citizen of the rights and privileges that constitute citizenship imposes correlative obligations, of which the most indispensable may well be "to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense," *Jacobson* v. *Massachusetts,* 197 U. S. 11, 29. Harsh as this may sound, it is no more so than the actualities to which it responds. Can it be said that there is no

rational nexus between refusal to perform this ultimate duty of American citizenship and legislative withdrawal of that citizenship? Congress may well have thought that making loss of citizenship a consequence of wartime desertion would affect the ability of the military authorities to control the forces with which they were expected to fight and win a major world conflict. It is not for us to deny that Congress might reasonably have believed the morale and fighting efficiency of our troops would be impaired if our soldiers knew that their fellows who had abandoned them in their time of greatest need were to remain in the communion of our citizens.

Petitioner urges that imposing loss of citizenship as a "punishment" for wartime desertion is a violation of both the Due Process Clause of the Fifth Amendment and the Eighth Amendment. His objections are that there is no notice of expatriation as a consequence of desertion in the provision defining that offense, that loss of citizenship as a "punishment" is unconstitutionally disproportionate to the offense of desertion and that loss of citizenship constitutes "cruel and unusual punishment."

The provision of the Articles of War under which petitioner was convicted for desertion, Art. 58, Articles of War, 41 Stat. 787, 800, does not mention the fact that one convicted of that offense in wartime should suffer the loss of his citizenship. It may be that stating all of the consequences of conduct in the statutory provision making it an offense is a desideratum in the administration of criminal justice; that can scarcely be said—nor does petitioner contend that it ever has been said—to be a constitutional requirement. It is not for us to require Congress to list in one statutory section not only the ordinary penal consequences of engaging in activities therein prohibited but also the collateral disabilities that follow, by operation of law, from a conviction thereof duly result-

ing from a proceeding conducted in accordance with all of the relevant constitutional safeguards.[3]

Of course an individual should be apprised of the consequences of his actions. The Articles of War put petitioner on notice that desertion was an offense and that, when committed in wartime, it was punishable by death. Art. 58, *supra*. Expatriation automatically followed by command of the Nationality Act of 1940, a duly promulgated Act of Congress. The War Department appears to have made every effort to inform individual soldiers of the gravity of the consequences of desertion; its Circular No. 273 of 1942 pointed out that convictions for desertion were punishable by death and would result in "forfeiture of the rights of citizenship," and it instructed unit commanders to "explain carefully to all

---

[3] It should be noted that a person cannot be deprived of his citizenship merely on the basis of an administrative finding that he deserted in wartime or even with finality on the sole basis of his having been dishonorably discharged as a result of a conviction for wartime desertion. Section 503 of the Nationality Act of 1940 provides:

"If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. . . ." 54 Stat. 1137, 1171, now § 360 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 273, 8 U. S. C. § 1503. In such a proceeding it is open to a person who, like petitioner, is alleged to have been expatriated under § 401 (g) of the 1940 Act to show, for example, that the court-martial was without jurisdiction (including observance of the requirements of due process) or that the individual, by his restoration to active duty after conviction and discharge, regained his citizenship under the terms of the proviso in § 401 (g), *supra*.

personnel of their commands [certain Articles of War, including Art. 58] . . . and emphasize the serious consequences which may result from their violation." Compilation of War Department General Orders, Bulletins, and Circulars (Government Printing Office 1943) 343. That Congress must define in the rubric of the substantive crime all the consequences of conduct it has made a grave offense and that it cannot provide for a collateral consequence, stern as it may be, by explicit pronouncement in another place on the statute books is a claim that hardly rises to the dignity of a constitutional requirement.

Petitioner contends that loss of citizenship is an unconstitutionally disproportionate "punishment" for desertion and that it constitutes "cruel and unusual punishment" within the scope of the Eighth Amendment. Loss of citizenship entails undoubtedly severe—and in particular situations even tragic—consequences. Divestment of citizenship by the Government has been characterized, in the context of denaturalization, as "more serious than a taking of one's property, or the imposition of a fine or other penalty." *Schneiderman* v. *United States,* 320 U. S. 118, 122. However, like denaturalization, see *Klapprott* v. *United States,* 335 U. S. 601, 612, expatriation under the Nationality Act of 1940 is not "punishment" in any valid constitutional sense. Cf. *Fong Yue Ting* v. *United States,* 149 U. S. 698, 730. Simply because denationalization was attached by Congress as a consequence of conduct that it had elsewhere made unlawful, it does not follow that denationalization is a "punishment," any more than it can be said that loss of civil rights as a result of conviction for a felony, see Gathings, Loss of Citizenship and Civil Rights for Conviction of Crime, 43 Am. Pol. Sci. Rev. 1228, 1233, is a "punishment" for any legally significant purposes. The process of denationalization, as devised by the expert Cabinet Committee on which Congress quite properly

and responsibly relied [4] and as established by Congress in the legislation before the Court,[5] was related to the authority of Congress, pursuant to its constitutional powers, to regulate conduct free from restrictions that pertain to legislation in the field technically described as criminal justice. Since there are legislative ends within the scope of Congress' war power that are wholly consistent with a "non-penal" purpose to regulate the military forces, and since there is nothing on the face of this legislation or in its history to indicate that Congress had a contrary purpose, there is no warrant for this Court's labeling the disability imposed by § 401 (g) as a "punishment."

Even assuming, *arguendo,* that § 401 (g) can be said to impose "punishment," to insist that denationalization is "cruel and unusual" punishment is to stretch that concept beyond the breaking point. It seems scarcely arguable that loss of citizenship is within the Eighth Amendment's prohibition because disproportionate to an offense that is capital and has been so from the first year of Independence. Art. 58, *supra;* § 6, Art. 1, Articles of War of 1776, 5 J. Cont. Cong. (Ford ed. 1906) 792. Is constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death? The seriousness of abandoning one's country when it is in the grip of mortal conflict precludes denial

---

[4] The report of that Committee stated that the provision in question "technically is not a penal law." Codification of the Nationality Laws of the United States, *supra,* at 68. In their letter to the President covering the report, the Committee stated that none of the loss of nationality provisions was "designed to be punitive . . . ." *Id.,* at VII.

[5] There is no basis for finding that the Congress that enacted this provision regarded it otherwise than as part of the clearly nonpenal scheme of "acts of expatriation" represented by § 401 of the Nationality Act of 1940, *supra.*

to Congress of the power to terminate citizenship here, unless that power is to be denied to Congress under any circumstance.

Many civilized nations impose loss of citizenship for indulgence in designated prohibited activities. See, generally, Laws Concerning Nationality, U. N. Doc. No. ST/LEG/SER.B/4 (1954). Although these provisions are often, but not always, applicable only to naturalized citizens, they are more nearly comparable to our expatriation law than to our denaturalization law.[6] Some countries have made wartime desertion result in loss of citizenship—native-born or naturalized. *E. g.*, § 1 (6), Philippine Commonwealth Act No. 63 of Oct. 21, 1936, as amended by Republic Act No. 106 of June 2, 1947, U. N. Doc., *supra,* at 379; see Borchard, Diplomatic Protection of Citizens Abroad, 730. In this country, desertion has been punishable by loss of at least the "rights of citizenship" [7] since 1865. The Court today reaffirms its decisions (*Mackenzie* v. *Hare,* 239 U. S. 299; *Savorgnan* v. *United States,* 338 U. S. 491) sustaining the power of Congress to denationalize citizens who had no desire or intention to give up their citizenship. If loss of citizenship may constitutionally be made the consequence of such conduct as marrying a foreigner, and thus certainly not "cruel and unusual," it seems more than incongruous that such loss should be thought "cruel and unusual" when it is the consequence of conduct that is also a crime. In short, denationalization, when attached to the offense

---

[6] In the United States, denaturalization is based exclusively on the theory that the individual obtained his citizenship by fraud, see *Luria* v. *United States,* 231 U. S. 9, 24; the laws of many countries making naturalized citizens subject to expatriation for grounds not applicable to natural-born citizens do not relate those grounds to the actual naturalization process. *E. g.*, British Nationality Act, 1948, 11 & 12 Geo. VI, c. 56, § 20 (3).

[7] See note 2, *supra.*

of wartime desertion, cannot justifiably be deemed so at variance with enlightened concepts of "humane justice," see *Weems* v. *United States,* 217 U. S. 349, 378, as to be beyond the power of Congress, because constituting a "cruel and unusual" punishment within the meaning of the Eighth Amendment.

Nor has Congress fallen afoul of that prohibition because a person's post-denationalization status has elements of unpredictability. Presumably a denationalized person becomes an alien *vis-à-vis* the United States. The very substantial rights and privileges that the alien in this country enjoys under the federal and state constitutions puts him in a very different condition from that of an outlaw in fifteenth-century England. He need not be in constant fear lest some dire and unforeseen fate be imposed on him by arbitrary governmental action—certainly not "while this Court sits" (Holmes, J., dissenting in *Panhandle Oil Co.* v. *Mississippi ex rel. Knox,* 277 U. S. 218, 223). The multitudinous decisions of this Court protective of the rights of aliens bear weighty testimony. And the assumption that brutal treatment is the inevitable lot of denationalized persons found in other countries is a slender basis on which to strike down an Act of Congress otherwise amply sustainable.

It misguides popular understanding of the judicial function and of the limited power of this Court in our democracy to suggest that by not invalidating an Act of Congress we would endanger the necessary subordination of the military to civil authority. This case, no doubt, derives from the consequence of a court-martial. But we are sitting in judgment not on the military but on Congress. The military merely carried out a responsibility with which they were charged by Congress. Should the armed forces have ceased discharging wartime deserters because Congress attached the consequence it did to their performance of that responsibility?

This legislation is the result of an exercise by Congress of the legislative power vested in it by the Constitution and of an exercise by the President of his constitutional power in approving a bill and thereby making it "a law." To sustain it is to respect the actions of the two branches of our Government directly responsive to the will of the people and empowered under the Constitution to determine the wisdom of legislation. The awesome power of this Court to invalidate such legislation, because in practice it is bounded only by our own prudence in discerning the limits of the Court's constitutional function, must be exercised with the utmost restraint. Mr. Justice Holmes, one of the profoundest thinkers who ever sat on this Court, expressed the conviction that "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States." Holmes, Speeches, 102. He did not, of course, deny that the power existed to strike down congressional legislation, nor did he shrink from its exercise. But the whole of his work during his thirty years of service on this Court should be a constant reminder that the power to invalidate legislation must not be exercised as if, either in constitutional theory or in the art of government, it stood as the sole bulwark against unwisdom or excesses of the moment.

Syllabus.

NISHIKAWA *v.* DULLES, SECRETARY OF STATE.

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

No. 19. Argued May 1–2, 1957.—Restored to the calendar for reargument June 24, 1957.—Reargued October 28, 1957.—Decided March 31, 1958.

Petitioner was a native-born citizen of the United States and he was considered by Japan to be a citizen of that country because his parents were Japanese citizens. In 1939, he went to Japan, intending to stay between two and five years visiting and studying. In 1941, he was conscripted into the Japanese Army, and he served in that Army while Japan was at war with the United States. After the war, he applied for an American passport but was given instead a certificate of loss of nationality. He sued for a declaratory judgment that he was a citizen of the United States. This was denied because the district judge did not believe his testimony that his service in the Japanese Army was involuntary. Petitioner alone testified at the trial. The Government introduced no testimony, and its only affirmative evidence was that petitioner went to Japan at a time when he was subject to conscription. *Held:* The evidence was not sufficient to establish petitioner's loss of citizenship under § 401 (c) of the Nationality Act of 1940 as a result of his entering and serving in the armed forces of a foreign state. Pp. 130–138.

(a) No conduct results in expatriation unless the conduct is engaged in voluntarily. P. 133.

(b) When a citizenship claimant proves his birth in this country or acquisition of American citizenship in some other way, the burden is upon the Government to prove an act that shows expatriation by clear, convincing and unequivocal evidence; and this rule governs cases under all subsections of § 401. P. 133.

(c) Because the consequences of denationalization are so drastic, the burden is upon the Government of persuading the trier of fact by clear, convincing and unequivocal evidence that the act showing renunciation of citizenship was performed voluntarily whenever the question of voluntariness is put in issue. Pp. 133–137.

(d) On the record in this case, the Government has not sustained the burden of establishing the voluntary conduct that is an essential ingredient of expatriation. Pp. 137–138.

235 F. 2d 135, reversed.

Fred Okrand argued the cause for petitioner on the original argument, *A. L. Wirin* on the reargument, and both were on the briefs.

Oscar H. Davis argued the cause for respondent. With him on the briefs were *Solicitor General Rankin, Warren Olney, III,* then Assistant Attorney General, and *Beatrice Rosenberg. J. F. Bishop* was also with them on the brief on the reargument.

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

In this, the third of the denationalization cases decided today, issues concerning Section 401 (c) of the Nationality Act of 1940 are presented. That statute provides:

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> . . . . . .
>
> "(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state . . . ." [1]

We need not in this case consider the constitutionality of Section 401 (c). This case thus differs from *Perez* v. *Brownell, ante,* p. 44, and *Trop* v. *Dulles, ante,* p. 86,

---

[1] 54 Stat. 1168, 1169. The present provision, Immigration and Nationality Act of 1952, § 349 (a) (3), 66 Stat. 267, 268, 8 U. S. C. § 1481 (a) (3), eliminates the necessity that the expatriate have or acquire the nationality of the foreign state.

where questions of the constitutionality of Sections 401 (e) and 401 (g) were determined. The issues with which we are concerned here relate solely to problems of burden of proof.

Petitioner brought this action in a District Court praying for a judgment declaring him to be a citizen of the United States. The controversy arose from petitioner's application to a United States Consulate in Japan for an American passport. Instead of the passport, he received more than a year later a Certificate of the Loss of the Nationality of the United States. Petitioner alone testified at the trial, the Government introducing no testimony. What follows is a summary of his testimony.

Petitioner was born in Artesia, California, in 1916. By reason of that fact, he was a citizen of the United States, and because of the citizenship of his parents, he was also considered by Japan to be a citizen of that country. Petitioner was educated in the schools of this country and lived here until 1939. In August of that year, having been graduated from the University of California with a degree in engineering, he went to Japan, intending to stay between two and five years, visiting and studying. He knew that his father had registered him in the family register in Japan. In November of 1939 petitioner's father, who was paying his way, died in this country and petitioner, lacking funds, went to work for an aircraft manufacturing company in Japan for the equivalent of $15 a month. He was unable to accumulate any savings. Pursuant to the Military Service Law of Japan, petitioner was required about June 1940 to take a physical examination, and on March 1, 1941, he was inducted into the Japanese Army. The Military Service Law provided for imprisonment for evasion. Between the time of his physical examination and his induction, petitioner did not protest his induction or attempt to renounce his

Japanese nationality, to return to the United States or to secure the aid of United States consular officials. He testified that he was told by a friend who worked at the American Embassy that the American Consulate could not aid a dual national; the Government has not contended that this was not so. He further testified that he had heard rumors about the brutality of the Japanese secret police which made him afraid to make any protest.

Petitioner testified that he did not know when he went to Japan that he was likely to be drafted. He said he was not aware at that time of any threat of war between the United States and Japan. He had left the United States just prior to the outbreak of war in Europe and two years and four months before Pearl Harbor. He testified that he was unable to read the Japanese language and lived too far out in the country to subscribe to an English-language newspaper, and therefore did not read any newspapers while in Japan.

Petitioner served as a maintenance man or mechanic in an Air Force regiment in China, Indo-China, the Philippines and Manchuria. He testified that when war between the United States and Japan began, he expressed the opinion to a group of noncommisioned officers that there was no chance of Japan's winning the war. That night he was given a thorough beating; he was beaten almost every day for a month, and afterwards he was beaten "a couple days a month." He won the nickname "America."

After hearing this testimony, the district judge announced from the bench that "the court simply does not believe the testimony of the witness. That is all. I simply do not believe his testimony." He went on to express his opinion that petitioner "went over because as a Japanese citizen under the laws of Japan it was necessary for him to serve his hitch in the army. . . . He went over and he waited until they reached him on the draft,

and when they did he was drafted." Formally, the court found as a fact on the basis of petitioner's testimony alone, which did not include an admission to that effect, that his "entry and service in the Japanese Armed Forces was his free and voluntary act." Therefore he was held to have lost his nationality under Section 401 (c) and judgment was rendered for respondent. The Court of Appeals for the Ninth Circuit affirmed that judgment.[2] We granted certiorari. 352 U. S. 907.

Whatever divergence of view there may be as to what conduct may, consistent with the Constitution, be said to result in loss of nationality, cf. *Perez* v. *Brownell, ante,* pp. 44, 62, it is settled that *no* conduct results in expatriation unless the conduct is engaged in voluntarily. *Mandoli* v. *Acheson,* 344 U. S. 133.[3] The Government does not contend otherwise. Likewise, the parties are agreed that when a citizenship claimant proves his birth in this country or acquisition of American citizenship in some other way, the burden is upon the Government to prove an act that shows expatriation by clear, convincing and unequivocal evidence. In *Gonzales* v. *Landon,* 350 U. S. 920, we held that the rule as to burden of proof in denaturalization cases[4] applied to expatriation cases under Section 401 (j) of the Nationality Act of 1940. We now conclude that the same rule should govern cases under all the subsections of Section 401.

The parties disagree as to whether the Government must also prove that the expatriating act was voluntarily performed or whether the citizenship claimant bears the

---

[2] 235 F. 2d 135.

[3] See also, *e. g., Acheson* v. *Murata,* 342 U. S. 900; *Acheson* v. *Okimura,* 342 U. S. 899; *Dos Reis ex rel. Camara* v. *Nicolls,* 161 F. 2d 860; 41 Op. Atty. Gen., No. 16.

[4] *Baumgartner* v. *United States,* 322 U. S. 665; *Schneiderman* v. *United States,* 320 U. S. 118.

burden of proving that his act was involuntary.[5] Petitioner contends that voluntariness is an element of the expatriating act, and as such must be proved by the Government. The Government, on the other hand, relies upon the ordinary rule that duress is a matter of affirmative defense and contends that the party claiming that he acted involuntarily must overcome a presumption of voluntariness.

Because the consequences of denationalization are so drastic petitioner's contention as to burden of proof of voluntariness should be sustained. This Court has said that in a denaturalization case, "instituted . . . for the purpose of depriving one of the precious right of citizenship previously conferred we believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen." *Schneiderman* v. *United States,*

---

[5] *Gonzales* v. *Landon,* 350 U. S. 920; *Acheson* v. *Murata,* 342 U. S. 900, and *Acheson* v. *Okimura,* 342 U. S. 899, are not dispositive of the issue. The holding in *Gonzales* went to the Government's burden of proof in general without specific regard to voluntariness. *Murata* and *Okimura* came here on appeal from a District Court's holding that various subsections of § 401 were unconstitutional. 99 F. Supp. 587, 591. We remanded for specific findings as to the circumstances attending the alleged acts of expatriation and the reasonable inferences to be drawn therefrom.

In *Bruni* v. *Dulles,* 98 U. S. App. D. C. 358, 235 F. 2d 855, the Court of Appeals for the District of Columbia Circuit considered *Gonzales* as requiring the Government to prove voluntariness by clear, convincing and unequivocal evidence. *Lehmann* v. *Acheson,* 206 F. 2d 592, can also be read as placing that burden on the Government. It is clear, at least, that the Third Circuit, *Lehmann* v. *Acheson, supra; Perri* v. *Dulles,* 206 F. 2d 586, as well as the Second Circuit, *Augello* v. *Dulles,* 220 F. 2d 344, regards conscription as creating a presumption of involuntariness which the Government must rebut. The Court of Appeals for the District of Columbia Circuit took a contrary view prior to *Bruni* v. *Dulles, supra. Alata* v. *Dulles,* 95 U. S. App. D. C. 182, 221 F. 2d 52; *Acheson* v. *Maenza,* 92 U. S. App. D. C. 85, 202 F. 2d 453.

320 U. S. 118, 122.[6] The same principle applies to expatriation cases, and it calls for placing upon the Government the burden of persuading the trier of fact by clear, convincing and unequivocal evidence that the act showing renunciation of citizenship was voluntarily performed. While one finds in the legislative history of Section 401, and particularly Section 401 (c), recognition of the concept of voluntariness,[7] there is no discussion of the problem of the burden of proof. What is clear is that the House Committee which considered the bill rejected a proposal to enact a conclusive presumption of voluntariness in the case of dual nationals entering or serving in the military forces of the nation of their second nationality.[8] It is altogether consonant with this history to

---

[6] See also *United States* v. *Minker*, 350 U. S. 179, 197 (concurring opinion): "When we deal with citizenship we tread on sensitive ground."

[7] See Hearings before the House Committee on Immigration and Naturalization on H. R. 6127, superseded by H. R. 9980, 76th Cong., 1st Sess. 150, 201.

[8] The proposal was advanced by the State Department spokesman, Mr. Flournoy, who said:

"If a man is a citizen of the United States and Japan, both countries, as he would be in all of these cases we have been discussing, and he is living in Japan, and he reaches the military age, and they call him for service, it should not make any difference from our point of view whether he makes a protest or not. It is his duty to serve. He is in that country, and he is a citizen of that country, and if we accept his plea of duress in these cases it practically nullifies the whole thing, so we should put a proviso in reading somewhat as follows: That if an American national also has the nationality of a foreign country and is residing therein at a time when he reaches the age for liability of military service his entry into the armed forces thereof shall be presumed to be voluntary. In other words, a plea of duress would not make any difference. He is a citizen of that country, and he is presumed to know that when the time comes he will have to serve." *Id.*, at 150.

Spokesmen for the Labor and Justice Departments objected, stating that dual nationals should have the opportunity to be heard on

place upon the Government the burden of proving voluntariness. The Court has said that "Rights of citizenship are not to be destroyed by an ambiguity." *Perkins* v. *Elg*, 307 U. S. 325, 337. The reference was to an ambiguity in a treaty, but the principle there stated demands also that evidentiary ambiguities are not to be resolved against the citizen.

Finally, the Government contends that even if it has the burden of proving voluntariness by clear, convincing and unequivocal evidence, that burden has been met in this case. What view the District Court took of the burden of proof does not clearly appear. The Court of Appeals seemed at one point to accept the evidence in the District Court as sufficient even on the view of the burden of proof as above stated.[9] That conclusion is not supportable. Of course, the citizenship claimant is subject to the rule dictated by common experience that one ordinarily acts voluntarily. Unless voluntariness is put in issue, the Government makes its case simply by proving the objective expatriating act. But here petitioner showed that he was conscripted in a totalitarian country to whose conscription law, with its penal sanctions, he was subject. This adequately injected the issue of voluntariness and required the Government to sustain its burden

---

the question of duress. *Id.*, at 150–156; 169–170; 200–203. At the time of the hearings § 401 (c) was not limited to dual nationals. The Senate Committee inserted the limitation. See 86 Cong. Rec. 12817.

The Court of Appeals for the First Circuit has correctly concluded that little significance attaches to the failure of the House Committee to accept a suggestion that the word "voluntarily" be inserted in subsections (b) through (g) of § 401. Hearings, *supra*, at 397–398. "It seems to us that the failure of the committee to accept this amendment is of little significance in view of the legislative history . . . indicating that such amendment was unnecessary and superfluous." *Dos Reis ex rel. Camara* v. *Nicolls*, 161 F. 2d 860, 864, n. 4.

[9] 235 F. 2d, at 140. But see *id.*, at 141.

of proving voluntary conduct by clear, convincing and unequivocal evidence.[10] The Government has not sustained that burden on this record. The fact that petitioner made no protest and did not seek aid of American officials—efforts that, for all that appears, would have been in vain—does not satisfy the requisite standard of proof. Nor can the district judge's disbelief of petitioner's story of his motives and fears fill the evidentiary gap in the Government's case. The Government's only affirmative evidence was that petitioner went to Japan at a time when he was subject to conscription.

On this record the Government has not established the voluntary conduct that is the essential ingredient of expatriation. The fact that this petitioner, after being conscripted, was ordered into active service in wartime on the side of a former enemy of this country must not be permitted to divert our attention from the necessity of maintaining a strict standard of proof in all expatriation cases. When the Government contends that the basic right of citizenship has been lost, it assumes an onerous burden of proof. Regardless of what conduct is alleged

[10] Petitioner's evidence of conscription also dispelled the presumption created by § 402 of the Nationality Act of 1940, 54 Stat. 1169, that a national who remains six months or more within the country of which either he or his parents have been nationals, has expatriated himself under § 401 (c) or (d). Even if valid, "Section 402 does not enlarge § 401 (c) or (d)," *Kawakita* v. *United States*, 343 U. S. 717, 730, and, like the analogous provision of § 2 of the Act of March 2, 1907, 34 Stat. 1228, it creates "a presumption easy to preclude, and easy to overcome." *United States* v. *Gay*, 264 U. S. 353, 358. The ambiguous terms of § 402 have since been superseded by § 349 (b) of the Immigration and Nationality Act of 1952, 66 Stat. 268, 8 U. S. C. § 1481 (b), which establishes a conclusive presumption of voluntariness on the part of a dual national who performs an expatriating act if he had resided in the state of his second nationality an aggregate of ten years or more immediately prior thereto. Of course, the new statutory presumption is not in issue in this case and there is no need to consider its validity.

458778 O—58——13

to result in expatriation, whenever the issue of voluntariness is put in issue, the Government must in each case prove voluntary conduct by clear, convincing and unequivocal evidence.

The judgment of the Court of Appeals is reversed and the cause is remanded to the District Court for further proceedings consistent with this opinion.

Reversed and remanded.

Mr. Justice Black, with whom Mr. Justice Douglas joins.

While I concur in the opinion of the Court I add the following to state what I conceive to be the controlling constitutional principles in this and other expatriation cases.

The Fourteenth Amendment declares that "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Nishikawa was born in this country while subject to its jurisdiction; therefore American citizenship is his constitutional birthright. See *United States* v. *Wong Kim Ark,* 169 U. S. 649. What the Constitution has conferred neither the Congress, nor the Executive, nor the Judiciary, nor all three in concert, may strip away. Although Congress can enact laws punishing those who shirk their duties as citizens or those who jeopardize our relations with foreign countries it cannot involuntarily expatriate any citizen. As The Chief Justice and Mr. Justice Douglas explain in their dissenting opinions in *Perez* v. *Brownell, ante,* pp. 62, 79, this results not only from the provisions of the Fourteenth Amendment but from the manner in which the Government of the United States was formed, the fundamental political principles which underlie its existence, and its continuing relationship to the citizenry who

erected and maintain it. Cf. *Osborn* v. *Bank of the United States,* 9 Wheat. 738, 827. In my view the notion that citizenship can be snatched away whenever such deprivation bears some "rational nexus" to the implementation of a power granted Congress by the Constitution is a dangerous and frightening proposition. By this standard a citizen could be transformed into a stateless outcast for evading his taxes, for fraud upon the Government, for counterfeiting its currency, for violating its voting laws and on and on *ad infinitum.*

Of course a citizen has the right to abandon or renounce his citizenship and Congress can enact measures to regulate and affirm such abjuration. But whether citizenship has been voluntarily relinquished is a question to be determined on the facts of each case after a judicial trial in full conformity with the Bill of Rights. Although Congress may provide rules of evidence for such trials, it cannot declare that such equivocal acts as service in a foreign army, participation in a foreign election or desertion from our armed forces, establish a conclusive presumption of intention to throw off American nationality. Cf. *Tot* v. *United States,* 319 U. S. 463. Of course such conduct may be highly persuasive evidence in the particular case of a purpose to abandon citizenship.

To the extent that *Mackenzie* v. *Hare,* 239 U. S. 299, and *Savorgnan* v. *United States,* 338 U. S. 491, applied principles contrary to those expressed in this opinion I believe they are inconsistent with the Constitution and cannot be regarded as binding authority.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE BURTON joins, concurring in the result.

This case involves a native-born citizen of Japanese parentage who has been declared to have lost his citizenship by virtue of § 401 (c) of the Nationality Act of 1940,

54 Stat. 1137, 1169, for having served in the Japanese armed forces while subject to the law of Japan making failure to serve a crime. That is the case before the Court. The defined issue raised by this case is the only issue, in my judgment, that the Court should decide.

Petitioner asserts that his service in the Japanese forces was performed under duress. His claim of duress is based on the fact that he was inducted into the Japanese armed forces pursuant to the compulsory conscription law of that country,[1] and that rumors of harsh punishment of draft evaders by the secret police and the ruthlessness of the government in power made him afraid to take any action to avoid service. The evidence to rebut this testimony, elicited on cross-examination, was that he had failed to take certain actions to avoid service; the only affirmative act urged in support of the voluntariness of his entry into service is that he went to Japan when he was of draft-eligible age[2] and remained there until inducted.

It is common ground that conduct will result in expatriation only if voluntarily performed. See *Mackenzie* v. *Hare,* 239 U. S. 299, 311–312; cf. *Acheson* v. *Okimura,* 342 U. S. 899; *Acheson* v. *Murata,* 342 U. S. 900. Accordingly, where a person who has been declared expatriated contests that declaration on grounds of duress, the evidence in support of this claim must be sympathetically scrutinized. This is so both because of the extreme gravity of being denationalized and because of the subtle, psychologic factors that bear on duress.

---

[1] According to a stipulation of the parties in the record, the Military Service Law of Japan provided punishment of up to three years of penal servitude for persons evading military service.

[2] There does not seem to be any explicit basis in the record for the trial court's finding (Finding of Fact No. III) that petitioner made the trip to Japan "knowing at that time that he was likely to be called for military service in the Japanese Armed Forces."

The issue that is ultimately decisive in a litigation is one thing, the mode for determining it quite another. The fact that conduct, in order to result in loss of citizenship, must be voluntary behavior does not inherently define the appropriate manner of its proof. The Government properly has a very heavy burden in expatriation cases: it must establish that the citizen committed an "act of expatriation"—*i. e.*, engaged in conduct of which the consequence is loss of citizenship—by clear, convincing and unequivocal evidence. *Gonzales* v. *Landon,* 350 U. S. 920, adopting the standard of *Schneiderman* v. *United States,* 320 U. S. 118, and *Baumgartner* v. *United States,* 322 U. S. 665. This is incumbent on the Government although the evidence in cases such as these may well be difficult to obtain. Much more difficult would it be for the Government to establish the citizen's state of mind as it bears on his will, purpose and choice of action—in short, "voluntariness." According to the ordinarily controlling principles of evidence, this would suggest that the individual, who is peculiarly equipped to clarify an ambiguity in the meaning of outward events, should have the burden of proving what his state of mind was. See *Selma, Rome & Dalton R. Co.* v. *United States,* 139 U. S. 560, 567–568. Moreover, any other evidence of his state of mind, outside of his own mental disclosures, will often be found only abroad, where the Government may have no facilities for conducting the necessary investigation. The Court should hesitate long before imposing on the Government, by a generalized, uncritical formula, a burden so heavy that the will of Congress becomes incapable of sensible, rational, fair enforcement.

Where an individual engages in conduct by command of a penal statute of another country to whose laws he is subject, the gravest doubt is cast on the applicability of the normal assumption—even in a prosecution for murder (see *Leland* v. *Oregon,* 343 U. S. 790)—that what

a person does, he does of his own free will. When a consequence as drastic as denationalization may be the effect of such conduct, it is not inappropriate that the Government should be charged with proving that the citizen's conduct was a response, not to the command of the statute, but to his own direction. The ready provability of the critical fact—existence of an applicable law, particularly a criminal law, commanding the act in question—provides protection against shifting this burden to the Government on the basis of a frivolous assertion of the defense of duress. Accordingly, the Government should, under the circumstances of this case, have the burden of proving by clear, convincing and unequivocal evidence that the citizen voluntarily performed an act causing expatriation.

Since the courts below were not guided by this formulation, the judgment should not be allowed to stand. However, the Government should not be denied a further opportunity to bring forward the necessary proof if it is able to do so. Whether, in other classes of cases in which the defense of duress is asserted, the Government should have the burden of proving its absence is a question the Court need not—and, therefore, should not—reach. For that reason, I concur in the result announced but cannot join the opinion of the Court.

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK joins, dissenting.

The central question in this case is simply whether Nishikawa's service in the Japanese Army can be said to be "voluntary" when the record contains virtually nothing more in the way of proof than that he went to Japan from this country in 1939 and was inducted into the army pursuant to a conscription law of Japan without any protest on his part.

Beyond establishing that he was drafted without protest, Nishikawa's testimony should be disregarded, for the

District Court expressly stated that it disbelieved his explanations as to why he had not sought the aid of American authorities in Japan or otherwise attempted to protest or prevent his induction, and the Court of Appeals has affirmed. Particularly when credibility is in issue we should not set ourselves against the factual determinations of the trial court, which had the great advantage of hearing and observing Nishikawa on the witness stand.

The Courts of Appeals have divided on the question whether proof of conscription, in the absence of anything more on either side, precludes a finding that service in a foreign army was voluntary. The Second and Third Circuits have held that it does. *Augello* v. *Dulles,* 220 F. 2d 344; *Lehmann* v. *Acheson,* 206 F. 2d 592; *Perri* v. *Dulles,* 206 F. 2d 586. The District of Columbia Circuit has ruled that "[d]uress cannot be inferred from the mere fact of conscription." *Acheson* v. *Maenza,* 92 U. S. App. D. C. 85, 90, 202 F. 2d 453, 458; *Alata* v. *Dulles,* 95 U. S. App. D. C. 182, 221 F. 2d 52; but see *Bruni* v. *Dulles,* 98 U. S. App. D. C. 358, 235 F. 2d 855.[1]

Moved by the consideration that a contrary rule would lead to the "drastic" consequence of denationalization, the Court holds that (1) the fact that Nishikawa was conscripted into the Japanese Army precluded the District Court from finding that his service was voluntary, in the absence of the Government's showing something more than that he failed to take any steps to prevent or protest his induction; and (2) the Government has the burden of proving voluntariness in all denationalization cases once the issue of duress has been "injected" into the

---

[1] See also *Hamamoto* v. *Acheson,* 98 F. Supp. 904. Compare *Acheson* v. *Okimura,* 342 U. S. 899; *Acheson* v. *Murata,* 342 U. S. 900, and the dissenting opinion in *Mandoli* v. *Acheson,* 344 U. S. 133, 139. As we read *Gonzales* v. *Landon,* 350 U. S. 920, cited in the majority opinion, that case related simply to the *standard,* and not to the *burden,* of proof in denationalization cases.

case. I too am not insensitive to the high value of American citizenship, but find myself compelled to dissent because in my opinion the majority's position can be squared neither with congressional intent nor with proper and well-established rules governing the burden of proof on the issue of duress.

I.

To permit conscription without more to establish duress unjustifiably limits, if it does not largely nullify, the mandate of § 401 (c). By exempting from the reach of the statute all those serving in foreign armies as to whom no more has been shown than their conscription, the Court is attributing to Congress the intention to permit many Americans who served in such armies to do so with impunity. There is no solid basis for such a restrictive interpretation. By the time the Nationality Act of 1940 was passed, conscription and not voluntary enlistment had become the usual method of raising armies throughout the world, and it can hardly be doubted that Congress was aware of this fact. In view of this background it is farfetched to assume that Congress intended the result reached by the Court, a result plainly inconsistent with the even-handed administration of § 401 (c). Moreover, the very terms of the section, which refer to both "entering" and "serving in" foreign armed forces, are at odds with such an intention.

II.

Although the Court recognizes the general rule that consciously performed acts are presumed voluntary, see 3 Wigmore, Evidence (3d ed.), § 860; Fed. Rules Civ. Proc., 8 (c), it in fact alters this rule in *all* denationalization cases by placing the burden of proving voluntariness on the Government, thus relieving citizen-claimants in

such cases from the duty of proving that their presumably voluntary acts were actually involuntary.[2]

One of the prime reasons for imposing the burden of proof on the party claiming involuntariness is that the evidence normally lies in his possession. This reason is strikingly applicable to cases of the kind before us, for evidence that an individual involuntarily served in a foreign army is peculiarly within his grasp, and rarely accessible to the Government. Nishikawa's case amply illustrates the proposition. In the eight months that passed between his notice to report for a physical examination and his actual induction Nishikawa could have taken a variety of steps designed to prevent his conscription, any of which would have been persuasive evidence of the involuntary character of his service. For example, he could have sought to return to the United States, to renounce his Japanese nationality, to advise Japanese officials that he was an American citizen, to enlist the assistance of American Consular officials in

---

[2] The Court not only reaches a conclusion inconsistent with the usual rules governing burden of proof, but does so in the face of § 402 of the Nationality Act, which provides in part:

"A national of the United States who was born in the United States . . . shall be presumed to have expatriated himself under subsection (c) or (d) of section 401, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state . . . and such presumption shall exist until overcome whether or not the individual has returned to the United States." 54 Stat. 1137, 1169.

Nishikawa was in Japan for 10 months before he even received notice to report for physical examination in the draft. He was inducted over 18 months after his arrival in Japan. This Court held in *Kawakita* v. *United States,* 343 U. S. 717, 730: "Section 402 does not enlarge § 401 (c) or (d); it creates a rebuttable presumption of expatriation; and when it is shown that the citizen did no act which brought him under § 401 (c) or (d), the presumption is overcome."

Japan, or to employ the aid of friends or relatives in the United States.[3] Nishikawa admits that he did none of these things. But if he claimed that he had, is it not apparent that he and not the Government is the logical party to bring forward the pertinent evidence? In such circumstances it seems to me the better course to require Nishikawa to prove his allegation of duress rather than to impose on the Government the well-nigh impossible task of producing evidence to refute such a claim.

For both of the reasons set forth above I think that the finding of the District Court that Nishikawa served in the Japanese Army without duress should not be disturbed.

In considering § 401 (c), we ought not to lose sight of the fact that it deals solely with dual nationals, remitting them to the citizenship of the country which they served in time of war. Unlike the majority, I do not believe that this consequence is incommensurate with petitioner's conduct. It seems to me that there is a large measure of justice in relegating Nishikawa solely to his Japanese citizenship, for it is with the armed forces of Japan that he served for more than four years during the heart of the late World War. Nishikawa's service included participation in military action against the United States in the Philippines. There is no suggestion that at any time during this period he ever performed any act indicating disloyalty to Japan or loyalty to the United States.

The Court remands the case presumably to give the Government the opportunity to show that Nishikawa's service with the Japanese Army was voluntary. Surely this is but an empty gesture. The Government can

---

[3] It is of course quite irrelevant that any steps taken by Nishikawa to forestall his induction may have been in vain. Whether successful or not, they would certainly have reflected his unwillingness to serve in the Army of Japan.

hardly be expected to adduce proof as to occurrences taking place in Japan more than 17 years ago which are now shrouded in obscurity beyond serious hope of detection.

Nishikawa's constitutional contention that Congress lacked power to enact § 401 (c) is, in my view, foreclosed by *Perez* v. *Brownell, ante,* p. 44, decided this day.

I would affirm the judgment of the Court of Appeals.

BROWN *v.* UNITED STATES.

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

No. 43. Argued April 4, 1957.—Restored to the calendar for reargument June 10, 1957.—Reargued October 22, 1957.—Decided March 31, 1958.

In the Government's civil suit in a Federal District Court for petitioner's denaturalization on the ground that she had fraudulently procured citizenship by swearing falsely that she was not, and had not been, a member of or affiliated with the Communist Party, she voluntarily took the stand and testified at length in her own defense. Thereafter, during cross-examination, she refused, on grounds of self-incrimination, to answer questions which were relevant to her testimony on direct examination. The District Court ruled that she had waived her privilege by testifying in her own defense and ordered her to answer; but she persisted in her refusal to do so. For this, she was summarily adjudged guilty of criminal contempt and sentenced to imprisonment. *Held:* The conviction is sustained. Pp. 149–157.

(a) There can be no doubt that stubborn disobedience of the duty to answer relevant inquiries in a judicial proceeding brings into force the power of the federal courts to punish for contempt. *Ex parte Hudgings*, 249 U. S. 378, and *In re Michael*, 326 U. S. 224, distinguished. Pp. 153–154.

(b) By taking the stand and testifying in her own behalf, petitioner waived the right to invoke on cross-examination her privilege against self-incrimination regarding matters made relevant by her direct examination. Pp. 154–156.

(c) The record does not fairly support petitioner's claim that the District Court found a waiver simply in the act of taking the stand and misled her as to the actual legal question involved. Pp. 156–157.

234 F. 2d 140, affirmed.

George W. Crockett, Jr. argued the cause and filed the briefs for petitioner.

Ralph S. Spritzer argued the cause for the United States. On the briefs were *Solicitor General Rankin, Warren Olney, III*, then Assistant Attorney General, and

Beatrice Rosenberg. *Mr. Spritzer* was also with them on the brief on the reargument.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a proceeding of summary disposition, under Rule 42 (a) of the Federal Rules of Criminal Procedure,[1] of a finding of criminal contempt committed in the actual presence of the court, the power to punish which is given by 18 U. S. C. § 401.[2] The proceeding grew out of a suit for denaturalization brought against petitioner pursuant to § 340 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 260, as amended, 8 U. S. C. (Supp. IV) § 1451 (a). The complaint in the denaturalization suit charged that petitioner had fraudulently procured citizenship in 1946 by falsely swearing that she was attached to the principles of the Constitution, and that she was not and had not been for ten years preceding opposed to organized government or a member of or affiliated with the Communist Party or any organization teaching opposition to organized government, whereas in fact petitioner had been, from 1933 to 1937, a member of the Communist Party and the Young Communist League, both organizations advocating the overthrow of the Government of the United States by force and violence.

---

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

[2] "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."

At the trial in the denaturalization proceeding, petitioner was called as an adverse witness by the Government under Rule 43 (b) of the Federal Rules of Civil Procedure. Petitioner admitted that she had once been a member of the Young Communist League, but denied that she had belonged to the Communist Party in the period before 1946. She refused to answer questions about activities and associations that were unlimited in time or directed to the period after 1946 on the ground that her answers might tend to incriminate her, and the District Court sustained the claim of privilege. At the close of the Government's examination, petitioner's counsel stated that, "I won't cross-examine the witness at this point. I will put her on on direct." [3]

Thereafter petitioner took the stand as a witness in her own behalf. She comprehensively reaffirmed the truth of the statements made at the time of her naturalization, and, although she admitted membership in the Young Communist League from about 1930, claimed that she had resigned in 1935 and had not engaged in any Communist activities from 1935 until her naturalization in 1946. Not content to rest there, petitioner went on to testify that she had never taught or advocated the overthrow of the existing government or belonged to any organization that did so advocate, that she believed in fighting for this country and would take up arms in its defense in event of hostilities with Soviet Russia, and that she was attached to the principles of the Constitution and the good order and happiness of the United States.[4] This

---

[3] Counsel for petitioner in this Court did not represent her in the trial court.

[4] "Q. Are you willing to take up arms in defense of this country, in the event of any hostility between the United States and Russia?

"A. Yes.

"Q. Regardless of whatever the reason may be for any hostility

testimony was directed to petitioner's present disposition towards the United States, and was not limited to the period before 1946.

---

between the government of the United States and the Government of Russia?

"A. That is correct.

"Q. In Question 28 you were asked: 'Are you a believer in anarchy, or the unlawful damage, injury or destruction of property, or of sabotage'? And you answered 'No.'

"Was that a true answer to that question?

"A. That was a true answer.

"Q. You say it was not only a true answer at the time you filed the petition, July 16, 1946, and is that the true answer today?

"A. It is true. It was a perfectly true answer to that question. I never believed in overthrowing anything. I believe in fighting for this country. I like this country. I never told anybody I didn't.

"Q. Did you ever teach or advocate anarchy or overthrow of the existing government in this country?

"A. Teach?

"Q. Did you ever teach the idea that we ought to overthrow the government of the United States?

"A. No, I never did.

"Q. Did you ever advocate that?

"A. No.

"Q. Did you ever say that we should?

"A. No, I never did.

"Q. To your knowledge, did you ever belong to any organization that taught or advocated anarchy or the overthrow of the existing government of this country?

"A. No. As much as I know, I didn't belong, to destroy the country. I believe in helping the country, and helping the people. That was my life of living, not destroying the things that the people put up.

"Q. Are you attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States?

"A. That, I am.

"Q. What do you understand by that? What do you understand by those words 'attached to the principles of the Constitution'?

"A. The way I understand this, when my country needs me, I fight for it and do what is right among the people."

On cross-examination the Government immediately put to petitioner the question, "Are you now or have you ever been a member of the Communist Party of the United States?" It also asked numerous other questions relating to Communist activities since 1946 that petitioner had successfully refused to answer when first examined. Petitioner again refused to answer, claiming the privilege against self-incrimination. The District Court ruled that by taking the stand in her own defense petitioner had abandoned the privilege, and directed her to answer. However, petitioner persisted in her refusal to answer any questions directed towards establishing that she had been a Communist since 1946. For this she was cast in contempt of court and sentenced to imprisonment for six months. The judgment of conviction was affirmed by the Court of Appeals. 234 F. 2d 140. Deeming the record to raise important questions regarding the scope of the privilege against self-incrimination and the power of a federal court to make summary disposition of a charge of criminal contempt, we brought the case here. 352 U. S. 908. Argument was had in the 1956 Term and the case set down for reargument in the present Term. 354 U. S. 907.

The conduct for which petitioner was found guilty of contempt was her sustained disobedience of the court's direction to answer pertinent questions on cross-examination after her claim of the privilege against self-incrimination had been overruled. On the first argument in this Court, petitioner stood on the validity of her claim of privilege as the essential ground for reversal here of the judgment of the Court of Appeals. It was taken for granted by petitioner no less than by the Government that for a party insistently to block relevant inquiry on cross-examination subjects him to punishment for contempt in the exercise of the power vested in the federal courts throughout our history. Act of Sept. 24, 1789,

§ 17, 1 Stat. 83; Act of Mar. 2, 1831, 4 Stat. 487–488; R. S. § 725; Judicial Code, 1911, § 268, 36 Stat. 1163; 18 U. S. C. § 401.

On reargument, both sides, responsive to a suggestion from the bench, discussed the relevance of *Ex parte Hudgings,* 249 U. S. 378, to the present situation. That case, followed in *In re Michael,* 326 U. S. 224, held that for perjury alone a witness may not be summarily punished for contempt. The essence of the holding in those cases was that perjury is a specifically defined offense, subject to prosecution under all the safeguards of the Fifth and Sixth Amendments, and that the truth or falsity of a witness' testimony ought not be left to a judge's unaided determination in the midst of trial. Perjury is one thing; testimonial recalcitrance another. He who offers himself as a witness is not freed from the duty to testify. The court (except insofar as it is constitutionally limited), not a voluntary witness, defines the testimonial duty. See Judge Learned Hand in *United States* v. *Appel,* 211 F. 495.

Such has been the unquestioned law in the federal judicial system time out of mind. It has been acted upon in the lower courts and this Court. Whatever differences the potentially drastic power of courts to punish for contempt may have evoked, a doubt has never been uttered that stubborn disobedience of the duty to answer relevant inquiries in a judicial proceeding brings into force the power of the federal courts to punish for contempt. Trial courts no doubt must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice. It is no less important for this Court to use self-restraint in the exercise of its ultimate power to find that a trial court has gone beyond the area in which it can properly punish for contempt. We are not justified in sliding from mere disagreement with the way in which a trial court has dealt with a particular

458778 O—58——14

matter, such as petitioner's conduct in the present case, into a condemnation of the court's action as an abuse of discretion.

We thus reach the constitutional issue.

Petitioner contends that by taking the stand and testifying in her own behalf she did not forego the right to invoke on cross-examination the privilege against self-incrimination regarding matters made relevant by her direct examination. She relies on decisions holding that witnesses in civil proceedings and before congressional committees do not waive the privilege by denials and partial disclosures, but only by testimony that itself incriminates. More particularly, petitioner's reliance is on *Arndstein* v. *McCarthy,* 254 U. S. 71; *McCarthy* v. *Arndstein,* 262 U. S. 355, 266 U. S. 34. In that litigation a witness called before special commissioners in bankruptcy proceedings filed schedules of his assets and liabilities and made certain disclosures in respect to his financial condition, but refused to answer numerous questions on the ground that to do so might incriminate him. This Court held that the witness' refusal did not constitute contempt; that since the evidence furnished "did not amount to an admission of guilt or furnish clear proof of crime . . . ," the privilege had not been abandoned and the witness was entitled to "stop short" when further testimony "might tend to incriminate him." 254 U. S., at 72; 262 U. S., at 358. The testimony of petitioner in the present case admittedly did not amount to "an admission of guilt or furnish clear proof of crime," but was, on the contrary, a denial of any activities that might provide a basis for prosecution.

Our problem is illumined by the situation of a defendant in a criminal case. If he takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of

relevant cross-examination. "[H]e has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts." *Fitzpatrick* v. *United States,* 178 U. S. 304, 315; and see *Reagan* v. *United States,* 157 U. S. 301, 304–305. The reasoning of these cases applies to a witness in any proceeding who voluntarily takes the stand and offers testimony in his own behalf. It is reasoning that controls the result in the case before us.

A witness who is compelled to testify, as in the *Arndstein* type of case, has no occasion to invoke the privilege against self-incrimination until testimony sought to be elicited will in fact tend to incriminate. It would indeed be irrelevant for him to do so. If he is to have the benefit of the privilege at all, and not be confronted with the argument that he has waived a right even before he could have invoked it, he must be able to raise a bar at the point in his testimony when his immunity becomes operative. A witness thus permitted to withdraw from the cross-fire of interrogation before the reliability of his testimony has been fully tested may on occasion have succeeded in putting before the trier of fact a one-sided account of the matters in dispute. This is an argumentative curtailment of the normal right of cross-examination out of regard for the fair claims of the constitutional protection against compulsory self-incrimination.

On the other hand, when a witness voluntarily testifies, the privilege against self-incrimination is amply respected without need of accepting testimony freed from the antiseptic test of the adversary process. The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry. Such a witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably

claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell. "[T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." *Walder* v. *United States,* 347 U. S. 62, 65. The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.[5] Petitioner, as a party to the suit, was a voluntary witness. She could not take the stand to testify in her own behalf and also claim the right to be free from cross-examination on matters raised by her own testimony on direct examination.

Petitioner claims that the District Court found that she had waived the privilege merely by taking the stand, whereas the Court of Appeals affirmed her conviction on the ground that she had taken the stand and testified as she did. Petitioner argues from this distinction that her conviction has been affirmed on a charge not made in the District Court. She also suggests that the reason given by the District Court for finding a waiver misled her as to the actual legal question involved, and that but for the assertions of the court she might have withdrawn her opposition to the cross-examination and answered the questions put by the Government.

---

[5] Striking the witness' testimony, or relying on the trier of fact to take into account the obvious unfairness of allowing the witness to escape cross-examination, must often in practice be poor substitutes for a positive showing under searching cross-examination that the testimony is in fact false.

The record does not fairly support the statement that the District Court found a waiver simply in the act of taking the stand. After petitioner had testified on direct examination, the court ruled that "the defendant having taken the stand in her own defense, has waived the right to invoke the Fifth Amendment . . . ." In view of the circumstances surrounding this ruling and the testimony that preceded it, it is reasonably clear that the court meant to convey by "having taken the stand in her own defense" what she said on the stand, not merely that she physically took the stand. As the District Court expressly stated in its opinion finding petitioner in contempt, it had cautioned her that "she had waived the right to claim any privileges under the Fifth Amendment, by reason of having testified as a witness in her own behalf." The reason for abandonment of the privilege, as thus expressed by the court, is wholly consistent with the reason given by the Court of Appeals in affirming the conviction, and with our ground for upholding the judgment of the Court of Appeals. Nice questions in interpreting the record to ascertain whether a trial court has discharged its duty of appropriately framing the legal issues in a litigation, or at least not misframing them to the detrimental reliance of one of the parties, are not here presented. Taken in context, the ruling of the District Court conveyed a correct statement of the law, and adequately informed petitioner that by her direct testimony she had opened herself to cross-examination on the matters relevantly raised by that testimony. The judgment is

Affirmed.

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

This is another decision by this Court eroding the constitutional privilege against self-incrimination. See,

e. g., Feldman v. *United States,* 322 U. S. 487; *Rogers* v. *United States,* 340 U. S. 367.

The questions which petitioner refused to answer undoubtedly called for responses which might have tended to incriminate her. Nevertheless, the Court holds that she can be imprisoned for contempt on the ground that a defendant in a civil action who voluntarily takes the stand to testify waives his privilege against self-incrimination to the extent of relevant cross-examination. Thus in substance the majority has extended the rule heretofore applied in criminal prosecutions to civil proceedings. I think this further encroachment on the privilege is unwarranted. I would reverse the petitioner's conviction on the basis of the general rule stated in *Arndstein* v. *McCarthy,* 254 U. S. 71, 262 U. S. 355, 266 U. S. 34, that a witness in a civil case does not forfeit the right to claim his privilege unless he makes disclosures which amount to "an actual admission of guilt or incriminating facts." 262 U. S., at 359.* Petitioner concededly made no such disclosures.

In my judgment the rule of waiver now applied in criminal cases, although long accepted, is itself debatable and should not be carried over to any new area absent the most compelling justification. By likening the position of a defendant who voluntarily takes the stand in a civil case to that of an accused testifying on his own behalf in a criminal prosecution the majority unfortunately fails to give due consideration to material differences between the two situations. For example failure of a criminal defendant to take the stand may not be made the subject of adverse comment by prosecutor or judge,

*As I construe the holding in *Arndstein* v. *McCarthy,* it is based on the simple ground that once a witness has incriminated himself subsequent inquiries concerning the same offense cannot harm him any further and the reason for the privilege disappears. But cf. *Rogers* v. *United States,* 340 U. S. 367.

nor may it lawfully support an inference of guilt. 18 U. S. C. § 3481; *Wilson* v. *United States,* 149 U. S. 60. On the other hand the failure of a party in a civil action to testify may be freely commented on by his adversary and the trier of fact may draw such inferences from the abstention as he sees fit on the issues in the case. *Bilokumsky* v. *Tod,* 263 U. S. 149, 153–154. Thus to apply the criminal rule of waiver to a civil proceeding may place a defendant in a substantial dilemma. If he testifies voluntarily he can be compelled to give incriminating evidence against himself; but, unlike a defendant in a criminal case, if he remains off the stand his silence can be used against him as "evidence of the most persuasive character." *Bilokumsky* v. *Tod, supra,* at 154.

The Court brushes aside this dilemma by assuming that a civil defendant can control the scope of his waiver when he voluntarily takes the stand because he "determines the area of disclosure and therefore of inquiry." I do not believe this assumption is correct. While it is true that a party can determine the area of his own disclosures on direct examination, the scope of permissible cross-examination is not restricted to the matters raised on direct but may include other and quite different matters if they will aid the court or jury to appraise the credibility of the witness and the probative value of his testimony. Such questions, which may range over a broad area and refer to matters collateral to the main issues, cannot be foreclosed by the witness and often cannot even be anticipated by him. See, *e. g., Radio Cab, Inc.,* v. *Houser,* 76 U. S. App. D. C. 35, 128 F. 2d 604; *Atkinson* v. *Atchison, Topeka & Santa Fe R. Co.,* 197 F. 2d 244. See also *Powers* v. *United States,* 223 U. S. 303, 314–316.

Furthermore a party to a civil action, unlike the defendant in a criminal case, may be compelled by his adversary to take the stand and thus forced into a situa-

tion (as illustrated by this case) where he must claim the privilege or incriminate himself. By claiming his privilege he may well prejudice his case for reasons wholly unrelated to its merits. In order to mitigate this damage he may feel great compulsion, either on cross-examination by his own counsel or by taking the stand later on his own behalf, to dispel some of the impression created by the claim of privilege. But this he cannot do under the Court's holding without thereby forfeiting his constitutional privilege.

The reason offered by the Court for compelling a civil defendant to incriminate himself or be imprisoned for contempt is that to do otherwise would be to accept testimony untested by cross-examination and thus extend "a positive invitation to mutilate the truth a party offers to tell." If punishment for contempt were the only method of protecting the other party and the trier from a one-sided, distorted version of the truth the substantial encroachment made by the majority on the privilege against self-incrimination might be somewhat more tolerable. But it is not. For example, as an obvious alternative, such one-sided testimony might be struck in full or part, if the occasion warranted, with appropriate directions by the judge for the jury to disregard it as unreliable. And in some instances where the prejudice to the opposing party was extreme and irremediable the court might even enter judgment in his favor. See *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322, 349–354. Compare *National Union of Marine Cooks* v. *Arnold,* 348 U. S. 37. By such means the trial judge could protect the right of the opposing party to a fair trial. At the same time the witness would not be treated as having waived his privilege so that he could be punished by fine or imprisonment for refusing to incriminate himself.

Since I believe that petitioner's conviction should be reversed for the reasons stated above, I find it unneces-

sary to discuss whether she was entitled to a trial with all the safeguards of the Bill of Rights before she could be punished for the crime of contempt. My views in that respect are set forth in some detail in my dissenting opinions in *Sacher* v. *United States,* 343 U. S. 1, 14, and *Green* v. *United States, post,* p. 193.

MR. JUSTICE BRENNAN, dissenting.

I would reverse this judgment. The District Courts do not have the untrammeled discretion to punish every contemptuous act as a criminal contempt. That is the basic teaching of such decisions as *Ex parte Hudgings,* 249 U. S. 378, and *In re Michael,* 326 U. S. 224. It will not be gainsaid that danger of abuse of this extraordinary power inheres in the absence of the safeguards usually surrounding criminal prosecutions, notably trial by jury and any but self-imposed judicial restraints upon the extent of punishment. That danger of abuse has required this Court closely to scrutinize these cases to guard against exceeding the bounds of discretion in the use of the power. We do so in the exercise of our general supervisory authority over the administration of criminal justice in the federal courts, *McNabb* v. *United States,* 318 U. S. 332, 340, but primarily because of the "importance of assuring alert self-restraint in the exercise by district judges of the summary power." *Offutt* v. *United States,* 348 U. S. 11, 13.

With that principle in mind, I cannot conclude that it was proper to convict petitioner of criminal contempt. Her contempt consisted in refusing to answer questions put to her on cross-examination because she believed that the Fifth Amendment afforded her a privilege to make such refusals. The majority concedes that the reason given to the petitioner by the trial judge to prove her waiver was an incorrect one but concludes that "Taken in

context . . . [it] conveyed a correct statement of the law. . . ." The fact remains that the trial judge's ruling on waiver was incorrect. He advised Mrs. Brown that she had waived her privilege by the simple act of taking the stand. But the rule that the privilege is waived by taking the stand developed in criminal cases as an historical corollary of the fact that the accused could not even be called or sworn as a witness. 8 Wigmore, Evidence (3d ed. 1940), § 2268. It has no application in civil cases. In civil cases the most that can be said is that a party witness subjects himself to cross-examination as to all matters testified to on direct.

The trial judge made his final ruling on the question of waiver on the morning of February 18, 1955. He repeated his statement that Mrs. Brown had waived her privilege by taking the stand.* The petitioner, believing that her conduct was privileged, continued to refuse to answer. No further evidence was offered after the petitioner's refusal to answer the questions put to her on cross-examination by the Government. On that same afternoon the trial judge delivered his opinion finding "by clear, unequivocal and convincing evidence, that the defendant did procure her citizenship illegally and fraudulently." He then proceeded to hold the petitioner in contempt for her refusal to answer. It is true that at this time he advised the petitioner that she had waived

---

* "The COURT. The Court holds that the defendant having taken the stand in her own defense, has waived the right to invoke the Fifth Amendment, and I will permit the witness to answer the question.

. . . . . .

"The COURT. The Court has just ruled that you having taken the stand in this case in your own defense, by so doing you have waived the right to invoke the Fifth Amendment. And I have just informed your counsel, and you, that you must answer the question. Now, if you do not answer the question, the Court will hold you in contempt of court."

her privilege by the testimony which she had given but it was of little help coming at the same time as the sentence.

In these circumstances, I can hardly believe that petitioner was guilty of such contempt of the authority of the court as to merit six months' imprisonment. The most that can be said of her conduct was that her lawyer could not predict that "taken in context" the appellate courts would sustain the trial judge's technically incorrect ruling on waiver.

This Court has recognized that the criminal-contempt power should be limited in its exercise to "the least possible power adequate to the end proposed," *In re Michael, supra,* at 227. The "end proposed," it should be clear, is not to impose vengeance for an insult to the court whose decree has been flouted, but to aid the fair and orderly administration of justice by deterring noncompliance with the court's lawful order. But I think that in contempts, as in other areas of the law, penal sanctions should be used sparingly and only where coercive devices less harsh in their effect would be unavailing. In other words, there is a duty on the part of the district judges not to exercise the criminal-contempt power without first having considered the feasibility of the alternatives at hand. MR. JUSTICE BLACK persuasively demonstrates in his dissenting opinion that the trial judge here might reasonably have resorted to several corrective devices to avoid both prejudice to the Government's case and unnecessary delay in the conduct of the trial. Cf. *Rubenstein* v. *Kleven,* 150 F. Supp. 47; Fed. Rules Civ. Proc., 37 (b). In addition, it appears that ordinary exercise of the civil-contempt power, cf. *Yates* v. *United States,* 355 U. S. 66, not even considered so far as this record shows, might have succeeded in achieving all the ends of justice without requiring resort to the far more drastic criminal sanction.

The Court does not ground the affirmance upon any finding that Mrs. Brown's conduct was actually disre-

spectful of the trial judge or that she obstinately flouted his authority. Indeed, her resort to her Fifth Amendment rights manifestly had substantial merit, for the majority does not say that the Amendment's protection against being required to give incriminating answers did not apply to the questions, but only that she waived the protection of the Amendment in the circumstances.

The situation, it seems to me, cried out for "alert self-restraint" by way of consideration of the other available correctives, before the judge took the particularly harsh step of sending Mrs. Brown to jail for six months. The trial judge gave no thought to the use of the other sanctions and, in my view, his exclusive reliance upon the criminal contempt power was arbitrary in the circumstances. I would therefore set aside the conviction.

GREEN ET AL. *v.* UNITED STATES.

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

No. 100. Argued October 21, 1957.—Decided March 31, 1958.

After petitioners were convicted of violating the Smith Act and sentenced to fine and imprisonment, they were enlarged on bail pending appeal. After this Court affirmed their convictions in *Dennis* v. *United States*, 341 U. S. 494, the United States Attorney served their counsel with copies of a proposed order on mandate requiring petitioners to surrender to the Marshal on July 2, 1951, for execution of their sentences and with notice that such order would be presented to the District Court for signature on July 2. Petitioners were informed by their counsel that their presence in court would be required on July 2; but they disappeared from their homes, failed to appear in court when the surrender order was signed on July 2, and remained fugitives for more than 4½ years. After they finally surrendered to the Marshal, they were tried in the District Court without a jury for criminal contempt, under 18 U. S. C. § 401 and Rule 42 of the Federal Rules of Criminal Procedure, for willful disobedience of the surrender order and were convicted and sentenced to three years' imprisonment, to commence after service of the five-year sentences imposed for violations of the Smith Act. *Held:* Their convictions of criminal contempt and the sentences therefor are sustained. Pp. 167–189.

1. Under 18 U. S. C. § 401, the power of federal courts to punish for criminal contempts, viewed in its historical perspective, includes the power to punish for disobedience of surrender orders. Pp. 168–173.

(a) Section 17 of the Judiciary Act of 1789 attributed to the federal judiciary powers possessed by English courts at common law to punish for contempts of court. P. 169.

(b) The Act of 1831 was intended to curtail the powers of federal courts to punish under the contempt power for certain conduct, not however of the kind involved here. It represented an effort by the Congress to define independently the contempt powers of federal courts. Pp. 170–173.

2. The evidence was sufficient to establish beyond a reasonable doubt petitioners' knowing violations of the surrender order. Pp. 173–179.

3. The District Court had power to sentence petitioners to imprisonment for more than one year. Pp. 179–187.

(a) Section 24 of the Clayton Act of 1914 (now found in amended form in 18 U. S. C. § 402), providing that contempts other than those referred to in § 24 were to be punished "in conformity to the usages at law . . . now prevailing," did not freeze into contempt law the sentencing practices of federal courts up to 1914 but means that contempts (including that involved in this case) other than those specified in § 24 were to be tried by normal contempt procedures, such as trial without jury. Pp. 179–182.

(b) Under 18 U. S. C. § 401, as under its statutory predecessors, the term of imprisonment is not subject to a one-year limitation but is within the discretion of the court. Pp. 182–183.

(c) Criminal contempts need not be prosecuted by indictment, since they are not "infamous crimes" within the meaning of the Fifth Amendment's provision that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." Pp. 183–185.

(d) This conclusion follows from the long line of cases in this Court to the effect that criminal contempts are not subject to jury trial as a matter of constitutional right under Article III, § 2 or the Sixth Amendment. Pp. 183–187.

4. Although federal courts in dealing with criminal contempts have a duty to exercise special care in applying their discretion to length of sentences imposed for commission of contempts, the three-year sentences here did not constitute an abuse of discretion on the part of the District Court. Pp. 187–189.

241 F. 2d 631, affirmed.

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

Ralph S. Spritzer argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Tompkins, Philip R. Monahan* and *Jerome L. Avedon.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioners are two of eleven defendants who were convicted in the Southern District of New York in 1949 of conspiring to teach and advocate the violent overthrow of the Government in violation of the Smith Act, 54 Stat. 670, 671, 18 U. S. C. §§ 371, 2385. Their convictions, each carrying a $10,000 fine and five years' imprisonment, were affirmed by this Court on June 4, 1951, in *Dennis* v. *United States,* 341 U. S. 494. After their convictions, petitioners had been enlarged on bail, and following the affirmance, the United States Attorney served counsel for the petitioners on June 28, 1951, with copies of a proposed order on mandate requiring petitioners to surrender to the United States Marshal on July 2 for the execution of their sentences, and with a notice that such order would be presented to the District Court for signature on the indicated day of surrender. Petitioners were thereupon informed by their counsel that their presence in court would be required on July 2. Both, however, disappeared from their homes, failed to appear in court when the surrender order was signed on July 2, and remained fugitives for more than four and a half years. Ultimately both voluntarily surrendered to the United States Marshal in New York, Green on February 27, 1956, and Winston on March 5, 1956.

Shortly thereafter, the United States instituted criminal contempt proceedings against the petitioners in the District Court for willful disobedience of the surrender order in violation of 18 U. S. C. § 401 (see p. 168, *infra*). Pursuant to Rule 42 (b) of the Federal Rules of Criminal Procedure, these proceedings were tried to the court without a jury.[1] Following a hearing, the court found

[1] This Rule provides that criminal contempts other than those committed in the actual presence of the court and seen or heard by

petitioners guilty of the contempts charged and sentenced each to three years' imprisonment to commence after service of the five-year sentences imposed in the conspiracy case. See 140 F. Supp. 117 (opinion as to Green). The Court of Appeals affirmed, 241 F. 2d 631, and we granted certiorari because the case presented important issues relating to the scope of the power of federal district courts to convict and sentence for criminal contempts. 353 U. S. 972.

The petitioners urge four grounds for reversal, namely: (1) the criminal contempt power of federal courts does not extend to surrender orders; (2) even if such power exists, the evidence was insufficient to support the judgments of contempt; (3) a prison sentence for criminal contempt cannot, as a matter of law, exceed one year; and (4) in any event the three-year sentences imposed were so excessive as to constitute an abuse of discretion on the part of the District Court. For the reasons given hereafter we think that none of these contentions can be sustained, and that the judgment of the Court of Appeals must be upheld.

I.

The contempt judgments rest on 18 U. S. C. § 401, which in pertinent part provides that a federal court:

> ". . . shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> . . . . .
>
> "(3) Disobedience or resistance to its lawful . . . order . . . ."

---

the court shall be prosecuted on notice. Notice may be given, as in the present case, by an order to show cause. The Rule states that a defendant is entitled to trial by jury if an Act of Congress so provides. See note 19, *infra*.

Since the order here issued was beyond dispute "lawful," § 401 plainly empowered the District Court to punish petitioners for disobeying it unless, as petitioners claim, this order is outside the scope of subdivision (3). This claim rests on the argument that the statute, viewed in its historical context, does not embrace an order requiring the surrender of a bailed defendant.

An evaluation of this argument requires an analysis of the course of development of federal statutes relating to criminal contempts. The first statute bearing on the contempt powers of federal courts was enacted as § 17 of the Judiciary Act of 1789, 1 Stat. 73, 83. It stated that federal courts "shall have power to . . . punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same . . . ." The generality of this language suggests that § 17 was intended to do no more than expressly attribute to the federal judiciary those powers to punish for contempt possessed by English courts at common law. Indeed, this Court has itself stated that under § 17 the definition of contempts and the procedure for their trial were "left to be determined according to such established rules and principles of the common law as were applicable to our situation." *Savin, Petitioner,* 131 U. S. 267, 275–276.[2] At English common law disobedience of a writ under the King's seal was early treated as a contempt, 4 Blackstone Commentaries 284, 285; Beale, Contempt of Court, 21 Harv. L. Rev. 161, 164–167; Fox, The Summary Process to Punish Contempt, 25 L. Q. Rev. 238, 249, and over the centuries English courts came to use the

[2] The debates conducted in 1830–1831 by leading counsel of that period during the impeachment proceedings against Judge James H. Peck, see p. 171, *infra,* contained discussions of the Act of 1789, and the limitations to be imposed upon it, which were cast largely in terms of the English common law preceding its enactment. See Stansbury, Report of the Trial of James H. Peck (1833).

458778 O—58——15

King's seal as a matter of course as a means of making effective their own process. Beale, at 167. It follows that under the Judiciary Act of 1789 the contempt powers of the federal courts comprehended the power to punish violations of their own orders.[3]

So much the petitioners recognize. They point out, however, that, at early English law, courts dealt with absconding defendants not by way of contempt, but under the ancient doctrine of outlawry, a practice whereby the defendant was summoned by proclamation to five successive county courts and, for failure to appear, was declared forfeited of all his goods and chattels. 4 Blackstone Commentaries 283, 319. In view of this distinct method at English common law of punishing refusal to respond to this summons, which was the equivalent of the present surrender order, petitioners argue that § 17 of the Judiciary Act of 1789, incorporating English practice, did not reach to a surrender order, and that the unique status of such an order subsisted under all statutory successors to § 17, including § 401 (3) of the existing contempt statute.

We find these arguments unconvincing. The reasons for the early English practice of proceeding against absconding defendants by way of outlawry rather than by contempt are obscure. It may have been that outlawry was resorted to because absconding was regarded so seriously as to require the drastic penalties of outlawry rather than fine or imprisonment. But whatever the reasons may have been, the fact that English courts adhered

---

[3] During the debates in 1830–1831 referred to in note 2, *supra*, several of the managers who argued that Judge Peck had exceeded the historical boundaries of the contempt power by the conduct which had provoked the impeachment proceedings (see p. 171, *infra*) appear to have assumed that courts were historically justified in employing the contempt power to deal with disobedience to court process. See Stansbury, *supra*, note 2, at 313, 395–396, 436, 444.

to the *practice* of dealing with such cases by outlawry should not obscure the general principle that they had *power* to treat willful disobedience of their orders as contempts of court. It is significant that, so far as we know, the severe remedy of outlawry, which fell into early disuse in the state courts, was never known to the federal law. See *United States* v. *Hall,* 198 F. 2d 726, 727–728. Its unavailability to federal courts, and the absence of any other sanctions for the disobedience of surrender orders, are in themselves factors which point away from the conclusion that the kind of power traditionally used to assure respect for a court's process should be found wanting in this one instance.

The subsequent development of the federal contempt power lends no support to the petitioners' position, for the significance of the Act of 1831, 4 Stat. 487, 488, lies quite in the opposite direction. Sentiment for passage of that Act arose out of the impeachment proceedings instituted against Judge James H. Peck because of his conviction and punishment for criminal contempt of a lawyer who had published an article critical of a decision of the judge then on appeal. Although it is true that the Act marks the first congressional step to curtail the contempt powers of the federal courts, the important thing to note is that the area of curtailment related not to punishment for disobedience of court orders but to punishment for conduct of the kind that had provoked Judge Peck's controversial action. As to such conduct, the 1831 Act confined the summary power of punishment to ". . . misbehaviour of any person . . . in the presence of the . . . courts, or so near thereto as to obstruct the administration of justice . . . ." The cases in this Court which have curbed the exercise of the contempt power by federal courts have concerned this clause, as found in statutory successors to the Act of 1831 including subdivision (1) of present 18 U. S. C. § 401, or a further clause in the Act

and its successors dealing with misbehavior of court "officers," now found in subdivision (2) of § 401.[4]

In contrast to the judicial restrictions imposed on the contempt power exercisable under the clauses now found in subdivisions (1) and (2) of § 401, we find no case suggesting that subdivision (3) of § 401, before us here, is open to any but its obvious meaning. This clause also finds its statutory source in the Act of 1831, which first made explicit the authority of federal courts to punish for conduct of the kind involved in this case by providing that the contempt power should extend to ". . . disobedience or resistance . . . to any lawful writ, process, order, rule, decree, or command . . ." of a federal court. Particularly in the absence of any showing that the old practice of outlawry was ever brought to the attention of Congress, there is no warrant for engrafting upon this unambiguous clause a dubious exception to the English contempt power stemming from this practice. Although the 1831 Act no doubt incorporated many of the concepts of the English common law, its legislative history indicates that Congress sought to define independently the contempt powers of federal courts rather than to have the Act simply reflect all the oddities of early English practice. The House Committee which reported the bill had been directed "to inquire into the expediency of *defining* by statute all offences which may be punished as contempts of . . ." federal courts. 7 Cong. Deb., 21st Cong., 2d Sess. (Gale's & Seaton's Reg.), pp. 560–561. (Italics added.) See Frankfurter and Landis, Power to Regulate Contempts, 37 Harv. L. Rev. 1010, 1024–1028.

---

[4] See, *e. g.*, *In re Michael*, 326 U. S. 224, *Nye* v. *United States*, 313 U. S. 33, and *Ex parte Hudgings*, 249 U. S. 378, all concerning the predecessor statutes to present § 401 (1), which relates to misbehavior in court or so near thereto as to obstruct the administration of justice, and *Cammer* v. *United States*, 350 U. S. 399, arising under § 401 (2), which deals with misbehavior of court officers in their official transactions.

Entirely apart from the historical argument, there are no reasons of policy suggesting a need for limitation of the contempt power in this situation. As the present cases evidence, the issuance of a bench warrant and the forfeiture of bail following flight have generally proved inadequate to dissuade defendants from defying court orders. See Willoughby, Principles of Judicial Administration (1929), 561–566. At the time these contempts were committed bail-jumping itself was not a criminal offense, and considerations in past decisions limiting the scope of the contempt power where the conduct deemed to constitute a contempt was also punishable as a substantive crime are not here relevant. Cf. *Ex parte Hudgings,* 249 U. S. 378, 382. There is small justification for permitting a defendant the assurance that his only risk in disobeying a surrender order is the forfeiture of a known sum of money, particularly when such forfeiture may result in injury only to a bail surety.

It may be true, as petitioners state, that this case and those of the other absconding *Dennis* defendants, *United States* v. *Thompson,* 214 F. 2d 545; *United States* v. *Hall,* 198 F. 2d 726, provide the first instances where a federal court has exercised the contempt power for disobedience of a surrender order. But the power to punish for willful disobedience of a court order, once found to exist, cannot be said to have atrophied by disuse in this particular instance. Indeed, when Congress in 1954 made bail-jumping a crime in 18 U. S. C. § 3146, it expressly preserved the contempt power in this very situation. We find support in neither history nor policy to carve out so singular an exception from the clear meaning of § 401 (3).

II.

Petitioners contend that the evidence was insufficient to support their contempt convictions, in that it failed to establish beyond a reasonable doubt their knowledge

of the existence of the surrender order. The Court of Appeals did not address itself to this contention, considering the issue foreclosed by its prior decisions in the *Thompson* and *Hall* cases, *supra,* where the evidence as to those other two *Dennis* defendants who were convicted of similar criminal contempts was identical with that involved here, except as to the circumstances of their ultimate apprehension.

In this Court, petitioners interpret the District Court's opinion to rest the contempt convictions on alternative theories: (a) that the petitioners had actual knowledge of the issuance of the July 2 surrender order, or (b) that they at least had notice of its prospective issuance and hence were chargeable with knowledge that it was in fact issued. But we find no such dual aspect to the District Court's decision, which rested solely on findings that, beyond a reasonable doubt, Green "knowingly disobeyed" the surrender order and Winston absented himself "with knowledge" of the order. Since we are satisfied that the record supports these findings, we need not consider whether mere notice of the prospective issuance of the order, cf. *Pettibone* v. *United States,* 148 U. S. 197, 206–207, would be sufficient to sustain these convictions on the theory that petitioners were chargeable as a matter of law with notice that it was later issued.

The evidence for the Government, there being none offered by the defense, related to three time intervals: (1) the period up to June 28, 1951; (2) the four-day interval between June 28, when the proposed surrender order was served on counsel with the notice of settlement, and July 2, when the surrender order was signed; and (3) the period ending with the surrender of the petitioners—February 27, 1956, in the case of Green, and March 5, 1956, in the case of Winston.

1. The judgments of conviction upon the conspiracy indictment under the Smith Act were entered, and the

petitioners were sentenced, on October 21, 1949. On November 2, 1949, the Court of Appeals admitted the petitioners to bail pending appeal upon separate recognizances, signed by each petitioner on November 3, by which each undertook, among other things, to

> "surrender himself in execution of the judgment and sentence appealed from *upon such day as the District Court* of the United States for the Southern District of New York *may direct,* if the judgment and sentence appealed from shall be affirmed . . . ." (Italics added.)

Following the Court of Appeals' affirmance of the conspiracy convictions on August 1, 1950, 183 F. 2d 201, Mr. Justice Jackson, as Circuit Justice, continued petitioners' bail on September 25, 1950, pending review of the convictions by this Court. 184 F. 2d 280. This Court, as noted above, affirmed the conspiracy convictions on June 4, 1951, and on June 22, 1951, Mr. Justice Jackson denied a stay of the Court's mandate.

2. On Thursday, June 28, 1951, one of the counsel in the *Dennis* case accepted service on behalf of all the defendants, including petitioners, of a proposed order on mandate requiring the defendants to "personally surrender to the United States Marshal for the Southern District of New York . . . on the 2nd day of July, 1951, at 11:05" a. m., together with a notice stating that the proposed order would be presented to the District Court "for settlement and signature" at 10 a. m. on that day.[5]

---

[5] This order can hardly be interpreted otherwise than as imposing on the *Dennis* defendants from the time that the order became effective on July 2 a continuing obligation to surrender promptly upon becoming aware of its effectiveness. The printed record before us indicates that the proposed order given counsel on June 28 read precisely in the form quoted in the text above, but the original copy of the order reveals that the time for surrender was first written as

It appears from the testimony of this same counsel and another *Dennis* counsel that on the following day, Friday, June 29, an unsuccessful request was made to the United States Attorney and the District Court to postpone the defendants' surrender until after the July 4 holiday; that on the same day these lawyers told the petitioners and the other *Dennis* defendants that they must be in court on Monday, July 2; and that petitioners assured counsel of their appearance on that day.[6] On

---

"10:30" a. m., and at some later time prior to the time the order was signed was changed to read "11.05." Petitioners make no issue of this discrepancy, and we attach no significance to it.

[6] The events of June 29, 1951, were testified to in court on July 3, 1951, by petitioners' counsel, Messrs. Sacher and Isserman. By stipulation, a transcript of this testimony was introduced into evidence during the contempt proceedings in the District Court, and excerpts from the testimony follow:

The Court: "Now, you did make a statement last week that you will have the four defendants [Green, Winston, Hall and Thompson] in court, as I recall, on Monday [July 2].

"Mr. Sacher: I said that all of them would be here.

. . . . . .

"The Court: And as you know, four of them were not here on Monday. Of course, you may be bound by some obligation of attorney and client, but are you able to give the Court any information as to their present whereabouts?

"Mr. Sacher: Your Honor, I should consider myself not bound by any obligation to withhold any information that I might have, and I give your Honor my assurance that I have no knowledge, I have no basis of knowledge as to their present whereabouts or where they might have gone.

"The Court: Where did you last see these four defendants?

. . . . . .

"Mr. Sacher: . . . I am not certain about Thompson, but I am fairly certain that I saw the three I mentioned sometime on Friday [June 29] at 35 East Twelfth Street.

"The Court: Did you tell them at that time that their presence was required in court yesterday morning?

"Mr. Sacher: Definitely. As a matter of fact I advised that because I think I saw them among other defendants after I had

July 2 all of the *Dennis* defendants surrendered, except the two petitioners, and Hall and Thompson. The surrender order was signed, bench warrants were issued for the arrest of these four, and the proceedings were adjourned to the following day, July 3.

3. On July 3 the names of the petitioners were called again in open court, and after interrogating counsel as to their disappearance (see note 6, *supra*), the court declared their bail forfeited. The petitioners remained in hiding until their eventual surrender, some four and a half years later. Prior to their respective surrenders in February and March, 1956, Green and Winston issued press releases announcing their intention to surrender and "enter prison." [7] When he turned up on the steps of the

---

been here on Friday, your Honor, and had made these motions [apparently referring to counsel's efforts to postpone the surrender date until after July 4], and therefore I advised that they all should be present and I was assured they would be.

. . . . . .

"The Court: Mr. Isserman, do you know where any of these defendants are?

"Mr. Isserman: I might say to the Court that I would not rest on privilege in this situation at all. I have no knowledge of the present whereabouts of any of these defendants. . . . I remember, Green being my client, I remember distinctly that I saw him on that day [June 29] and received from him the assurance that he would be here Monday morning [July 2]."

[7] Excerpts from Green's press release:

"On Monday, February 27th at 12 noon I shall cease being a *fugitive* from injustice and instead become its prisoner. At that time, I shall appear at Foley Square. . . . The course I chose five years ago was not dictated by personal considerations. In many ways it was *harsher than that of imprisonment*. . . . [I]t seemed incumbent upon me to resist that trend [i. e. to 'an American brand of fascism'] with every ounce of strength I possessed. Some could do so by *going to jail;* others by not. . . . *I enter prison* with head high and conscience clear." (Italics added.)

Excerpts from Winston's press release:

"Reiterating my innocence, and protesting the flagrant miscarriage

courthouse, Green also responded to certain questions put by reporters and stated, among other things, that he intended "to go to the United States Marshal's office," this being a requirement found only in the surrender order itself. Winston made a similar statement in his press release.

In summary, one day after counsel was served on June 28 with the proposed order calling for petitioners' surrender on July 2, together with the notice stating that the order would also be presented for the court's signature on that day, petitioners were unequivocally notified by counsel that their presence in court was required on July 2. From these undisputed facts, coupled with petitioners' disappearance, it was certainly permissible for the District Court to infer that petitioners knew of the proposed surrender order, of the failure of counsel's efforts on June 29 to postpone the surrender date, and of the court's intention to sign the order on July 2. We need not decide whether these facts alone would sustain the finding that petitioners knew of the issuance of the surrender order on July 2 as planned, for unquestionably as background they furnished significant support for the District Court's ultimate finding that petitioners' statements to the press at the time of their eventual surrender in 1956 (see note 7, *supra*) indicated their knowledge of the issuance of the order, a finding strengthened by the fact that the recognizance admitting the petitioners to bail obligated petitioners to surrender for service of sentence only when so directed by the District Court.

No doubt some of this evidence lent itself to conflicting inferences, but those favorable to the petitioners were, in our view, not of such strength as to compel the trier of

---

of justice in my case, *I now enter prison* . . . . I shall appear this coming Monday, March 5th, 12:30 p. m., at the U. S. Marshal's Office in Foley Square." (Italics added.)

the facts to reject alternative unfavorable inferences. Our duty as an appellate court is to assess the evidence as a whole under the rigorous standards governing criminal trials, rather than to test by those standards each item of evidence relied on by the District Court. 9 Wigmore, Evidence (3d ed. 1940), § 2497; 1 Wharton, Criminal Evidence (12th ed. 1955), § 16. So viewing the entire record, we think the District Court was justified in finding that the evidence established, beyond a reasonable doubt, petitioners' knowing violations of the surrender order.

III.

We deal here with petitioners' claim that the District Court was without power to sentence them to imprisonment for more than one year.

Section 17 of the Judiciary Act of 1789 confirmed the power of federal courts ". . . to punish by fine or imprisonment, at the discretion of said courts . . ." certain contempts. The Act of 1831 simply referred to the power to "inflict summary punishments," and present § 401 contains substantially the above language of the Act of 1789. Petitioners contend that despite the provision for "discretion," the power to punish under § 401 is limited to one year by certain sections of the Clayton Act of 1914, 38 Stat. 730, 738–740. In any event, we are urged to read such a limitation into § 401 in order to avoid constitutional difficulties which, it is said, would otherwise confront us.

We turn first to the argument based on the Clayton Act. Sections 21 and 22 of that Act provided that certain rights not traditionally accorded persons charged with contempt, notably the right to trial by jury, should be granted in certain classes of criminal contempts, and that persons tried under these procedures were not subject to a fine of more than $1,000 or imprisonment for longer

than six months.[8] Section 24 of the Act made these provisions inapplicable to other categories of contempts, including the contempt for which the petitioners here have been convicted,[9] and provided that such excluded categories of contempts were to be punished "in conformity to the *usages* at law and in equity *now prevailing.*" (Italics added.) In the recodification of 1948 the foregoing provisions of the Clayton Act were substantially re-enacted in § 402 [10] of the present contempt statute, and the above-quoted clause now reads: "in conformity to the prevailing usages at law."

Petitioners' argument is that the purpose and effect of the "usages . . . now prevailing" language of § 24 of the Clayton Act was to freeze into federal contempt law the sentencing practices of federal courts, which up to that time appear never to have imposed a contempt sentence of more than one year.[11] These practices, suggest peti-

---

[8] The substance of §§ 21 and 22 was that one charged with the commission of acts constituting willful disobedience to a lawful court order could demand a trial by jury if (§ 21) ". . . the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed . . . ." Section 22 provided that the jury trial ". . . shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information."

[9] This section excluded from the Act, *inter alia,* contempts committed by disobedience to any court order entered in any suit or action ". . . brought or prosecuted in the name of, or on behalf of, the United States . . . ."

[10] At the present time, 18 U. S. C. § 402 contains the definitional provision formerly in § 21 of the Clayton Act and expressly refers to 18 U. S. C. § 3691, which provides that contempts falling within this definition are subject to trial by jury.

[11] Petitioners have shown us no federal decision which intimates any constitutional or common-law restriction on the *power* of federal courts to sentence for over one year. As stated by the Court of Appeals in the present case, 241 F. 2d, at 634, ". . . there is not in

tioners, reflect the unarticulated belief of federal courts that criminal contempts are not infamous crimes and hence not subject to punishment by imprisonment for over one year; [12] this belief is said to derive from the constitutional considerations to which we shortly turn. In view of this suggested effect of § 24, petitioners would have us read the "discretion" vested in federal courts by § 401 as referring exclusively to the choice between sentencing to fine or imprisonment, or in any event as subject to the unexpressed limitation of one year's imprisonment.

Particularly in the context of the rest of the Clayton Act of 1914 we cannot read the "usages . . . now prevailing" clause of § 24 as incorporating into the statute the sentencing practices up to that date. In § 22 the statute specifically restricts to six months the maximum term of imprisonment which may be imposed for commission of any of the contempts described in § 21. Had Congress also intended to restrict the term of imprisonment for contempts excluded from the operation of the Act by § 24, it is difficult to understand why it did not make explicit its intention, as it did in § 22, rather than so subtly express its purpose by proceeding in the devious manner attributed to it by the petitioners. Further, there is no evidence that the past sentencing practices of the courts were ever brought to the attention of Congress. That the federal courts themselves have not considered their sentencing power to be restricted by § 24 of the Clayton Act or by § 402 of the present contempt statute is indicated by the fact that in at least nine cases subsequent to 1914, contempt convictions carrying sentences of more than

---

the books a syllable of recognition of any such supposed limitation." Under English law contempt sentences were not subject to any statutory limit. See Fox, Eccentricities of the Law of Contempt of Court, 36 L. Q. Rev. 394, 398.

[12] See p. 182, *infra*.

one year have been affirmed by four different Courts of Appeals and on one occasion by this Court.[13]

Such of the legislative history as is germane here argues against the petitioners and strengthens our conclusions that the "usages . . . now prevailing" clause of § 24 of the Clayton Act did no more than emphasize that contempts other than those specified in § 21 were to be tried under familiar contempt *procedures,* that is, among other things, by the court rather than a jury. The House Report accompanying the bill which was substantially enacted as §§ 21, 22 and 24 of the Clayton Act referred to the provisions later forming these sections as dealing ". . . entirely with questions of Federal procedure relating to injunctions and contempts committed without the presence of the court." H. R. Rep. No. 627, 63d Cong., 2d Sess. 21. There is no evidence of a broader purpose to enact so substantial a rule of substantive law encompassing all criminal contempts.

We are nevertheless urged to read into § 401 a one-year limitation on the sentencing power in order to avoid constitutional issues which the petitioners deem present in the absence of such a restriction. But in view of what we have shown, the section's provision that a federal court may punish *"at its discretion"* the enumerated classes of contempts cannot reasonably be read to allow a court merely the choice between fines and imprisonment. We think the Court of Appeals correctly said: "The phrase 'at its discretion,' does not mean that the court

---

[13] *Hill* v. *United States ex rel. Weiner,* 300 U. S. 105; *United States* v. *Brown,* 247 F. 2d 332 (2d Cir.); *Lopiparo* v. *United States,* 216 F. 2d 87 (8th Cir.); *United States* v. *Thompson,* 214 F. 2d 545 (2d Cir.); *United States* v. *Hall,* 198 F. 2d 726 (2d Cir.); *United States ex rel. Brown* v. *Lederer,* 140 F. 2d 136 (7th Cir.); *Warring* v. *Huff,* 74 U. S. App. D. C. 302, 122 F. 2d 641 (D. C. Cir.); *Conley* v. *United States,* 59 F. 2d 929 (8th Cir.); *Creekmore* v. *United States,* 237 F. 743 (8th Cir.).

must choose between fine and imprisonment; the word 'or,' itself provides as much and the words, if so construed, would have been redundant. The term of imprisonment is to be as much in the court's discretion as the fine." 241 F. 2d, at 634.

We therefore turn to petitioners' constitutional arguments. The claim is that proceedings for criminal contempts, if contempts are subject to prison terms of more than one year, must be based on grand jury indictments under the clause of the Fifth Amendment providing: "No person shall be held to answer for a capital, or otherwise *infamous crime,* unless on a presentment or indictment of a Grand Jury . . . ." (Italics added.) Since an "infamous crime" within the meaning of the Amendment is one punishable by imprisonment in a penitentiary, *Mackin* v. *United States,* 117 U. S. 348, and since imprisonment in a penitentiary can be imposed only if a crime is subject to imprisonment exceeding one year, 18 U. S. C. § 4083, petitioners assert that criminal contempts if subject to such punishment are infamous crimes under the Amendment.

But this assertion cannot be considered in isolation from the general status of contempts under the Constitution, whether subject to "infamous" punishment or not. The statements of this Court in a long and unbroken line of decisions involving contempts ranging from misbehavior in court to disobedience of court orders establish beyond peradventure that criminal contempts are not subject to jury trial as a matter of constitutional right.[14]

[14] The following are the major opinions of this Court which have discussed the relationship between criminal contempts and jury trial and have concluded or assumed that criminal contempts are not subject to jury trial under Art. III, § 2, or the Sixth Amendment: *Savin, Petitioner,* 131 U. S. 267, 278; *Eilenbecker* v. *District Court of Plymouth County,* 134 U. S. 31, 36–39; *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 489; *In re Debs,* 158 U. S. 564, 594–596; *Bessette* v. *W. B. Conkey Co.,* 194 U. S. 324, 336–337;

Although appearing to recognize this, petitioners nevertheless point out that punishment for criminal contempts cannot in any practical sense be distinguished from punishment for substantive crimes, see *Gompers* v. *United States,* 233 U. S. 604, 610, and that contempt proceedings have traditionally been surrounded with many of the protections available in a criminal trial.[15] But this Court has never suggested that such protections included the right to grand jury indictment. Cf. *Savin, Petitioner,* 131 U. S. 267, 278; *Gompers* v. *United States, supra,* at 612. And of course the summary procedures followed by English courts prior to adoption of the Constitution in dealing with many contempts of court did not embrace the use of either grand or petit jury. See 4 Blackstone Commentaries 283–287. It would indeed be anomalous to conclude that contempts subject to sentences of imprisonment for over one year are "infamous

---

Gompers v. *United States,* 233 U. S. 604, 610–611; *Ex parte Hudgings,* 249 U. S. 378, 383; *Michaelson* v. *United States,* 266 U. S. 42, 67; *United States* v. *United Mine Workers,* 330 U. S. 258, 298. Although the statements contained in these cases, with few exceptions, are broadly phrased and do not refer to particular categories of criminal contempts, several of the cases involved review of contempt convictions arising out of disobedience to court orders. See in particular *In re Debs, Gompers* v. *United States,* and *United States* v. *United Mine Workers.*

For more general statements of the nature of the contempt power and its indispensability to federal courts, see *United States* v. *Hudson,* 7 Cranch 32, 34; *Ex parte Robinson,* 19 Wall. 505, 510; *Ex parte Terry,* 128 U. S. 289, 302–304; *Bessette* v. *W. B. Conkey Co., supra,* at 326; *Myers* v. *United States,* 264 U. S. 95, 103; *Michaelson* v. *United States, supra,* at 65–66.

[15] See, *e. g., Cooke* v. *United States,* 267 U. S. 517, 537 (compulsory process and assistance of counsel); *Gompers* v. *United States,* 233 U. S. 604, 611–612 (benefit of a statute of limitations generally governing crimes); *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 444 (proof of guilt beyond a reasonable doubt and freedom from compulsion to testify).

crimes" under the Fifth Amendment although they are neither "crimes" nor "criminal prosecutions" for the purpose of jury trial within the meaning of Art. III, § 2,[16] and the Sixth Amendment.[17]

We are told however that the decisions of this Court denying the right to jury trial in criminal contempt proceedings are based upon an "historical error" reflecting a misunderstanding as to the scope of the power of English courts at the early common law to try summarily for contempts, and that this error should not here be extended to a denial of the right to grand jury. But the more recent historical research into English contempt practices predating the adoption of our Constitution reveals no such clear error and indicates if anything that the precise nature of those practices is shrouded in much obscurity. And whatever the breadth of the historical error said by contemporary scholarship to have been committed by English courts of the late Seventeenth and Eighteenth Centuries in their interpretation of English precedents involving the trials of contempts of court, it at least seems clear that English practice by the early Eighteenth Century comprehended the use of summary powers of conviction by courts to punish for a variety of contempts committed within and outside court.[18] Such indeed is the

---

[16] "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."

[17] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

[18] Petitioners derive their argument as to historical error from the writings of Sir John Charles Fox. However, Fox's major effort was to show that a statement in an unpublished opinion by Wilmot, J., in *The King* v. *Almon* (1765), to the effect that summary punishment for contempts committed out of court stood upon "immemorial usage," was based on an erroneous interpretation of earlier law as applied to the case before him, namely, *contempt by libel on the*

statement of English law of this period found in Blackstone, *supra*, p. 184, who explicitly recognized use of a summary power by English courts to deal with disobedience of court process. It is noteworthy that the Judiciary Act of 1789, first attempting a definition of the contempt power, was enacted by a Congress with a Judiciary Committee including members of the recent Constitutional Convention, who no doubt shared the prevailing views in the American Colonies of English law as expressed in Blackstone. See *Ex parte Burr*, 4 Fed. Cas. 791, 797 (No. 2,186). Against this historical background, this Court has never deviated from the view that the constitutional guarantee of trial by jury for "crimes" and "criminal prosecutions" was not intended to reach to criminal contempts. And indeed beginning with the Judiciary Act of 1789, Congress has

---

court by a stranger to court proceedings. See Fox, *The King* v. *Almon* (Parts I and II), 24 L. Q. Rev. 184, 266; Fox, The History of Contempt of Court (1927), 5–43. That contempts committed in the view of the court were at an early date dealt with summarily is not disputed by Fox. The History of Contempt of Court, *supra*, at 50. Insofar as Fox discusses contempts out of court by disobedience to court orders, it is not clear whether the author contends that such contempts were tried at early English law under summary procedures only for *civil coercive* purposes, or for *criminal, punitive* purposes as well. Cf. *The King* v. *Almon*, *supra*, at 188, 277–278; and Fox, The Summary Process to Punish Contempt (Parts I and II), 25 L. Q. Rev. 238, 354, with *The King* v. *Almon*, at 195, 276; The Summary Process to Punish Contempt, at 249; and The History of Contempt of Court, *supra*, at 108–110. See also Beale, Contempt of Court, 21 Harv. L. Rev. 161, 164, 169–171. Fox concludes that by the mid-Seventeenth or early Eighteenth Century, a variety of contempts committed outside of court were subject to punishment by the exercise of a court's summary jurisdiction. The Summary Process to Punish Contempts, *supra*, at 252, 366, 370–371. It appears that under present English law disobedience to court process is but one of the many categories of contempts of court which are dealt with summarily. 8 Halsbury, Laws of England (3d ed. 1954), 3–4, 25–26; 1 Russell, Crime (10th ed. 1950), 329–330.

consistently preserved the summary nature of the contempt power in the Act of 1831 and its statutory successors, departing from this traditional notion only in specific instances where it has provided for jury trial for certain categories of contempt.[19]

We do not write upon a clean slate. The principle that criminal contempts of court are not required to be tried by a jury under Article III or the Sixth Amendment is firmly rooted in our traditions. Indeed, the petitioners themselves have not contended that they were entitled to a jury trial. By the same token it is clear that criminal contempts, although subject, as we have held, to sentences of imprisonment exceeding one year, need not be prosecuted by indictment under the Fifth Amendment. In various respects, such as the absence of a statutory limitation of the amount of a fine or the length of a prison sentence which may be imposed for their commission, criminal contempts have always differed from the usual statutory crime under federal law. As to trial by jury and indictment by grand jury, they possess a unique character under the Constitution.[20]

IV.

Petitioners contend that the three-year sentences imposed upon them constituted an abuse of discretion on the part of the District Court.

---

[19] See 18 U. S. C. § 402, *supra*, note 10; 18 U. S. C. § 3692 (jury trial for contempts based on violation of injunctions in cases involving labor disputes); § 151, 71 Stat. 638, 42 U. S. C. A. § 1995 (right to jury trial under provisions of the Civil Rights Act of 1957 in limited circumstances in cases of criminal contempts).

[20] This holding makes unnecessary consideration of petitioners' argument based on Rule 7 of the Federal Rules of Criminal Procedure, which falls with their constitutional argument. Rule 7 refers to criminal offenses, that is "crimes" in the constitutional sense. Criminal contempts are governed by Rule 42.

We take this occasion to reiterate our view that in the areas where Congress has not seen fit to impose limitations on the sentencing power for contempts the district courts have a special duty to exercise such an extraordinary power with the utmost sense of responsibility and circumspection. The "discretion" to punish vested in the District Courts by § 401 is not an unbridled discretion. Appellate courts have here a special responsibility for determining that the power is not abused, to be exercised if necessary by revising themselves the sentences imposed. This Court has in past cases taken pains to emphasize its concern with the use to which the sentencing power has occasionally been put, both by remanding for reconsideration of contempt sentences in light of factors it deemed important, see *Yates* v. *United States,* 355 U. S. 66; *Nilva* v. *United States,* 352 U. S. 385, and by itself modifying such sentences. See *United States* v. *United Mine Workers,* 330 U. S. 258. The answer to those who see in the contempt power a potential instrument of oppression lies in assurance of its careful use and supervision, not in imposition of artificial limitations on the power.

It is in this light that we have considered the claim that the sentences here were so excessive as to amount to an abuse of discretion. We are led to reject the claim under the facts of this case for three reasons. First, the contempt here was by any standards a most egregious one. Petitioners had been accorded a fair trial on the conspiracy charges against them and had been granted bail pending review of their convictions by the Court of Appeals and this Court. Nevertheless they absconded, and over four and a half years of hiding culminated not in a belated recognition of the authority of the court, but in petitioners' reassertion of justification for disobeying the surrender order. Second, comparing these sentences with those imposed on the other fugitives in the *Dennis*

case, the sentences here are shorter by a year than that upheld in the *Thompson* case, and no longer than that inflicted in the *Hall* case. It is true that Hall and Thompson were apprehended, but the record shows that the District Court took into account the fact that the surrender of these petitioners was voluntary; there is the further factor that the period during which petitioners remained fugitives was longer than that in either the *Hall* or *Thompson* case. Third, the sentences were well within the maximum five-year imprisonment for bail-jumping provided now by 18 U. S. C. § 3146, a statute in which Congress saw fit expressly to preserve the contempt power without enacting any limitation on contempt sentences.

In these circumstances we cannot say that the sentences imposed were beyond the bounds of the reasonable exercise of the District Court's discretion.

Affirmed.

MR. JUSTICE FRANKFURTER, concurring.

In joining the Court's opinion I deem it appropriate to add a few observations. Law is a social organism, and evolution operates in the sociological domain no less than in the biological. The vitality and therefore validity of law is not arrested by the circumstances of its origin. What Magna Carta has become is very different indeed from the immediate objects of the barons at Runnymede. The fact that scholarship has shown that historical assumptions regarding the procedure for punishment of contempt of court were ill-founded, hardly wipes out a century and a half of the legislative and judicial history of federal law based on such assumptions. Moreover, the most authoritative student of the history of contempt of court has impressively shown that "from the reign of Edward I it was established that the Court had power to punish summarily contempt committed . . . in the actual view of the Court." Fox, History of Contempt of Court, 49–52.

Whatever the conflicting views of scholars in construing more or less dubious manuscripts of the Fourteenth Century, what is indisputable is that from the foundation of the United States the constitutionality of the power to punish for contempt without the intervention of a jury has not been doubted. The First Judiciary Act conferred such a power on the federal courts in the very act of their establishment, 1 Stat. 73, 83, and of the Judiciary Committee of eight that reported the bill to the Senate, five members including the chairman, Senator, later to be Chief Justice, Ellsworth, had been delegates to the Constitutional Convention.[1] In the First Congress itself no less than nineteen members, including Madison who contemporaneously introduced the Bill of Rights, had been delegates to the Convention. And when an abuse under this power manifested itself, and led Congress to define more explicitly the summary power vested in the courts, it did not remotely deny the existence of the power but merely defined the conditions for its exercise more clearly, in an Act "declaratory of the law concerning contempts of court." Act of Mar. 2, 1831, 4 Stat. 487. Although the judge who had misused the power was impeached, and Congress defined the power more clearly, neither the proponents of the reform nor Congress in its corrective legislation suggested that the established law be changed by making the jury part of the procedure for the punishment of criminal contempt. This is more significant in that such a proposal had only recently been put before Congress as part of the draft penal code of Edward Livingston of Louisiana.

Nor has the constitutionality of the power been doubted by this Court throughout its existence. In at least two score cases in this Court, not to mention the vast mass of

---

[1] Oliver Ellsworth, Chairman, William Paterson, Caleb Strong, Richard Bassett, William Few. 1 Annals of Cong. 17.

decisions in the lower federal courts, the power to punish summarily has been accepted without question.[2] It is

[2] *Ex parte Kearney,* 7 Wheat. 38; *In re Chiles,* 22 Wall. 157; *Ex parte Terry,* 128 U. S. 289; *In re Savin,* 131 U. S. 267; *In re Cuddy,* 131 U. S. 280; *In re Swan,* 150 U. S. 637; *In re Debs,* 158 U. S. 564; *Brown* v. *Walker,* 161 U. S. 591; *In re Lennon,* 166 U. S. 548; *Bessette* v. *W. B. Conkey Co.,* 194 U. S. 324; *Nelson* v. *United States,* 201 U. S. 92; *United States* v. *Shipp,* 203 U. S. 563, 214 U. S. 386; *Ex parte Young,* 209 U. S. 123; *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402; *Blair* v. *United States,* 250 U. S. 273; *Craig* v. *Hecht,* 263 U. S. 255; *Brown* v. *United States,* 276 U. S. 134; *Sinclair* v. *United States,* 279 U. S. 749; *Blackmer* v. *United States,* 284 U. S. 421; *Clark* v. *United States,* 289 U. S. 1; *United States* v. *United Mine Workers,* 330 U. S. 258; *Rogers* v. *United States,* 340 U. S. 367; *Sacher* v. *United States,* 343 U. S. 1; *Nilva* v. *United States,* 352 U. S. 385; *Yates* v. *United States,* 355 U. S. 66.

In the following cases the Court, although refusing to sustain contempt convictions for other reasons, took for granted trial by the court without a jury: *Ex parte Robinson,* 19 Wall. 505; *In re Burrus,* 136 U. S. 586; *Wilson* v. *North Carolina,* 169 U. S. 586; *In re Watts,* 190 U. S. 1; *Baglin* v. *Cusenier Co.,* 221 U. S. 580; *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418; *Ex parte Hudgings,* 249 U. S. 378; *Cooke* v. *United States,* 267 U. S. 517; *Nye* v. *United States,* 313 U. S. 33; *Pendergast* v. *United States,* 317 U. S. 412; *United States* v. *White,* 322 U. S. 694; *In re Michael,* 326 U. S. 224; *Blau* v. *United States,* 340 U. S. 332; *Hoffman* v. *United States,* 341 U. S. 479; *Cammer* v. *United States,* 350 U. S. 399.

The materials on the basis of which this unbroken course of adjudication is proposed to be reversed have in fact been known in this country for almost half a century and were available to the Justices who participated in many of these decisions. The first of the studies of criminal contempt by Sir John Charles Fox, *The King* v. *Almon,* 24 Law Q. Rev. 184, appeared in 1908, and the results of the research of Solly-Flood were published as early as 1886. The Story of Prince Henry of Monmouth and Chief-Justice Gascoign, 3 Transactions of the Royal Historical Society (N. S.) 47. Mr. Justice Holmes, writing for the Court in *Gompers* v. *United States,* 233 U. S. 604 (1914), noted the work of Solly-Flood. He observed that: "It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses, because trial by jury as it has been gradually worked out and fought out has been thought not to extend to them as a matter of constitutional right. These

relevant to call the roll of the Justices, not including those now sitting, who thus sustained the exercise of this power:

Washington	Gray	Pitney
Marshall	Blatchford	McReynolds
Johnson	L. Q. C. Lamar	Brandeis
Livingston	Fuller	Clarke
Todd	Brewer	Taft
Story	Brown	Sutherland
Duval	Shiras	Butler
Clifford	H. E. Jackson	Sanford
Swayne	White	Stone
Miller	Peckham	Roberts
Davis	McKenna	Cardozo
Field	Holmes	Reed
Strong	Day	Murphy
Bradley	Moody	R. H. Jackson
Hunt	Lurton	Rutledge
Waite	Hughes	Vinson
Harlan	Van Devanter	Minton [3]
Matthews	J. R. Lamar	

To be sure, it is never too late for this Court to correct a misconception in an occasional decision, even on a rare occasion to change a rule of law that may have long persisted but also have long been questioned and only fluctuatingly applied. To say that everybody on the Court

---

contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure, 3 Transactions of the Royal Historical Society, N. S. p. 147 (1885), and that at least in England it seems that they still may be and preferably are tried in that way." 233 U. S., at 610–611.

[3] Beginning with *Ex parte Robinson,* 19 Wall. 505, and *In re Chiles,* 22 Wall. 157, this list includes every Justice who sat on the Court since 1874, with the exception of Mr. Justice Woods (1881–1887), and Mr. Justice Byrnes (1941–1942).

has been wrong for 150 years and that that which has been deemed part of the bone and sinew of the law should now be extirpated is quite another thing. Decision-making is not a mechanical process, but neither is this Court an originating lawmaker. The admonition of Mr. Justice Brandeis that we are not a third branch of the Legislature should never be disregarded. Congress has seen fit from time to time to qualify the power of summary punishment for contempt that it gave the federal courts in 1789 by requiring in explicitly defined situations that a jury be associated with the court in determining whether there has been a contempt. See, *e. g.*, 18 U. S. C. § 3691; Civil Rights Act of 1957, 71 Stat. 634, 638, 42 U. S. C. A. § 1995. It is for Congress to extend this participation of the jury, whenever it sees fit to do so, to other instances of the exercise of the power to punish for contempt. It is not for this Court to fashion a wholly novel constitutional doctrine that would require such participation whatever Congress may think on the matter, and in the teeth of an unbroken legislative and judicial history from the foundation of the Nation.[4]

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

The power of a judge to inflict punishment for criminal contempt by means of a summary proceeding stands as an anomaly in the law.[1] In my judgment the time has

[4] "We do not write on a blank sheet. The Court has its jurisprudence, the helpful repository of the deliberate and expressed convictions of generations of sincere minds addressing themselves to exposition and decision, not with the freedom of casual critics or even of studious commentators, but under the pressure and within the limits of a definite official responsibility." Chief Justice Hughes speaking on the occasion of the 150th anniversary of the Court. 309 U. S. XIV.

[1] The term "summary proceeding" (or "summary trial") is used in its ordinary sense to refer to a "form of trial in which the ancient established course of legal proceedings is disregarded, especially in

come for a fundamental and searching reconsideration of the validity of this power which has aptly been characterized by a State Supreme Court as, "perhaps, nearest akin to despotic power of any power existing under our form of government." [2] Even though this extraordinary authority first slipped into the law as a very limited and insignificant thing, it has relentlessly swollen, at the hands of not unwilling judges, until it has become a drastic and pervasive mode of administering criminal justice usurping our regular constitutional methods of trying those charged with offenses against society. Therefore to me this case involves basic questions of the highest importance far transcending its particular facts. But the specific facts do provide a striking example of how the great procedural safeguards erected by the Bill of Rights are now easily evaded by the ever-ready and boundless expedients of a judicial decree and a summary contempt proceeding.

I would reject those precedents which have held that the federal courts can punish an alleged violation outside the courtroom of their decrees by means of a summary trial, at least as long as they can punish by severe prison sentences or fines as they now can and do.[3] I

---

the matter of trial by jury, and, in the case of the heavier crimes, presentment by a grand jury." 3 Bouvier's Law Dictionary (8th ed. 1914) 3182. Of course as the law now stands contempts committed in the presence of the judge may be punished without any hearing or trial at all, summary or otherwise. For a flagrant example see *Sacher* v. *United States*, 343 U. S. 1.

[2] *State ex rel. Ashbaugh* v. *Circuit Court*, 97 Wis. 1, 8, 72 N. W. 193, 194–195.

[3] The precedents are adequately collected in note 14 of the Court's opinion.

Much of what is said in this opinion is equally applicable to contempts committed in the presence of the court. My opposition to summary punishment for those contempts was fully set forth in my dissent in *Sacher* v. *United States*, 343 U. S. 1, 14.

would hold that the defendants here were entitled to be tried by a jury after indictment by a grand jury and in full accordance with all the procedural safeguards required by the Constitution for "all criminal prosecutions." I am convinced that the previous cases to the contrary are wrong—wholly wrong for reasons which I shall set out in this opinion.

Ordinarily it is sound policy to adhere to prior decisions but this practice has quite properly never been a blind, inflexible rule. Courts are not omniscient. Like every other human agency, they too can profit from trial and error, from experience and reflection. As others have demonstrated, the principle commonly referred to as *stare decisis* has never been thought to extend so far as to prevent the courts from correcting their own errors. Accordingly, this Court has time and time again from the very beginning reconsidered the merits of its earlier decisions even though they claimed great longevity and repeated reaffirmation. See, *e. g., Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64; *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466; *Nye* v. *United States,* 313 U. S. 33.[4] Indeed, the Court has a special responsibility where questions of constitutional law are involved to review its decisions from time to time and where compelling reasons present themselves to refuse to follow erroneous precedents; otherwise its mistakes in interpreting the Constitution are extremely difficult to alleviate and needlessly so. See *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 405

[4] "I . . . am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." Chief Justice Taney, *Passenger Cases,* 7 How. 283, 470 (dissenting opinion).

(Brandeis, J., dissenting); Douglas, Stare Decisis, 49 Col. L. Rev. 735.

If ever a group of cases called for reappraisal it seems to me that those approving summary trial of charges of criminal contempt are the ones. The early precedents which laid the groundwork for this line of authorities were decided before the actual history of the procedures used to punish contempt was brought to light, at a time when "[w]holly unfounded assumptions about 'immemorial usage' acquired a factitious authority and were made the basis of legal decisions." [5] These cases erroneously assumed that courts had always possessed the power to punish all contempts summarily and that it inhered in their very being without supporting their suppositions by authority or reason. Later cases merely cite the earlier ones in a progressive cumulation while uncritically repeating their assumptions about "immemorial usage" and "inherent necessity." [6]

---

[5] Frankfurter and Landis, Power to Regulate Contempts, 37 Harv. L. Rev. 1010, 1011.

It also seems significant that the initial decisions by this Court actually upholding the power of the federal courts to punish contempts by summary process were not made until as late as the final decades of the last century, almost a full century after the adoption of the Constitution. Since that time the power has been vigorously challenged on a number of occasions. See, *e. g., Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, 425 (dissenting opinion); *Sacher* v. *United States,* 343 U. S. 1, 14 (dissenting opinion). Within the past few years there has been a tendency on the part of this Court to restrict the substantive scope of the contempt power to narrower bounds than had been formerly thought to exist. See, *e. g., Nye* v. *United States,* 313 U. S. 33; *Bridges* v. *California,* 314 U. S. 252; *In re Michael,* 326 U. S. 224; *Cammer* v. *United States,* 350 U. S. 399. Cf. *In re Oliver,* 333 U. S. 257. In substantial part this is attributable to a deeply felt antipathy toward the arbitrary procedures now used to punish contempts.

[6] Perhaps the classic example is the much criticized decision in *In re Debs,* 158 U. S. 564. For some of the milder comment see

No justified expectations would be destroyed by the course I propose. There has been no heavy investment in reliance on the earlier cases; they do not remotely lay down rules to guide men in their commercial or property affairs. Instead they concern the manner in which persons are to be tried by the Government for their alleged crimes. Certainly in this area there is no excuse for the perpetuation of past errors, particularly errors of great continuing importance with ominous potentialities. Apparently even the majority recognizes the need for some kind of reform by engrafting the requirement that punishment for contempt must be "reasonable"—that irrepressible, vague and delusive standard which at times threatens to engulf the entire law, including the Constitution itself, in a sea of judicial discretion.[7] But this trifling amelioration does not strike at the heart of the problem and can easily come to nothing, as the majority's very approval of the grossly disproportionate sentences imposed on these defendants portends.

Before going any further, perhaps it should be emphasized that we are not at all concerned with the power of courts to impose conditional imprisonment for the purpose of compelling a person to obey a valid order. Such coercion, where the defendant carries the keys to freedom in his willingness to comply with the court's directive, is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees. See *United States* v. *United Mine Workers of America,* 330

Lewis, A Protest Against Administering Criminal Law by Injunction—The Debs Case, 42 Am. L. Reg. 879; Lewis, Strikes and Courts of Equity, 46 Am. L. Reg. 1; Dunbar, Government by Injunction, 13 L. Q. Rev. 347; Gregory, Government by Injunction, 11 Harv. L. Rev. 487.

[7] *E. g.,* see *Beauharnais* v. *Illinois,* 343 U. S. 250; *Perez* v. *Brownell, ante,* p. 44.

U. S. 258, 330–332 (dissenting and concurring opinion). Instead, at stake here is the validity of a criminal conviction for disobedience of a court order punished by a long, fixed term of imprisonment. In my judgment the distinction between conditional confinement to compel future performance and unconditional imprisonment designed to punish past transgressions is crucial, analytically as well as historically, in determining the permissible mode of trial under the Constitution.

Summary trial of criminal contempt, as now practiced, allows a single functionary of the state, a judge, to lay down the law, to prosecute those who he believes have violated his command (as interpreted by him), to sit in "judgment" on his own charges, and then within the broadest kind of bounds to punish as he sees fit. It seems inconsistent with the most rudimentary principles of our system of criminal justice, a system carefully developed and preserved throughout the centuries to prevent oppressive enforcement of oppressive laws, to concentrate this much power in the hands of any officer of the state. No official, regardless of his position or the purity and nobleness of his character, should be granted such autocratic omnipotence. Indeed if any other officer were presumptuous enough to claim such power I cannot believe the courts would tolerate it for an instant under the Constitution. Judges are not essentially different from other government officials. Fortunately they remain human even after assuming their judicial duties. Like all the rest of mankind they may be affected from time to time by pride and passion, by pettiness and bruised feelings, by improper understanding or by excessive zeal. Frank recognition of these common human characteristics, as well as others which need not be mentioned, undoubtedly led to the determination of those who formed our Constitution to fragment power, especially the power to define and enforce the criminal law, among dif-

ferent departments and institutions of government in the hope that each would tend to operate as a check on the activities of the others and a shield against their excesses thereby securing the people's liberty.

When the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused.[8] He truly becomes the judge of his own cause. The defendant charged with criminal contempt is thus denied what I had always thought to be an indispensable element of due process of law—an objective, scrupulously impartial tribunal to determine whether he is guilty or innocent of the charges filed against him. In the words of this Court: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. . . . Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." *In re Murchison,* 349 U. S. 133, 136–137. Cf. *Chambers* v. *Florida,* 309 U. S. 227, 236–237; *Tumey* v. *Ohio,* 273 U. S. 510; *In re Oliver,* 333 U. S. 257.

The vices of a summary trial are only aggravated by the fact that the judge's power to punish criminal contempt is exercised without effective external restraint. First, the substantive scope of the offense of contempt is inor-

[8] A series of recent cases in this Court alone indicates that the personal emotions or opinions of judges often become deeply involved in the punishment of an alleged contempt. See, *e. g., Fisher* v. *Pace,* 336 U. S. 155; *Sacher* v. *United States,* 343 U. S. 1; *Offutt* v. *United States,* 348 U. S. 11; *Nilva* v. *United States,* 352 U. S. 385; *Yates* v. *United States,* 355 U. S. 66.

dinately sweeping and vague; it has been defined, for example, as "any conduct that tends to bring the authority and administration of the law into disrespect or disregard." [9] It would be no overstatement therefore to say that the offense with the most ill-defined and elastic contours in our law is now punished by the harshest procedures known to that law. Secondly, a defendant's principal assurance that he will be fairly tried and punished is the largely impotent review of a cold record by an appellate court, another body of judges. Once in a great while a particular appellate tribunal basically hostile to summary proceedings will closely police contempt trials but such supervision is only isolated and fleeting. All too often the reviewing courts stand aside readily with the formal declaration that "the trial judge has not abused his discretion." But even at its rare best appellate review cannot begin to take the place of trial in the first instance by an impartial jury subject to review on the spot by an uncommitted trial judge. Finally, as the law now stands there are no limits on the punishment a judge can impose on a defendant whom he finds guilty of contempt except for whatever remote restrictions exist in the Eighth Amendment's prohibition against cruel and unusual punishments or in the nebulous requirements of "reasonableness" now promulgated by the majority.

In my view the power of courts to punish criminal contempt by summary trial, as now exercised, is precisely the kind of arbitrary and dangerous power which our forefathers both here and abroad fought so long, so bitterly, to stamp out. And the paradox of it all is that the courts were established and are maintained to provide impartial tribunals of strictly disinterested arbiters to resolve charges of wrongdoing between citizen and citizen or citizen and state.

---

[9] Oswald, Contempt of Court (3d ed. 1911), 6.

The Constitution and Bill of Rights declare in sweeping unequivocal terms that "The Trial of all Crimes . . . shall be by Jury," that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," and that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." As it may now be punished criminal contempt is manifestly a crime by every relevant test of reason or history. It was always a crime at common law punishable as such in the regular course of the criminal law.[10] It possesses all of the earmarks commonly attributed to a crime. A mandate of the Government has allegedly been violated for which severe punishment, including long prison sentences, may be exacted—punishment aimed at chastising the violator for his disobedience.[11] As Mr. Justice Holmes irrefutably observed for the Court in *Gompers* v. *United States,* 233 U. S. 604, at 610–611: "These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only

[10] See pp. 202–213, *infra.*

[11] In accordance with established usage 18 U. S. C. § 1 defines a felony as any "offense punishable by death or imprisonment for a term exceeding one year." By this standard the offense of contempt is not only a crime, but a felony—a crime of the gravest and most serious kind.

Of course if the maximum punishment for criminal contempt were sufficiently limited that offense might no longer fall within the category of "crimes"; instead it might then be regarded, in the light of our previous decisions, as a "petty" or "minor" offense for which the defendant would not necessarily be entitled to trial by jury. See *District of Columbia* v. *Clawans,* 300 U. S. 617; *Callan* v. *Wilson,* 127 U. S. 540.

458778 O—58——17

by the usual criminal procedure . . . and that at least in England it seems that they still may be and preferably are tried in that way." [12]

This very case forcefully illustrates the point. After surrendering the defendants were charged with fleeing from justice, convicted, and given lengthy prison sentences designed to punish them for their flight. Identical flight has now been made a statutory crime by the Congress with severe penalties.[13] How can it possibly be any more of a crime to be convicted of disobeying a statute and sent to jail for three years than to be found guilty of violating a judicial decree forbidding precisely the same conduct and imprisoned for the same term?

The claim has frequently been advanced that courts have exercised the power to try all criminal contempts summarily since time immemorial and that this mode of trial was so well established and so favorably regarded at the time the Constitution was adopted that it was carried forward intact, by implication, despite the express provisions of the Bill of Rights requiring a completely different and fairer kind of trial for "all crimes." The myth of immemorial usage has been exploded by recent scholarship as a mere fiction. Instead it seems clear that until at least the late Seventeenth or early Eighteenth Century the English courts, with the sole exception of the extraordinary and ill-famed Court of Star Chamber whose arbitrary procedures and gross excesses brought forth many of

---

[12] Cf. *New Orleans* v. *Steamship Co.*, 20 Wall. 387, 392 ("Contempt of court is a specific criminal offence."). And see *Michaelson* v. *United States ex rel. Chicago, St. P., M. & O. R. Co.*, 266 U. S. 42, 66–67; *Pendergast* v. *United States*, 317 U. S. 412, 417–418.

"Since a charge of criminal contempt is essentially an accusation of crime, all the constitutional safeguards available to an accused in a criminal trial should be extended to prosecutions for such contempt." Frankfurter and Greene, The Labor Injunction, 226.

[13] 18 U. S. C. § 3146.

the safeguards included in our Constitution, neither had nor claimed power to punish contempts committed out of court by summary process. Fox, The History of Contempt of Court; Frankfurter and Landis, Power to Regulate Contempts, 37 Harv. L. Rev. 1010, 1042–1052; Beale, Contempt of Court, Criminal and Civil, 21 Harv. L. Rev. 161. Prior to this period such contempts were tried in the normal and regular course of the criminal law, including trial by jury.[14] After the Star Chamber was abolished in 1641 the summary contempt procedures utilized by that odious instrument of tyranny slowly began to seep into the common-law courts where they were embraced by judges not averse to enhancing their own power. Still for decades the instances where such irregular procedures were actually applied remained few and far between and limited to certain special situations.

Then in 1765 Justice Wilmot declared in an opinion prepared for delivery in the Court of King's Bench (but never actually handed down) that courts had exercised the power to try all contempts summarily since their creation in the forgotten past. Although this bald assertion has been wholly discredited by the painstaking research of the eminent authorities referred to above, and even though Wilmot's opinion was not published until some years after our Constitution had been adopted, nor cited as authority by any court until 1821, his views have nevertheless exerted a baleful influence on the law of contempt both in this country and in England.

---

[14] One scholar has argued that even contempts in the face of the courts were tried by jury after indictment by grand jury until the reign of Elizabeth I. Solly-Flood, Prince Henry of Monmouth and Chief Justice Gascoign, 3 Transactions of the Royal Historical Society (N. S.) 47. Although agreeing that contempts *in facie* were often tried by a jury up to and beyond this period, Fox takes the view that such contempts were also punishable by summary procedures from the early common law.

By the middle of the last century the English courts had come to accept fully his thesis that they inherently possessed power to punish all contempts summarily, in or out of court. Yet even then contempts were often punished by the regular criminal procedures so that this Court could report as late as 1913 that they were still preferably tried in that manner. *Gompers* v. *United States,* 233 U. S. 604, 611.[15]

The Government, relying solely on certain obscure passages in some early law review articles by Fox, contends that while the common-law courts may not have traditionally possessed power to punish all criminal contempts without a regular trial they had always exercised such authority with respect to disobedience of their decrees. I do not believe that the studies of Fox or of other students of the history of contempt support any such claim. As I understand him, Fox reaches precisely the opposite conclusion. In his authoritative treatise, expressly written to elaborate and further substantiate the opinions formed in his earlier law review comments, he states clearly at the outset:

> "The first of [this series of earlier articles], entitled *The King* v. *Almon,* was written to show that in former times the offence of contempt committed out of court was tried by a jury in the ordinary course of law and not summarily by the Court as at present [1927]. The later articles also bear upon the history of the procedure in matters of contempt. Further

---

[15] In passing it is interesting to note that even Wilmot felt obliged to bolster his position by pointing to the fact that a defendant, under a notion then prevalent, could exonerate himself from a charge of contempt by fully denying the charges under oath. In this event he could only be prosecuted for false swearing in which case he was entitled, as Wilmot elaborately observes, to trial by jury. See Curtis and Curtis, The Story of a Notion in the Law of Criminal Contempt, 41 Harv. L. Rev. 51.

> inquiry confirmed the opinion originally formed with regard to the trial of contempt and brought to light a considerable amount of additional evidence which, with the earlier matter, is embodied in the following chapters . . . ." [16]

Then in summarizing he asserts that strangers to court proceedings were never punished except by the ordinary processes of the criminal law for contempts committed out of the court's presence until some time after the dissolution of the Star Chamber; he immediately follows with the judgment that parties were governed by the same general rules that applied to strangers.[17] Of course he recognizes the antiquity of the jurisdiction of courts to enforce their orders by conditional confinement, but such coercion, as pointed out before, is obviously something quite different from the infliction of purely punitive penalties for criminal contempt when compliance is no longer possible.

Professors Frankfurter and Landis in their fine article likewise unequivocally declare:

> ". . . the Clayton Act [providing for jury trial of certain charges of criminal contempt] does nothing new. It is as old as the best traditions of the common law. . . .
>
> "Down to the early part of the eighteenth century cases of contempt even in and about the common-law courts when not committed by persons officially connected with the court were dealt with by the ordinary course of law, *i. e.,* tried by jury, except when the offender confessed or when the offense was committed 'in the actual view of the court.' . . .
>
> . . . . .

---

[16] Fox, The History of Contempt of Court, VII.

[17] *Id.,* at 116–117. See also, *id.,* at 3–4, 13, 54–55, 71–72, 89.

> "[U]ntil 1720 there is no instance in the common-law precedents of punishment otherwise than after trial in the ordinary course and not by summary process." [18]

And Professor Beale in his discussion of the matter concludes:

> "As early as the time of Richard III it was said that the chancellor of England compels a party against whom an order is issued by imprisonment; and a little later it was said in the chancery that 'a decree does not bind the right, but only binds the person to obedience, so that if the party will not obey, then the chancellor may commit him to prison till he obey, and that is all the chancellor can do.' This imprisonment was by no means a punishment, but was merely to secure obedience to the writ of the king. Down to within a century [Beale was writing in 1908] it was very doubtful if the chancellor could under any circumstances inflict punishment for disobedience of a decree. . . . In any case the contempt of a defendant who had violated a decree in chancery could be purged by doing the act commanded and paying costs; . . . .
>
> . . . . . .
>
> "Where the court inflicts a definite term of imprisonment by way of punishment for the violation of its orders, the case does not differ, it would seem, from the case of criminal contempt out of court, and regular process and trial by jury should be required." [19]

In brief the available historical material as reported and analyzed by the recognized authorities in this field

---

[18] Power to Regulate Contempts, 37 Harv. L. Rev. 1010, 1042, 1046.

[19] Contempt of Court, Criminal and Civil, 21 Harv. L. Rev. 161, 169–170, 174.

squarely refutes the Government's insistence that disobedience of a court order has always been an exception punishable by summary process. Insofar as this particular case is concerned, the Government frankly concedes that it cannot point to a single instance in the entire course of Anglo-American legal history prior to this prosecution and two related contemporary cases where a defendant has been punished for criminal contempt by summary trial after fleeing from court-ordered imprisonment.[20]

Those who claim that the delegates who ratified the Constitution and its contemporaneous Amendments intended to exempt the crime of contempt from the procedural safeguards expressly established by those great charters for the trial of "all crimes" carry a heavy burden indeed. There is nothing in the Constitution or any of its Amendments which even remotely suggests such an exception. And as the Government points out in its brief, it does not appear that there was a word of discussion in the Constitutional Convention or in any of the state ratifying conventions recognizing or affirming the jurisdiction of courts to punish this crime by summary process, a power which in all particulars is so inherently alien to the method of punishing other public offenses provided by the Constitution.

In the beginning the contempt power with its essentially arbitrary procedures was a petty, insignificant part of our law involving the use of trivial penalties to preserve order in the courtroom and maintain the authority of the courts.[21] But since the adoption of the Constitu-

---

[20] See *United States* v. *Thompson*, 214 F. 2d 545; *United States* v. *Hall*, 198 F. 2d 726.

[21] Although records of the colonial era are extremely fragmentary and inaccessible apparently such contempts as existed were not the subject of major punishment in that period. From the scattered reported cases it appears that alleged offenders were let off after an

tion it has undergone an incredible transformation and growth, slowly at first and then with increasing acceleration, until it has become a powerful and pervasive device for enforcement of the criminal law. It is no longer the same comparatively innocuous power that it was. Its summary procedures have been pressed into service for such far-flung purposes as to prevent "unlawful" labor practices, to enforce the prohibition laws, to secure civil liberties and now, for the first time in our history, to punish a convict for fleeing from imprisonment.[22] In brief it has become a common device for by-passing the constitutionally prescribed safeguards of the regular criminal law in punishing public wrongs. But still worse, its subversive potential to that end appears to be virtually unlimited. All the while the sentences imposed on those found guilty of contempt have steadily mounted, until now they are even imprisoned for years.

I cannot help but believe that this arbitrary power to punish by summary process, as now used, is utterly irreconcilable with first principles underlying our Constitution and the system of government it created—principles which were uppermost in the minds of the gen-

---

apology, a reprimand or a small fine or other relatively slight punishment. I have found no instance where anyone was unconditionally imprisoned for even a term of months, let alone years, during that era when extremely harsh penalties were otherwise commonplace.

[22] The following are merely random samples of important and far-reaching federal regulatory Acts now in effect under which a violation of any provision of the Act is not only a statutory crime punishable as such but also may be enjoined at the Government's request and punished as a criminal contempt by summary process if the injunction is disobeyed. Securities Exchange Act, 48 Stat. 900, 15 U. S. C. § 78u; Natural Gas Act, 52 Stat. 832, 15 U. S. C. § 717s; Fair Labor Standards Act, 52 Stat. 1069, 29 U. S. C. § 217; Atomic Energy Act, 68 Stat. 959, 42 U. S. C. (Supp. IV) § 2280; Federal Communications Act, 48 Stat. 1092, 47 U. S. C. § 401; Defense Production Act of 1950, 64 Stat. 817, 50 U. S. C. App. § 2156.

eration that adopted the Constitution. Above all that generation deeply feared and bitterly abhorred the existence of arbitrary, unchecked power in the hands of any government official, particularly when it came to punishing alleged offenses against the state. A great concern for protecting individual liberty from even the possibility of irresponsible official action was one of the momentous forces which led to the Bill of Rights. And the Fifth, Sixth, Seventh and Eighth Amendments were directly and purposefully designed to confine the power of courts and judges, especially with regard to the procedures used for the trial of crimes.

As manifested by the Declaration of Independence, the denial of trial by jury and its subversion by various contrivances was one of the principal complaints against the English Crown. Trial by a jury of laymen and no less was regarded as the birthright of free men.[23] Witness the fierce opposition of the colonials to the courts of admiralty in which judges instead of citizen juries were authorized to try those charged with violating certain laws.[24] The same zealous determination to protect jury trial dominated the state conventions which ratified the Constitution and eventually led to the solemn reaffirmation of that mode of trial in the Bill of Rights—not only for all criminal prosecutions but for all civil causes involving $20 or more. See 2 Story, Commentaries on the Constitution (5th ed. 1891), §§ 1763–1768. I find it difficult

[23] As early as 1765 delegates from nine colonies meeting in New York declared in a Declaration of Rights that trial by jury was the "inherent and invaluable right" of every colonial. 43 Harvard Classics 147, 148.

[24] In 1775 Jefferson protested: "[Parliament has] extended the jurisdiction of the courts of admiralty beyond their antient limits thereby depriving us of the inestimable right of trial by jury in cases affecting both life and property and subjecting both to the decision arbitrary decision [*sic*] of a single and dependent judge." 2 Journals of the Continental Congress (Ford ed.) 132.

to understand how it can be maintained that the same people who manifested such great concern for trial by jury as to explicitly embed it in the Constitution for every $20 civil suit could have intended that this cherished method of trial should not be available to those threatened with long imprisonment for the crime of contempt. I am confident that if there had been any inkling that the federal courts established under the Constitution could impose heavy penalties, as they now do, for violation of their sweeping and far-ranging mandates without giving the accused a fair trial by his fellow citizens it would have provoked a storm of protest, to put it mildly. Would any friend of the Constitution have been foolhardy enough to take the floor of the ratifying convention in Virginia or any of a half dozen other States and even suggest such a possibility? [25]

As this Court has often observed, "The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning," *United States* v. *Sprague,* 282 U. S. 716, 731; ". . . constitutions, although framed by conventions, are yet created by the votes of the entire body of electors in a State, the most of whom are little disposed, even if they were able, to engage in such refinements. The simplest and most obvious interpretation of a constitution, if in itself sensible, is the

[25] Although Section 17 of the Judiciary Act of 1789, 1 Stat. 73, 83, authorized the federal courts to punish contempts "in any cause or hearing before the same," it did not, as this Court has pointed out, define what were contempts or prescribe the method of punishing them. *Savin, Petitioner,* 131 U. S. 267, 275. Section 17, which contains a number of other provisions, appears to have been a comparatively insignificant provision of the judicial code enacted by the Congress without material discussion in the midst of 34 other sections, many of which were both extremely important and highly controversial.

most likely to be that meant by the people in its adoption," *Lake County* v. *Rollins,* 130 U. S. 662, 671. Cf. Mr. Justice Holmes in *Eisner* v. *Macomber,* 252 U. S. 189, 219–220 (dissenting opinion). It is wholly beyond my comprehension how the generality of laymen, or for that matter even thoughtful lawyers, either at the end of the Eighteenth Century or today, could possibly see an appreciable difference between the crime of contempt, at least as it has now evolved, and other major crimes, or why they would wish to draw any distinction between the two so far as basic constitutional rights were concerned.

It is true that Blackstone in his Commentaries incorporated Wilmot's erroneous fancy that at common law the courts had immemorially punished all criminal contempts without regular trial. Much ado is made over this by the proponents of summary proceedings. Yet at the very same time Blackstone openly classified and uniformly referred to contempt as a "crime" throughout his treatise, as in fact it had traditionally been regarded and punished at common law.[26] Similarly, other legal treatises available in this country during the period when the Constitution was established plainly treated contempt as a "crime." [27] It seems to me that if any guide to the meaning of the Constitution can be fashioned from the circulation of the Commentaries and these other legal authorities through the former colonies (primarily among lawyers and judges) it is at least as compatible with the

---

[26] See, *e. g.,* 4 Blackstone's Commentaries 1–6, 119–126, 280–287. Also pertinent here is Blackstone's oft-quoted laudation of trial by jury "as the glory of the English law. . . . [I]t is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals." 3 *id.,* at 379.

[27] See, *e. g.,* 1 Hawkins, Pleas of the Crown (6th ed. 1787), 87.

view that the Constitution requires a jury trial for criminal contempts as with the contrary notion.

But far more significant, our Constitution and Bill of Rights were manifestly not designed to perpetuate, to preserve inviolate, every arbitrary and oppressive governmental practice then tolerated, or thought to be, in England. Cf. *Bridges* v. *California,* 314 U. S. 252, 263–268. Those who formed the Constitution struck out anew free of previous shackles in an effort to obtain a better order of government more congenial to human liberty and welfare. It cannot be seriously claimed that they intended to adopt the common law wholesale. They accepted those portions of it which were adapted to this country and conformed to the ideals of its citizens and rejected the remainder. In truth there was widespread hostility to the common law in general and profound opposition to its adoption into our jurisprudence from the commencement of the Revolutionary War until long after the Constitution was ratified. As summarized by one historian:

> "The Revolutionary War made everything connected with the law of England distasteful to the people at large. The lawyers knew its value: the community did not. Public sentiment favored an American law for America. It was quickened by the unfriendly feeling toward the mother country which became pronounced toward the close of the eighteenth century and culminated in the War of 1812." [28]

---

[28] Baldwin, The American Judiciary, 14.

"After the Revolution the public was extremely hostile to England and to all that was English and it was impossible for the common law to escape the odium of its English origin." Pound, The Spirit of the Common Law, 116. And see Warren, History of the American Bar, 224–228.

Although the bench and bar, particularly those who were adherents to the principles of the Federalist Party, often favored carrying foward the common law to the fullest possible extent popular sentiment was overwhelmingly against them.[29]

Apologists for summary trial of the crime of contempt also endeavor to justify it as a "necessity" if judicial orders are to be observed and the needful authority of the courts maintained. "Necessity" is often used in this context as convenient or desirable. But since we are dealing with an asserted power which derogates from and is fundamentally inconsistent with our ordinary, constitutionally prescribed methods of proceeding in criminal cases, "necessity," if it can justify at all, must at least refer to a situation where the extraordinary power to punish by summary process is clearly indispensable to the enforcement of court decrees and the orderly administration of justice. Or as this Court has repeatedly phrased it, the courts in punishing contempts should be rigorously restricted to the "least possible power adequate to the end proposed." See, *e. g., In re Michael,* 326 U. S. 224, 227.

Stark necessity is an impressive and often compelling thing, but unfortunately it has all too often been claimed loosely and without warrant in the law, as elsewhere, to justify that which in truth is unjustifiable. As one of

---

[29] In 1804 the Chief Justice and two Associate Justices of the Pennsylvania Supreme Court were actually impeached for sentencing a person to jail for contempt. In part the impeachment rested on the feeling that punishment of contempt by summary process was an arbitrary practice of the common law unsuited to this country. While the Justices were narrowly acquitted this apparently only aggravated popular antagonism toward the contempt power. See 3 McMaster, History of the People of the United States (1938 ed.), 153–162.

our great lawyers, Edward Livingston, observed in proposing the complete abolition of summary trial of criminal contempts:

> "Not one of the oppressive prerogatives of which the crown has been successively stripped, in England, but was in its day, defended on the plea of necessity. Not one of the attempts to destroy them, but was deemed a hazardous innovation." [30]

When examined in closer detail the argument from "necessity" appears to rest on the assumption that the regular criminal processes, including trial by petit jury and indictment by grand jury, will not result in conviction and punishment of a fair share of those guilty of violating court orders, are unduly slow and cumbersome, and by intervening between the court and punishment for those who disobey its mandate somehow detract from its dignity and prestige. Obviously this argument reflects substantial disrespect for the institution of trial by jury, although this method of trial is—and has been for centuries—an integral and highly esteemed part of our system of criminal justice enshrined in the Constitution itself. Nothing concrete is ever offered to support the innuendo that juries will not convict the same proportion of those guilty of contempt as would judges. Such evidence as is available plus my own experience convinces me that by and large juries are fully as responsible in meting out justice in criminal cases as are the judiciary.[31] At the same time, and immeasurably more important, trial before a jury and in full compliance with all of the other protections of the Bill of Rights is much

---

[30] 1 Works of Edward Livingston 264.

[31] See, *e. g.*, Sunderland, Trial by Jury, 11 Univ. of Cin. L. Rev. 119, 120; Hartshorne, Jury Verdicts: A Study of Their Characteristics and Trends, 35 A. B. A. J. 113.

less likely to result in a miscarriage of justice than summary trial by the same judge who issued the order allegedly violated.

Although some are prone to overlook it, an accused's right to trial by a jury of his fellow citizens when charged with a serious criminal offense is unquestionably one of his most valuable and well-established safeguards in this country.[32] In the words of Chief Justice Cooley: "The law has established this tribunal because it is believed that, from its numbers, the mode of their selection, and the fact that jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of circumstances, involving both act and intent, than any single man, however pure, wise and eminent he may be. This is the theory of the law; and as applied to criminal accusations, it is eminently wise, and favorable alike to liberty and to justice." *People* v. *Garbutt,* 17 Mich. 9, 27. Trial by an impartial jury of independent laymen raises another imposing barrier to oppression by government officers. As one of the more perceptive students of our experiment in freedom keenly observed, "The institution of the jury . . . places the real direction of society in the hands of the governed, or of a portion of the governed, and not in that of the government." 1 De Tocqueville, Democracy in America (Reeve trans., 1948 ed.), 282. The jury injects a democratic element into the law. This element is vital to the effective administration of criminal justice,

---

[32] See *Ex parte Milligan,* 4 Wall. 2, 122–123; *Thompson* v. *Utah,* 170 U. S. 343, 349–350; *Dimick* v. *Schiedt,* 293 U. S. 474, 485–486; *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11, 16, 18–19; The Federalist, No. 83 (Hamilton); 2 Story, Commentaries on the Constitution of the United States, 544; 2 Wilson's Works (Andrews ed. 1896) 222.

not only in safeguarding the rights of the accused, but in encouraging popular acceptance of the laws and the necessary general acquiescence in their application. It can hardly be denied that trial by jury removes a great burden from the shoulders of the judiciary. Martyrdom does not come easily to a man who has been found guilty as charged by twelve of his neighbors and fellow citizens.

It is undoubtedly true that a judge can dispose of charges of criminal contempt faster and cheaper than a jury. But such trifling economies as may result have not generally been thought sufficient reason for abandoning our great constitutional safeguards aimed at protecting freedom and other basic human rights of incalculable value. Cheap, easy convictions were not the primary concern of those who adopted the Constitution and the Bill of Rights. Every procedural safeguard they established purposely made it more difficult for the Government to convict those it accused of crimes. On their scale of values justice occupied at least as high a position as economy. But even setting this dominant consideration to one side, what compelling necessity is there for special dispatch in *punishing* criminal contempts, especially those occurring beyond the courtroom? When the desired action or inaction can no longer be compelled by coercive measures and all that remains is the punishment of past sins there is adequate time to give defendants the full benefit of the ordinary criminal procedures. As a matter of fact any slight delay involved might well discourage a court from resorting to hasty, unnecessary measures to chastise suspected disobedience. I believe that Mr. Justice Holmes, speaking for himself and Mr. Justice Brandeis, took his stand on invulnerable ground when he declared that where "there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other

illegal acts." *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, 425–426 (dissenting opinion).[33]

For almost a half century the Clayton Act has provided for trial by jury in all cases of criminal contempt where the alleged contempt is also a violation of a federal criminal statute.[34] And since 1931 the Norris-LaGuardia Act has granted the same right where a charge of criminal contempt is based on the alleged violation of an injunction issued in a labor dispute.[35] Notwithstanding the forebodings of calamity and destruction of the judicial system which preceded, accompanied and briefly followed these reforms, there is no indication whatever that trial by jury has impaired the effectiveness or authority of the courts in these important areas of the law. Furthermore it appears that in at least five States one accused of the crime of contempt is entitled, at least to some degree, to demand jury trial where the alleged contempt occurred

---

[33] Again this case aptly demonstrates the point. Here the defendants surrendered several years after they had been ordered to appear and serve their sentences. There was no reason for urgent action to punish them for their absence, there was ample time to impanel a jury and prosecute them in the regular manner. As a matter of fact almost a month and a half did elapse between their surrender and trial.

Alleged contempts committed beyond the court's presence where the judge has no personal knowledge of the material facts are especially suited for trial by jury. A hearing must be held, witnesses must be called, and evidence taken in any event. Cf. *Cooke* v. *United States,* 267 U. S. 517. And often, as in this case, crucial facts are in close dispute.

I might add, at this point, that MR. JUSTICE BRENNAN has forcefully demonstrated, in my judgment, that the evidence in this case was wholly insufficient to prove a crucial element of the offense charged—namely, notice of the surrender order.

[34] 38 Stat. 738–739, as amended, 18 U. S. C. §§ 402, 3691.

[35] 47 Stat. 72, 18 U. S. C. § 3692.

458778 O—58——18

beyond the courtroom.[36] Again, I am unable to find any evidence, or even an assertion, that judicial orders have been stripped of their efficacy or courts deprived of their requisite dignity by the intervention of the jury in those States. So far as can be discerned the wheels of justice have not ground to a halt or even noticeably slowed. After all the English courts apparently got on with their business for six or seven centuries without any general power to try charges of criminal contempt summarily.

I am confident that in the long run due respect for the courts and their mandates would be much more likely if they faithfully observed the procedures laid down by our nationally acclaimed charter of liberty, the Bill of Rights.[37] Respect and obedience in this country are not engendered—and rightly not—by arbitrary and autocratic procedures. In the end such methods only yield real contempt for the courts and the law. The classic example of this is the use and abuse of the injunction and summary contempt power in the labor field. The federal courts have still not recovered from the scars inflicted by their intervention in that area where Congress finally stepped in and preserved the right of jury trial to all those charged with the crime of contempt.

In the last analysis there is no justification in history, in necessity, or most important in the Constitution for trying those charged with violating a court's decree in a manner wholly different from those accused of disobeying any other mandate of the state. It is significant that neither the Court nor the Government makes any serious effort to justify such differentiation except that it has been sanctioned by prior decisions. Under the

---

[36] Arizona, Rev. Stat. Ann., 1956, § 12–863; Georgia, Code Ann., 1935, § 24–105; Kentucky, Rev. Stat. Ann., 1955, § 432.260; Oklahoma, Stat. Ann., 1936, Tit. 21, § 567; Pennsylvania, Purdon's Stat. Ann., 1930 (Cum. Ann. Pocket Pt. 1957), Tit. 17, § 2047.

[37] See Brown, Whence Come These Sinews? 12 Wyo. L. J. 22.

Constitution courts are merely one of the coordinate agencies which hold and exercise governmental power. Their decrees are simply another form of sovereign directive aimed at guiding the citizen's activity. I can perceive nothing which places these decrees on any higher or different plane than the laws of Congress or the regulations of the Executive insofar as punishment for their violation is concerned. There is no valid reason why they should be singled out for an extraordinary and essentially arbitrary mode of enforcement. Unfortunately judges and lawyers have told each other the contrary so often that they have come to accept it as the gospel truth. In my judgment trial by the same procedures, constitutional and otherwise, which are extended to criminal defendants in all other instances is also wholly sufficient for the crime of contempt.

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, dissenting.

I dissent because I do not believe that the evidence was sufficient to establish beyond a reasonable doubt the petitioners' guilt of the criminal contempt charged.

Petitioners were among 11 leaders of the Communist Party who were convicted of violation of the Smith Act, now 18 U. S. C. § 2385, on October 14, 1949. Both were sentenced to a fine of $10,000 and to five years' imprisonment, and were enlarged on bail pending appeal. The Court of Appeals affirmed the convictions on August 1, 1950, and this Court in turn affirmed on June 4, 1951. *Dennis* v. *United States,* 341 U. S. 494. On June 28, 1951, prior to formal receipt of the Supreme Court judgment, the District Court drew up a proposed Order on Mandate making the judgment of this Court that of the District Court. The last paragraph "FURTHER ORDERED, ADJUDGED and decreed that the defendants personally surrender to the United States Marshal . . . on the 2nd day of July,

1951 . . . ." This proposed order was served on the attorneys for the 11 and they promised to bring their clients into court the following Monday, July 2, to begin serving their sentences. On Friday, June 29, the attorneys met with all the defendants and "advised that they all should be present [in court on Monday] and . . . [were] assured they would be." But by Monday four had absconded. Since seven were present, however, the Order on Mandate was signed, and the seven were taken off to serve their prison terms. The court canceled the bail of the missing four on July 3 and issued a bench warrant for their arrest. Two of the four, Hall and Thompson, were apprehended in 1951 and 1953 respectively and were convicted of criminal contempt. *United States* v. *Hall,* 198 F. 2d 726; *United States* v. *Thompson,* 214 F. 2d 545. The petitioners surrendered voluntarily in 1956 and were likewise convicted of criminal contempt. The contempt charged in each instance was a violation of 18 U. S. C. § 401 (3) by disobedience of the provision of the Order on Mandate, issued on the morning of July 2, 1951, requiring the surrender of all the *Dennis* defendants to the United States Marshal at 11:05 a. m. on that day. Significantly, at the time the judge signed the order he lined out the hour of surrender, appearing as 10:30 in the proposed order, and substituted 11:05, the time at which the order was actually signed. See the opinion of Judge Biggs in *United States* v. *Hall, supra,* at 732.

The most that can be said is that the evidence might have been sufficient to support conviction of the petitioners for bail jumping if that had been an offense at the time they fled. But bail jumping did not become a separate crime until three years after the petitioners' flight, when this void in the law—highlighted by the petitioners' conduct—led the Department of Justice to secure the enactment of 18 U. S. C. § 3146. See H. R. Rep. No. 2104, 83d Cong., 2d Sess. But, in any event, bail jumping is

not the offense charged, and, although it is certainly a most serious obstruction of the administration of justice, it is not in itself a criminal contempt.

The Court relates the criminal contempt charged to bail jumping by its use of § 3146 as support for the sentences imposed upon the petitioners. But bail jumping under § 3146 is proved merely by evidence that the accused willfully failed to surrender within 30 days after incurring a forfeiture of his bail. Much more, however, than evidence sustaining a conviction for bail jumping is necessary to sustain convictions for the contempts here charged of violating 18 U. S. C. § 401 (3) by willful and knowing disobedience of a single provision of the Order on Mandate of July 2, 1951. The indispensable element of that offense, to be proved beyond a reasonable doubt, *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 444, is that the petitioners, who were not served with the order, in some other way obtained actual knowledge of its existence and command. *Kelton* v. *United States*, 294 F. 491; *In re Kwelman*, 31 F. Supp. 23; see *Wilson* v. *North Carolina*, 169 U. S. 586.

Assessment of the sufficiency of the evidence bearing on the petitioners' knowledge requires that the precise time at which the order came into existence be kept clearly in mind. The Court of Appeals below fell into palpable error in reading the specifications to charge "disobedience of the order of June 28." 241 F. 2d 631, 632. The order was not signed or entered until court convened after 10 o'clock on the morning of July 2. What happened on June 28 was that the attorneys of the *Dennis* defendants were served with copies of a *proposed* order to be entered on July 2. But the attorneys' knowledge cannot be imputed to their clients. *In re Kwelman, supra.* The petitioners had absconded by July 2, and the record is completely silent as to their whereabouts from June 29 until they surrendered almost five years later. Con-

cededly, direct evidence of knowledge by the petitioners of the order of July 2 is wholly lacking and the case for conviction rests entirely upon circumstantial evidence.

The proof upon which reliance is placed consists of evidence (1) that the petitioners knew on June 29, 1951, that the order was to be entered on July 2, and (2) that the petitioners made certain statements to the press at the time of their surrender almost five years later.

First. Manifestly, foreknowledge that an order might come into existence does not prove knowledge that it did come into existence. Even if the petitioners knew on June 29 that the order was likely to be signed on July 2, the most that can be said is that after July 2 the petitioners knew that the order *was to have been entered.* This, of course, is not the same as knowledge that the order *had been entered,* and it is the latter knowledge which the Government must prove beyond a reasonable doubt. Knowledge that the order *had been entered,* of course, could only be acquired by the petitioners after the order had come into existence on the morning of July 2; and that knowledge can hardly be inferred from the events which occurred prior to the moment the order was entered. See the opinion of Judge Biggs in *United States* v. *Hall,* 198 F. 2d 726, 733–735.

The Government's lack of confidence in the proofs to show actual knowledge is implicit in its effort to sustain the convictions on a theory of constructive knowledge derived from the events of June 28 and from the evidence that on June 29 the petitioners and the other *Dennis* defendants were told by the attorneys that they must be in court on July 2. The short answer to this contention is that the petitioners are not charged with disobedience of an order of which they had *constructive* knowledge but with disobedience of an order of which they had *actual* knowledge, and conviction can be had on the precise charge, or not at all. In any event, the sole authority

relied upon by the Government is a dictum in *Pettibone* v. *United States,* 148 U. S. 197, 206–207, to the effect that persons may be chargeable with knowledge of an order from notice that an application will be made for the order. But whatever its utility in civil cases, theories of constructive knowledge have no place in the criminal law. Not only is this forcefully demonstrated in Judge Biggs' opinion in *United States* v. *Hall, supra,* but the *Pettibone* dictum has not been followed in criminal contempt cases. *Kelton* v. *United States, supra; In re Kwelman, supra.*

Second. Since the evidence of knowledge that an order was to be entered is not sufficient to prove knowledge that the order was entered, what of the evidence of what was said by the petitioners at the time of their surrender? The Court refers to the petitioners' press releases in which they stated they would surrender to "enter prison," and to Green's further reference that he intended to "go to the United States Marshal's Office." But, of course, surrender could only have been to enter prison. Their statements prove no more than what the petitioners and everyone else knew had to happen when this Court affirmed their Smith Act convictions in 1951. And it can hardly be doubted that, after the many months these petitioners spent at their trial in the Foley Square Courthouse, both the location and function of the Marshal's Office was well known to them. That the Court must resort to these statements to find probative weight in the evidence demonstrates the inherent insufficiency of the proofs to show actual knowledge.

Nor do there appear other circumstances from which knowledge may be inferred. The Court's opinion gives the impression that the surrender order was an order in familiar and customary use, well known to the sophisticated in the criminal law. I doubt that even widely experienced criminal lawyers encounter this provision very often. The provision was not the occasion for the

entry of the order of July 2. The purpose of that order, as its caption "Order on Mandate" shows, was to enter an order in the District Court to give effect to the Mandate of this Court affirming the convictions of the *Dennis* defendants. But for the necessity of entering an order for that purpose there may well have been no surrender order. No statute or rule of court, even a local rule of the District Court, can be pointed to as requiring inclusion of the surrender provision. The bondsman who stands to lose the posted bail, not a surrender order, is usually counted on to produce the defendant. Hearings before Subcommittee No. 4 of the House Committee on the Judiciary on H. R. 8658, 83d Cong., 2d Sess. 14–19. This is not to say, of course, that the provision was in any way improper or illegal or served no useful purpose. Nevertheless its novelty is indicated when the Court must look to a provision of the bail bond as the only discoverable source of authority for the provision.

I can well understand why the Government should have desired to proceed against these petitioners for their serious obstruction of the administration of justice. In the absence of a statutory provision aimed directly at this conduct, the Government resorted to this attempt to punish that obstruction as a criminal contempt. However, regardless of the view taken on the underlying constitutional issue involved, the odiousness of the offense cannot be a reason for relaxing the normal standards of proof required to sustain a conviction under § 401 (3). Believing that the proofs in this case fall short of that standard, I must dissent.

PEORIA TRANSIT LINES, INC., *v.* CITY OF PEORIA.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 780. Decided March 31, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: 11 Ill. 2d 520, 144 N. E. 2d 609.

John E. Cassidy, Sr. for appellant.

Robert G. Day for appellee.

PER CURIAM.

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

CANTWELL *v.* CANTWELL.

APPEAL FROM THE SUPREME COURT OF INDIANA.

No. 766. Decided March 31, 1958.

Appeal dismissed and certiorari denied.
Reported below: 237 Ind. 168, 143 N. E. 2d 275.

William C. Wines and *John C. Lawyer* for appellant.

Daniel F. Kelly 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.

PRATT *v.* DEPARTMENT OF THE ARMY ET AL.

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

No. 455, Misc. Decided March 31, 1958.

Appeal dismissed.

Petitioner *pro se.*

Solicitor General Rankin, Assistant Attorney General Doub and *Samuel D. Slade* for appellees.

PER CURIAM.

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

STRONG *v.* UNITED STATES ET AL.

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

No. 456, Misc. Decided March 31, 1958.

Appeal dismissed.

Reported below: 155 F. Supp. 468.

James F. Connolly for appellant.

Solicitor General Rankin, Assistant Attorney General Doub, Paul A. Sweeney and *Herman Marcuse* for appellees.

PER CURIAM.

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

Syllabus.

UNITED STATES *v.* F. & M. SCHAEFER BREWING CO.

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

No. 79. Argued January 6, 1958.—Decided April 7, 1958.

In respondent's suit against the Government in a Federal District Court for the recovery of money only, which was tried without a jury, the judge filed an opinion on April 14 granting respondent's motion for summary judgment, without specifying the amount, and the clerk noted that fact in the civil docket on the same date. On May 24, the judge signed and filed a formal document captioned "Judgment," which specified the exact amount of recovery, and the clerk noted that fact in the civil docket on the same date. The Government filed a notice of appeal within 60 days after the latter entry but more than 60 days after the former entry. *Held:* In the circumstances of this case, the appeal was taken within 60 days from the "entry of the judgment," as required by Rule 73 (a) of the Federal Rules of Civil Procedure, and it should not have been dismissed as untimely. Pp. 228–236.

(a) Whatever may be the practical needs, no present statute or rule requires that a final judgment be contained in a separate document so labeled. P. 232.

(b) When an opinion embodies the essential elements of a judgment for money and clearly evidences the judge's intention that it shall be his final act in the case and it has been filed and entered in the docket, the time to appeal starts to run under Rule 73 (a). Pp. 232–233.

(c) When an opinion leaves doubtful whether the judge intended it to be his final act in the case, the clerk's notation of it in the docket cannot constitute "entry of the judgment" within the meaning of Rule 58. P. 233.

(d) A final judgment for money must, at least, determine, or specify the means of determining, the amount; and an opinion which does not either expressly or by reference determine the amount of money awarded leaves doubtful whether it was intended by the judge to be his final act in the case. Pp. 233–234.

(e) The opinion in this case stated the amount of money illegally collected from respondent; but, by its failure to state the date

of payment, it failed to state facts necessary to compute the amount of interest to be included in the judgment; and this omission cannot be cured by a search of the record, because Rule 79 (a) requires the clerk's entry to show the "substance of [the] judgment." Pp. 234–235.

(f) In the circumstances of this case, the formal "Judgment" signed by the judge on May 24, rather than a statement in the opinion filed on April 14, must be considered the court's judgment, and the time for appeal ran from its entry in the docket. Pp. 235–236.

236 F. 2d 889, reversed.

Leonard B. Sand argued the cause for the United States. With him on the briefs were *Solicitor General Rankin, Acting Assistant Attorney General Stull* and *I. Henry Kutz*. *Roger Fisher* was also on a brief for the United States.

Thomas C. Burke argued the cause for respondent. With him on the brief was *Walter S. Orr*.

Mr. Justice Whittaker delivered the opinion of the Court.

This case presents questions concerning the timeliness of an appeal by the Government from a summary judgment of a District Court to the Court of Appeals in an action for the recovery of money only. The basic question presented is which of two series of judicial and ministerial acts—one on April 14 and the other on May 24, 1955—constituted the "judgment" and "entry of the judgment." If it was the former, the appeal was out of time, but if the latter, it was not.

The overt facts are clear and undisputed. Respondent sued the Government for $7,189.57, alleged to have been illegally assessed and collected from it as federal stamp taxes, and for interest thereon from the date of payment. After issue was joined, respondent moved for summary judgment. The district judge, after hearing the motion,

filed an opinion on April 14, 1955 (130 F. Supp. 322), in which, after finding that respondent had paid stamp taxes to the Government in the amount of $7,012.50 and interest in the amount of $177.07, but making no finding of the date or dates of payment, he referred to an earlier decision of the same legal question by his colleague, Judge Leibell, in *United States* v. *National Sugar Refining Co.*, 113 F. Supp. 157, and concluded, saying: "I am in agreement with Judge Leibell's analysis and, accordingly, the plaintiff's motion is granted." Thereupon, the clerk made the following notation in the civil docket: "April 14, 1955. Rayfiel, *J.* Decision rendered on motion for summary judgment. Motion granted. See opinion on file."

Thereafter, on May 24, 1955, counsel for *respondent* presented to the judge, and the latter signed and filed, a formal document captioned "Judgment," which referred to the motion and the hearing of it and to the "opinion" of April 14, and then,

> "ORDERED, ADJUDGED AND DECREED that the plaintiff, The F. & M. Schaefer Brewing Co., recover of the defendant, United States of America, the sum of $7,189.57 and interest thereon from February 19, 1954 in the amount of $542.80, together with costs as taxed by the Clerk of the Court in the sum of $37, aggregating the sum of $7,769.37, and that plaintiff have judgment against defendant therefor."

On the same day the clerk stamped the document "Judgment Rendered: Dated: May 24th, 1955," and made the following notation in the civil docket:

> "May 24, 1955. Rayfiel, *J.* Judgment filed and docketed against defendant in the sum of $7189.57 with interest of $542.80 together with costs $37 amounting in all to $7769.37. Bill of Costs attached to judgment."

On July 21, 1955, the Government filed its notice of appeal from the order "entered in this action on May 25th, 1955 . . . ." Thereafter, respondent moved to dismiss the appeal upon the ground that the opinion of April 14 constituted the "judgment," that the clerk's entry of that date constituted "entry of the judgment," and that the appeal was not taken within 60 days from the "entry of the judgment," as required by Rule 73 (a).[1] The Court of Appeals, holding that the opinion of April 14 was a "decisive and complete act of adjudication," and that the notation made by the clerk in the civil docket on that date constituted "entry of the judgment" within the meaning of Rule 58 and adequately disclosed the "substance" of the judgment as required by Rule 79 (a), sustained the motion and dismissed the appeal as untimely. 236 F. 2d 889. Because of an asserted conflict among the circuits [2] and the public importance of the proper interpretation and uniform application of the provisions of the Federal Rules governing the time within

---

[1] Unless otherwise stated, all references herein to Rules are to the Federal Rules of Civil Procedure.

[2] The First Circuit in *United States* v. *Higginson*, 238 F. 2d 439, declined to follow the Second Circuit's opinion in the instant case, unless the latter may be said to rest upon local Rule 10 (a) of the Southern and Eastern Districts of New York, providing, in part, that a "memorandum of the determination of a motion, signed by the judge, shall constitute the order," and concluded: "To the extent that the language of the Schaefer opinion might apply even where no such local rule exists, this decision is not in accord with it." *Id.*, at 443. In its later case of *Matteson* v. *United States*, 240 F. 2d 517, the Second Circuit makes clear that it regards the *Higginson* opinion as in conflict with its opinion in the instant case, saying: "Since we viewed the local rule as merely corroborative of the practice actually required by F. R. 58, Judge Hartigan's opinion must be taken as disapproving our reasoning." *Id.*, at 518.

The Fourth Circuit's opinion in *Papanikolaou* v. *Atlantic Freighters*, 232 F. 2d 663, also appears, in result at least, to be in conflict with the Second Circuit's opinion in the instant case.

which appeals may be taken from judgments of District Courts in actions for money only tried without a jury, we granted certiorari. 353 U. S. 907.

Stated summarily, the Government contends (1) that practical considerations require that a final judgment be contained in a separate document so labeled; (2) that the district judge's opinion did not contain any of the elements of a final judgment for money nor manifest an intention that it was to be his final act in the case; (3) that it was only the formal judgment of May 24 which awarded any sum of money to respondent and which invoked the provisions of Rule 58, saying "When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction"; (4) that where, as here, a formal judgment is signed and filed by the judge it is *prima facie* his final decision, and, inasmuch as nothing in his opinion indicated any contrary intention, the formal "judgment" constituted his final decision; and (5) that the notation made by the clerk in the civil docket on April 14 did not indicate an award of any sum of money to respondent and, therefore, did not "show . . . the substance of [a money] judgment of the court," as required by Rule 79 (a) and, hence, did not constitute "the entry of [a] judgment" for money, within the meaning of Rule 58, nor start the running of the time to appeal under Rule 73 (a).

Resolution of these contentions depends principally upon the proper construction and application of the pertinent provisions of Rules 58 and 79 (a). Rule 58, in pertinent part, provides:

> "When the *court directs* that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith *upon receipt by him of the direction* . . . . The notation of a judgment in the civil docket as provided by Rule 79 (a) *consti-*

> *tutes the entry of the judgment;* and the judgment is not effective before such entry." (Emphasis supplied.)

So much of Rule 79 (a) as is pertinent here provides:

> "All . . . judgments shall be noted . . . in the civil docket . . . . These notations shall be brief but *shall show . . . the substance of each . . . judgment of the court . . . .*" (Emphasis supplied.)

At the outset the Government contends that practical considerations—namely, certainty as to what judicial pronouncements are intended to be final judgments in order to avoid both premature and untimely appeals, to render certain the date of judgment liens, and to enable the procurement of writs of execution, transcripts and certified copies of judgments—require that a judgment be contained in a separate document so labeled, and urges us so to hold. Whatever may be the practical needs in these respects, the answer is that no present statute or rule so requires, as the Government concedes, and the decisional law seems settled that "[n]o form of words . . . is necessary to evince [the] rendition [of a judgment]." *United States* v. *Hark*, 320 U. S. 531, 534. See also *In re Forstner Chain Corporation,* 177 F. 2d 572, 576.

While an opinion may embody a *final decision,* the question whether it does so depends upon whether the judge has or has not clearly declared his intention in this respect in his opinion. Therefore, when, as here, the action is for money only—whether for a liquidated or an unliquidated amount, as Rule 58 makes no such distinction—it is necessary to determine whether the language of the opinion embodies the essential elements of a judgment for money and clearly evidences the judge's intention that it shall be his final act in the case. If it does so, it constitutes his final judgment and, under Rule 58, it "directs that a party recover [a sum of] money," and,

"upon receipt by [the clerk] of the [opinion]," requires him to "enter judgment forthwith" against the party found liable for the amount awarded, which is to be done by making a brief "notation of [the] judgment in the civil docket [showing the substance of the judgment of the court] as provided by Rule 79 (a)." When all of these elements clearly appear final judgment has been both pronounced and entered, and the time to appeal starts to run under the provisions of Rule 73 (a). And, as correctly held by the Court of Appeals, the later filing and entry of a more formal judgment could not constitute a second final judgment in the case nor extend the time to appeal. 236 F. 2d, at 892.

But, on the other hand, if the opinion leaves doubtful whether the judge intended it to be his final act in the case—and, in an action for money, failure to determine either expressly or by reference the amount to be awarded is strong evidence of such lack of intention—one cannot say that it "directs that a party recover [a sum of] money," as required by Rule 58 before the clerk "shall enter judgment forthwith"; nor can one say that the clerk's "notation in the civil docket"—if it sets forth no more substance than is contained or directed in the opinion, and being only a ministerial act (*In re Forstner Chain Corporation, supra,* 177 F. 2d, at 576) it may do no more—"show[s] . . . the substance of [a] judgment" of the court, as required by Rule 79 (a), and "constitutes the entry of the judgment" against a party for a sum of money under Rule 58.

While, as stated, there is no statute or rule that specifies the essential elements of a final judgment, and this Court has held that "[n]o form of words and no peculiar formal act is necessary to evince [the] rendition [of a judgment]" (*United States* v. *Hark, supra,* at 534), yet it is obvious that a final judgment for money must, at least, determine, or specify the means for determining, the amount (*United*

States v. *Cooke,* 215 F. 2d 528, 530); and an opinion, in such a case, which does not either expressly or by reference determine the amount of money awarded reveals doubt, at the very least, whether the opinion was a "*complete* act of adjudication"—to borrow a phrase from the Court of Appeals—or was intended by the judge to be his final act in the case.

But respondent argues, as the Court of Appeals held, that the opinion stated the amount of money illegally collected from respondent and, therefore, adequately determined the amount awarded, and that inasmuch as the clerk's entry incorporated the opinion by reference, it, too, adequately stated the amount of the judgment. This contention might well be accepted were it not for the fact that the action also sought recovery of interest on the amount paid by respondent from the date of payment to the date of judgment, and for the fact that the opinion does not state the date or dates of payment and, hence, did not state facts necessary to compute the amount of interest to be included in the judgment. Cf. *United States* v. *Cooke, supra,* at 530. In an effort to counter the effect of these omissions, respondent states that a search of the record, which it urges we should make, would show that the Government's answer admitted the date of payment, and thus would furnish the information necessary to compute the amount of interest to be included in the judgment. It relies upon a statement in the *Forstner* case, *supra,* saying "Whether such a judgment has been rendered depends primarily upon the intention of the court, *as gathered from the record as a whole* . . . ." 177 F. 2d, at 576. (Emphasis supplied.) This argument cannot be accepted under the facts here for the reason that Rule 79 (a) expressly requires that the clerk's entry "shall show . . . the substance of [the] judgment of the court . . . ." Surely the amount of a judgment for money is a vital part of its substance. To hold that one must

search the whole record to determine the amount, or the facts necessary to compute the amount, of a final judgment for money would be to ignore the quoted provision of Rule 79 (a).

In these circumstances, the rule declared by this Court in the *Hark* case—though a criminal case and, therefore, not governed by the Federal Rules of Civil Procedure, which as we have shown afford no aid in determining judicial intent—is exactly apposite and controlling.

> "Where, as here, a formal judgment is signed by the judge, this is *prima facie* the decision or judgment rather than a statement in an opinion or a docket entry. . . . The judge was conscious, as we are, that he was without power to extend the time for appeal. He entered a formal order of record. We are unwilling to assume that he deemed this an empty form or that he acted from a purpose indirectly to extend the appeal time, which he could not do overtly. In the absence of anything of record to lead to a contrary conclusion, we take the formal order of March 31 as in fact and in law the pronouncement of the court's judgment and as fixing the date from which the time for appeal ran." *United States* v. *Hark,* 320 U. S., at 534–535. See also *United States* v. *Higginson,* 238 F. 2d 439, 443.

The actions of all concerned—of the judge in not stating in his opinion the amount, or means for determining the amount, of the judgment; of the clerk in not stating the amount of the judgment in his notation on the civil docket; of counsel for the Government in not appealing from the "opinion"; of counsel for respondent in preparing and presenting to the judge a formal "judgment" on May 24; and, finally, of the judge himself in signing and filing the formal "judgment" on the latter date—clearly show that none of them understood the opinion

to be the judge's final act or to constitute his final judgment in the case. Therefore, as in *Hark,* we must take the court's formal judgment of May 24 and the clerk's entry thereof on that date as in fact and in law the pronouncement and entry of the judgment and as fixing the date from which the time for appeal ran.

Reversed.

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

This case presents the question whether an appeal by the Government to the Court of Appeals from a summary judgment rendered against it was taken within the sixty-day period established by Rule 73 (a) of the Federal Rules of Civil Procedure. Ultimately decision turns on the need felt for nation-wide uniformity in the detailed application of rules of procedure within the federal judicial system, as against regard for local conditions and experience in the different circuits in construing rules phrased in broad and functional terms. Though not so formulated by the Court, this is the underlying question for decision, for I cannot believe we brought here for review a discrete instance, a particular, nonrecurring set of circumstances, or that we wish to encourage petitions for certiorari to review, from time to time, other individual sets of circumstances. The issues on the basis of which the Government sought review in this case were said to be of importance because they affected "all litigants in the federal courts."

Respondent taxpayer sued to recover $7,189.57 in stamp taxes, an amount specifically set forth in its complaint, alleged to have been illegally assessed and collected from it, and moved for summary judgment. On April 14, 1955, the District Court filed a "Memorandum Decision" directed to the motion for summary judgment.

In its opinion the court, relying on Judge Leibell's decision in *United States* v. *National Sugar Refining Co.*, 113 F. Supp. 157, found that the tax, in the amount of $7,189.57, had been illegally collected, and concluded by stating that, "I am in agreement with Judge Leibell's analysis and, accordingly, the plaintiff's motion is granted." 130 F. Supp. 322, 324. On the same day the clerk made the following entry in the civil docket: "Rayfiel, *J.* Decision rendered on motion for summary judgment. Motion granted. See opinion on file."

Over a month later, on May 24, 1955, the court signed a paper, submitted to it by respondent, entitled "Judgment." This document recited that, respondent having moved for summary judgment, and the motion having been granted on April 14, 1955, and the court's opinion having been filed, "IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, The F. & M. Schaefer Brewing Co., recover of the defendant, United States of America, the sum of $7,189.57 and interest thereon from February 19, 1954 in the amount of $542.80, together with costs as taxed by the Clerk of the Court in the sum of $37, aggregating the sum of $7,769.37, and that plaintiff have judgment against defendant therefor." On that day the clerk made the following entry in the docket: "Rayfiel, *J.* Judgment filed and docketed against defendant in the sum of $7189.57 with interest of $542.80 together with costs $37 amounting in all to $7769.37. Bill of Costs attached to judgment."

The Government filed its notice of appeal on July 21, 1955, ninety-eight days after the decision granting the motion for summary judgment, and fifty-eight days after the entry of the formal judgment of May 24. The Court of Appeals for the Second Circuit, six judges sitting *en banc,* unanimously dismissed the appeal on the ground that the notice of appeal had not been filed within sixty days from the entry of judgment as required by

Rule 73 (a) of the Federal Rules of Civil Procedure. The court found that judgment had been entered on April 14, 1955, when the motion for summary judgment was granted, and not on May 24, 1955, when the formal "Judgment" was docketed.

Rule 73 (a) provides:

> "When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry . . . ."

Rule 54 (a) defines a "judgment" as:

> "a decree and any order from which an appeal lies."

Rule 58, entitled "Entry of Judgment," provides that:

> "Unless the court otherwise directs and subject to the provisions of Rule 54 (b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. *When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction;* but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79 (a) constitutes the entry of the judgment; and the judgment is not

> effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs." (Emphasis supplied.)

Rule 79 (a) describes the civil docket mentioned in Rule 58, and goes on to declare that:

> "All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted chronologically in the civil docket . . . . These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court . . . ."

Thus, before the time for appeal begins to run under Rule 73 (a), a judgment as contemplated in Rule 58 must have been rendered by the court and, in compliance with Rule 79 (a), entered by the clerk in the civil docket. The judgment must have been both properly rendered and properly entered, and the entry of judgment is the decisive procedural moment. In the present case the question is whether the memorandum decision of April 14, 1955, was a "judgment" within the meaning of the Rules, and if it was, whether the clerk's docket notation of that date showed the "substance" of the judgment.

The Rules nowhere define with mechanical exactitude the meaning of the term "judgment." Rule 54 (a), however, in stating that a judgment includes "a decree and any order from which an appeal lies," emphasizes that a judgment is not confined to judicial actions so described, but includes any act of the court that performs the function of a judgment in bringing litigation to its final determination. Rule 58 is pertinent to what that function is and in describing when a judgment shall be entered indirectly illumines what a judgment is within the contemplation of the Rules. Thus, when a jury returns a general verdict and there have been no interrogatories,

judgment on the verdict shall be entered forthwith by the clerk, without further direction from the court. When the case is tried to the court and the relief awarded is complex, the court must approve the form of the judgment and direct that it be entered by the clerk. However, when the court directs that a party recover money only, and that is the situation in the present case, or that all relief be denied, the clerk is to enter judgment forthwith upon receipt of the direction.

One thing is clear from a close reading of these Rules in the light of the general purpose "to secure the just, speedy, and inexpensive determination of every action." Fed. Rules Civ. Proc., 1. Simplicity and speed, when consonant with effective protection of the interests of the parties, are touchstones for the interpretation of all the Rules, especially those strategically placed to advance the litigation to its final conclusion. Thus, as regards the judgment contemplated by Rule 73 (a), no formal document stamped "judgment" is required, and the direction that a party recover money or that all relief be denied may be included in an informal memorandum, given at the end of a written opinion, or even delivered orally from the bench. Of the many decisions in the Courts of Appeals on this question, none has suggested that a judgment must be expressed in a formal, autonomous document, as is required by the cumbersome, wasteful practice in some States. Such a requirement would contradict the liberal policy of the Federal Rules. We have recognized, even in a criminal case not governed by these Rules, that "No form of words and no peculiar formal act is necessary to evince [the rendition of a judgment] . . . or to mature the right of appeal." *United States* v. *Hark*, 320 U. S. 531, 534. The fact that by Rule 58 the court is expressly required to approve the form of the judgment when the relief granted is more complex than money or costs is surely convincing that

when only money or costs are awarded there is no such requirement.

The 1946 amendment to Rule 58 underscored the purpose not to require from the court a particular formal act or an explicit direction that judgment be entered. The Rule had provided that: "When the court directs the entry of a judgment that a party recover only money or costs or that there be no recovery, the clerk shall enter judgment forthwith upon receipt by him of the direction . . . ." 308 U. S. 737. It was amended to read: "When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction . . . ." 329 U. S. 863. According to the Notes of the Advisory Committee, "The substitution of the more inclusive phrase 'all relief be denied' for the words 'there be no recovery', makes it clear that the clerk shall enter the judgment forthwith in the situations specified *without awaiting the filing of a formal judgment approved by the court.*" 28 U. S. C., p. 4343. (Emphasis supplied.) Moreover, the elimination of the words "the entry of a judgment" made it clear that it is the direction to recover that is the essential act, and not a direction explicitly to enter judgment or a direction framed in any particular manner.

Of course the court may, in the exercise of its control over the shape of the judgment and the time of its rendition, indicate that no judgment will be rendered until a formal document is drawn up, approved, and signed. The Rules themselves recognize that in many cases, according to the relief awarded, the careful formulation of a separate judgment may be indispensable to the proper disposition of the litigation. Moreover, a formal document evidencing the judgment may in some circumstances be necessary for execution, for registration

under state law, or for divers purposes unrelated to the taking of an appeal. In the present case, for example, the Government states that, under Treasury Department procedures, respondent could not have secured payment of the judgment without submitting a certified copy stating the precise amount of the judgment plus interest and costs. But these requirements, admitting their relevance to the particular purposes for which they are designed, do not justify eroding an important federal procedural policy in favor of speed and simplicity in taking appeals by demanding that because the definitive adjudication of a claim must be in a particular form for a particular purpose it must be so for all.

What is required under Rule 73 (a) is action by the court that clearly indicates that the issues presented by the litigation have been adjudicated, and that the decision is wholly completed and not dependent on further action by the court. Furthermore, since the parties must be in a position to make an intelligent choice whether or not to appeal, the court must inform them not only that it has decided the case, but what it has decided. In assessing the court's action to determine whether these requirements have been met and a judgment has been rendered within the meaning of Rule 73 (a), an appellate court naturally looks to the import of the trial court's action as it must reasonably have appeared to the parties. Certainty that the court has in fact rendered an appealable judgment is of course a vital consideration, so that meritorious appeals may not be lost through inadvertence. Surely such certainty can be attained by directing trial judges to explicitness in decision and expression without insisting on archaic formalities that pointlessly delay the course of the litigation. As Chief Judge Clark has indicated in an opinion following the decision in the present case, appellate rules should not be "adjusted to accommo-

date carelessness, at cost of . . . serious losses in effective court procedure . . . ." *Matteson* v. *United States,* 240 F. 2d 517, 519.

It is readily apparent that these criteria set only very broad limits on the interpretation of judicial action and that considerable scope is left for variation according to local custom and practice, properly so in a country as diversified and vast as ours. In this regard the judgment in *United States* v. *Hark,* 320 U. S. 531, *supra,* a criminal case involving an appeal direct to this Court under the Criminal Appeals Act, now 18 U. S. C. § 3731, is not significantly different from a judgment under the Federal Rules of Civil Procedure. There the District Court rendered an opinion granting the defendants' motion to quash the indictment, and some weeks later signed a formal order to the same effect. This Court concluded that the formal order rather than the earlier opinion was the judgment of the court within the meaning of the statute, and that the appeal from it was timely. This conclusion was reached, however, only after finding that the customary practice in the District Court for the District of Massachusetts, from which the appeal had come, was to issue a formal order quashing an indictment and to regard it as the judgment. The Court expressly refused, because of the diversity of practice in the lower courts, to lay down a "hard and fast rule" that when a formal judgment is filed it must necessarily be regarded as the judgment for purposes of appeal. In saying that a formal judgment is prima facie the judgment of the court, we made it clear that this presumption could be overcome by a showing of local practice to the contrary.

In *Commissioner of Internal Revenue* v. *Estate of Bedford,* 325 U. S. 283, a case involving the timeliness of a petition for certiorari for review in this Court of a judgment of a Court of Appeals, we found that by common

understanding and long-continued practice in the Court of Appeals, the formal order of mandate rather than the opinion was regarded as the judgment of the court. The Court respected this practice because, as we said, "Whether the announcement of an opinion and its entry in the docket amounts to a judgment for purposes of appeal or whether that must await some later formal act, ought not to be decided on nice-spun argumentation in disregard of the judicial habits of the court whose judgment is called into question, of the bar practising before it, of the clerk who embodies its procedural traditions, as well as in conflict with the assumption of the reviewing court." 325 U. S., at 287–288. Procedural requirements within the federal judicial system are not to be fitted to a Procrustean bed. To the extent that the Federal Rules clearly contemplate a certain manner of doing things, of course such explicitness must be respected. But when the Rules do not so require, and the subject is one intimately associated with local practice and custom and adequately dealt with on that basis, loyalty to the Rules precludes imposition of uniformity merely for its own sake.

In the Second Circuit a decision of a District Court, when it is a complete, clear, and final adjudication, is deemed the judgment of the court, even though a later, formal judgment is signed and filed at the instance of one of the parties. We have the word of a unanimous Court of Appeals for this. Moreover, we have the decisions of that court over a number of years consistently enforcing, without dissent, the practice to which it adheres in the present case. So active a litigant as the Government could hardly have been unaware that such was in fact the governing practice in the application of Rule 73 (a). The rule when first squarely stated in *United States* v. *Wissahickon Tool Works, Inc.*, 200 F. 2d 936,

938, reflected a position taken in a line of earlier authorities,[1] and it has since been repeated with increasing emphasis and clarity.[2] That court has continually admonished the District Courts to be clear and explicit in their adjudications so that certainty will not be sacrificed and litigants confused, but no less has it been concerned, because of the volume of litigation in the courts of that harried circuit and the widespread criticism of the law's delays, to formulate and enforce procedures that by their speed and simplicity will best expedite cases to a final determination.

If the decision of a District Court is, standing alone, a clear and final adjudication of the case, and at the time rendered sufficient to give notice of the running of the time for appeal, the Court of Appeals has refused to reassess its significance in the light of a later formal judgment. To give weight to the filing of the formal judgment in this situation, that court has found, would increase rather than diminish uncertainty and confusion, since the legal effect of the first decision would vary depending on the chance, often within the control of the parties as much as the court, that more formal action is taken later. The temptation would be too great to present a formal judgment for the court's approval simply to cast doubt on the finality of the earlier action, and thus improperly to extend the time for appeal. Although in other circuits a contrary position appears to have been taken and

---

[1] See *Leonard* v. *Prince Line, Ltd.*, 157 F. 2d 987, 989; *Murphy* v. *Lehigh Valley R. Co.*, 158 F. 2d 481, 484–485; *Binder* v. *Commercial Travelers Mut. Acc. Assn.*, 165 F. 2d 896, 901; *Markert* v. *Swift & Co.*, 173 F. 2d 517, 519, n. 2.

[2] *United States* v. *Roth*, 208 F. 2d 467; *Napier* v. *Delaware, L. & W. R. Co.*, 223 F. 2d 28; *Matteson* v. *United States*, 240 F. 2d 517; *Edwards* v. *Doctors Hospital, Inc.*, 242 F. 2d 888; *Repan* v. *American President Lines, Ltd.*, 243 F. 2d 876.

weight is given to the later filing of a formal judgment, *e. g., United States* v. *Higginson,* 238 F. 2d 439, 441–443 (C. A. 1st Cir.), it cannot be said that the view adopted by the Second Circuit is without reason or inappropriate to the needs and practicalities of litigation in that circuit.[3] In view of the varying problems in different circuits, we should, in this matter, leave to a Court of Appeals a considerable measure of freedom to interpret and form the practice in the District Courts in the light of its experience with the procedural relations between itself and those courts.

If the general rule of practice and interpretation in the Second Circuit is not in conflict with the Federal Rules of Civil Procedure, it is also not unreasonable as applied in the present case. The opinion of the District Court clearly informed the parties that respondent's motion for summary judgment was granted, and nothing in the language of the court remotely suggested that any formal judgment or further action by the court was contemplated or necessary for finality of adjudication. The amount of the judgment was the amount, plus interest and costs, of the tax illegally assessed and collected, and this amount was recited in the opinion as an agreed fact. Rule 58

[3] In its opinion in the present case the Court of Appeals invokes not only the Federal Rules of Civil Procedure and its own carefully formulated views on the rendition of judgment as understood in those Rules, but also Rule 10 (a) of the Southern and Eastern Districts of New York. This Rule provides that, "A memorandum of the determination of a motion, signed by the judge, shall constitute the order; but nothing herein contained shall prevent the court from making an order, either originally or on an application for resettlement, in more extended form." However, in *Matteson* v. *United States,* 240 F. 2d 517, following the decision in the present case, the Court of Appeals explained that it "viewed the local rule as merely corroborative of the practice actually required by F. R. 58 . . . ." 240 F. 2d, at 518.

specifically provides that the entry of judgment shall not be delayed for the taxing of costs, and since the date of the payment of the tax was not in dispute, the interest due was a simple, mathematically ascertainable item, and the failure to state it explicitly in the opinion neither qualified nor delayed the definitive aspect of the judgment.

The Court itself recognizes that a "judgment" for the purposes of appeal is no more than an action by the court that finally and completely adjudicates the issues presented by the litigation, and that ultimately the question is one of ascertaining the intention of the District Court in a given case. Nevertheless, the Court reverses the unanimous determination of the Court of Appeals on this question, and it appears to rest this unusual action on the slender reed that the opinion of the District Court failed to show on its face the amount of the interest. In judging whether the District Court intended to make a final disposition of the case, the Court of Appeals surely was correct in concluding that this trivial circumstance was more than outweighed by the other circumstances of the case.

There may be cases in which the trial court's decision is inconclusive and ambiguous as to whether further action is contemplated, or it may be impossible to determine the practical effect of the judgment without complicated computations or information not available at the time the court renders its decision. But the present case is not one of these. The different considerations such cases present do not justify us in striking down a reasonable procedural rule relevantly applied. Nor is it material that in this case it was respondent itself that submitted for the court's approval the formal judgment of May 24th. When the motion for summary judgment was granted on April 14th and a final judgment rendered according to the

established practice in the Second Circuit, the time for appeal commenced to run automatically by force of Rule 73 (a). The fact that the court or either of the parties later proceeded on the assumption that further action was necessary or desirable to obtain a judgment, or for whatever reason, could in no way enlarge the time within which to invoke the jurisdiction of the appellate court. Such action could not prevent either respondent or the Court of Appeals from insisting on the finality of the District Court's first decision.

What has been said in regard to the rendering of judgment applies equally to the entry of judgment on the civil docket. Rule 79 (a) requires that the notation on the docket be brief but show the "substance" of the judgment rendered. "Substance" in this context is not a term of Aristotelian metaphysics; it has no meaning apart from the realities of custom and practice and adequacy of notice to those whose conduct is governed by the docket entries and the information they reasonably convey. Such a practical reading of the Rule does not, contrary to the Government's contention, render nugatory the requirement that the substance of the judgment be shown, but properly interprets that requirement in terms of the purpose for which it was designed.

The docket entry in the present case recited that the motion for summary judgment had been granted, and referred to the court's opinion on file. The opinion in turn told of the amount of the judgment. Surely we cannot say, on a question so related to local custom and understanding, that the Court of Appeals erred in finding this sufficient notice to the parties that the case had been decided and how it had been decided. The docket entry standing alone would doubtless convey little to a stranger to the litigation. To those familiar with the case, however, and attentive to the question of appeal, it compre-

hensively conveyed the vital information necessary to protect their interests. The use of the word "judgment," or the recital of the amount of the judgment in the docket as well as in the opinion would have done no more, and a flat rule that such recitals must be included would convert Rule 79 (a) from a common-sense direction to maintain a docket useful to the court, the clerk, and interested parties, into a demand for pointless technicalities that ultimately might well seriously inconvenience them. If the amount of the judgment must necessarily appear in the docket, so also, it can be argued, must the terms of an injunction, the substance of that judgment; but by such inclusions the usefulness of the docket as an index and brief history of the proceedings would be substantially impaired if not defeated.

It must be remembered that the problem before us concerns not the niceties of abstract logic or legal symmetry, but the practicalities of litigation and judicial administration in the federal courts of New York, Connecticut, and Vermont, comprising the Second Circuit. Doubtless the Federal Rules of Civil Procedure, insofar as they govern the time for taking appeals, must be observed throughout the country by all eleven Courts of Appeals. But since the Rules do not lay down self-defining specifications or mechanically enforceable details on many matters, including the rendition and entry of judgments, does due regard for the Rules require more than obedience to the functional purposes they express? Does their observance necessarily imply a nation-wide uniformity in their formal application? We have for review the practical construction given to Rule 73 (a) by a Court of Appeals with as large a volume of business as any. By this practice the appellate jurisdiction of that court has been guided for some years, and it has been approved by every appellate judge in the circuit who has had occa-

458778 O—58——20

sion to consider the question. The membership of the Court of Appeals reflects the experience of judges among those of longest experience in our judiciary, both on the District Courts and the Courts of Appeals, judges who have had extensive experience at the bar both in private and public litigation, and judges of special competence in the domain of procedure.[4] A rule of procedure authenticated by such a weighty certificate of legitimacy should not be nullified out of regard for considerations of *elegantia juris*. Certainly we should not upset it unless compelled to do so by the clear requirements of unambiguous legislation or the enforcement of unassailable even if implicit standards for the fair administration of justice.

I would affirm the judgment.

---

[4] The court sitting on the present case included:

Chief Judge Clark—6 years' private practice, 19 years on the Court of Appeals, 21 years member of the Advisory Committee on the Federal Rules of Civil Procedure.

Judge Frank—22 years' private practice, 6 years' federal administrative service, 16 years on the Court of Appeals.

Judge Medina—35 years' private practice, 4 years on the District Court, 7 years on the Court of Appeals.

Judge Hincks—14 years' private practice, 22 years on the District Court, 5 years on the Court of Appeals.

Judge Lumbard—21 years' private practice, 6 years in the United States Attorney's Office, 3 years on the Court of Appeals.

Judge Waterman—29 years' private practice, 3 years on the Court of Appeals.

Other judges who sat in *United States* v. *Wissahickon Tool Works, Inc.*, 200 F. 2d 936, *supra,* or the cases cited in note 2 were:

Judge Learned Hand—12 years' private practice, 15 years on the District Court, 27 years on the Court of Appeals at retirement.

Judge Augustus N. Hand—19 years' private practice, 13 years on the District Court, 26 years on the Court of Appeals at retirement.

Judge Swan—13 years' private practice, 26 years on the Court of Appeals at retirement.

Judge Chase—7 years' private practice, 10 years on state courts, 25 years on the Court of Appeals at retirement.

MR. JUSTICE HARLAN, dissenting.

The effort which has gone into this case has at least ended happily from the point of view of preserving the integrity of those provisions of the Federal Rules of Civil Procedure bearing on the timeliness of appeals. The Court's opinion, and the dissent of MR. JUSTICE FRANKFURTER which I have joined, are at one on the basic issue, namely, that entry of a formal judgment is not necessary to start the time for appeal running, and also agree that the determinative question in any given case is whether the District Court intended its decision on the merits to be a final disposition of the matter. After an *en banc* Court of Appeals had decided that the District Court in this instance did intend to make a final disposition of the case, I should have thought this Court would have considered it the better course to affirm the judgment below, with an appropriate suggestion to district judges to leave no room for argument about their intentions respecting finality, rather than to reverse the Court of Appeals on what was essentially an issue of fact.

Even so, the Court's action perhaps has a silver lining, for I daresay it will stimulate district judges to be more at pains in the future, cf. *Matteson* v. *United States,* 240 F. 2d 517, 518, to give in their opinions in these "money" cases an affirmative indication of intention regarding the finality or nonfinality of their decisions. If such is the effect of this decision, it will be a healthy thing, for surely such a commonplace affair as the time for appeal should not be permitted to breed litigation.

GRIMES *v.* RAYMOND CONCRETE PILE CO. ET AL.

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

No. 456. Argued March 10, 1958.—Decided April 7, 1958.

Petitioner sued respondents under the Jones Act for damages for injuries sustained while being transferred at sea from a tug to a "Texas tower" being secured to the ocean bed at its ultimate location as a radar warning station. The District Court indicated that the evidence created a fact question as to whether he was a member of the crew of any vessel, but directed a verdict for respondents on the ground that petitioner's exclusive remedy was under the Defense Bases Act. The Court of Appeals held that the Defense Bases Act did not provide the exclusive remedy for a crew member; but it affirmed the District Court's judgment on the ground that the evidence was not sufficient to create a fact question as to whether petitioner was a crew member. *Held:*

1. The remedy under the Jones Act created for a member of the crew of any vessel is saved by 42 U. S. C. § 1654. P. 253.

2. Petitioner's evidence presented an evidentiary basis for a jury's finding whether or not petitioner was a member of a crew of any vessel. P. 253.

245 F. 2d 437, reversed and case remanded.

Harry Kisloff argued the cause for petitioner. With him on the brief was *George J. Engelman.*

Frank L. Kozol argued the cause for respondents. With him on the brief was *Thomas D. Burns.*

PER CURIAM.

The petitioner brought this suit in the District Court for the District of Massachusetts. He sought damages under the Jones Act, 46 U. S. C. § 688, for injuries suffered while being transferred at sea in a "Navy life ring" from a tug to a Texas tower which the respondents, his employers, were constructing under a contract with the Government on Georges Bank, 110 miles east of Cape Cod.

The District Court directed a verdict for the respondents at the close of the petitioner's case. The trial judge indicated his view that the evidence created a fact question on the issue as to whether the petitioner was a crew member, but held that the petitioner's exclusive remedy was under the Defense Bases Act, 42 U. S. C. §§ 1651–1654, which incorporates the remedies of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §§ 901–950. The Court of Appeals for the First Circuit held that the Defense Bases Act did not provide the exclusive remedy for a member of a crew in light of § 1654 of the Act providing "This chapter shall not apply in respect to the injury . . . of . . . (3) a master or member of a crew of any vessel." However, the Court of Appeals affirmed the District Court's judgment, one judge dissenting, upon the ground that the evidence was not sufficient to create a fact question as to whether the petitioner was a crew member. 245 F. 2d 437. We granted certiorari, 355 U. S. 867.

We hold, in agreement with the Court of Appeals, that 42 U. S. C. § 1654 saves the remedy under the Jones Act created for a member of a crew of any vessel. We hold further, however, in disagreement with the Court of Appeals, that the petitioner's evidence presented an evidentiary basis for a jury's finding whether or not the petitioner was a member of a crew of any vessel. *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370; *Gianfala* v. *Texas Co.*, 350 U. S. 879; *South Chicago Co.* v. *Bassett*, 309 U. S. 251.

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

Reversed.

Mr. Justice Frankfurter is of opinion that, since the course of argument demonstrated that the case turns

entirely on evaluation of evidence in a particular set of circumstances, the writ of certiorari was improvidently granted and should be dismissed.

MR. JUSTICE HARLAN, whom MR. JUSTICE WHITTAKER joins, dissenting.

Even stretching the Court's past opinions in this field to their utmost, *e. g., Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370, I cannot agree with today's decision. The Court of Appeals is said to have erred in holding the evidence insufficient to warrant a jury finding that petitioner was a "member of a crew of any vessel," and thus entitled to avail himself of the remedies for seamen provided by the Jones Act. See *Swanson* v. *Marra Bros., Inc.*, 328 U. S. 1. In view of the fact that it has long been settled that a "member of a crew" is one who is "naturally and primarily on board [a vessel] to aid in . . . navigation," *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 260, a statement of the facts in this case should suffice to show why I disagree with the Court.

Respondent had contracted to install for the United States Government at a site 110 miles seaward of Cape Cod a "Texas Tower"—a triangular metal platform superimposed some 60 feet above the surface of the sea on supports permanently affixed to the floor of the ocean by three caissons, and utilized to operate a radar warning station. Petitioner, a member of the Pile Drivers Union, had been employed by respondent as a pile driver on the project. For several weeks, petitioner assisted in the completion of the tower in the Bethlehem East Boston Yards. When the tower was towed to sea, petitioner with about 25 other workmen lived on the tower and kept it in condition by operating air compressors, generators, and pumps to expedite installation at the permanent site, as well as by performing certain functions to keep it in safe tow. After the tower was anchored at its per-

manent site and while the temporary pilings were being driven down, petitioner performed only pile-driving.

Six days after the tower had been placed in its permanent position, petitioner and several other workmen were sent to a nearby barge, which was without crew and used solely to transport construction materials, to prepare for transfer of such materials to the tower. They reached the barge by way of a tug, worked there for about six hours, and then started on their return to the tower. While on the Navy life ring which was used to effect his transfer from tug to tower, petitioner was injured when the life ring collided with the pilothouse on the tug.

On these facts I am unable to see how a jury could permissibly find petitioner to be a "member of a crew of any vessel" under any sensible meaning of that phrase. Presumably the Court does not consider as a vessel this man-made island, the Texas Tower, which was securely fixed to the ocean bed before petitioner was injured. I find equally untenable the other possible basis for the Court's action—that petitioner's sporadic work for a few hours on the barge, a minor incident to his continuing employment as a pile driver on the tower, could be found to transform him at the time of the accident into a seaman and a member of the crew of the barge. If the "standing" requirements of the Jones Act are still to be regarded as having any real content, I can find no room for debate that this individual is not a seaman, unless a "seaman" is to mean nothing more than a person injured while working at sea. We should give effect to the law as Congress has written it.

It should be remembered that Congress has not left this petitioner remediless, but has provided him with redress under the Defense Bases Act, 42 U. S. C. § 1651.* Indeed, petitioner has already followed that path and collected compensation for his injuries.

*I agree with the Court that the Defense Bases Act does not foreclose *seamen* from having recourse to the Jones Act.

MATLES *v.* UNITED STATES.

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

No. 378. Decided April 7, 1958.*

Certiorari granted.

An affidavit showing good cause is a prerequisite to the initiation of denaturalization proceedings, and such affidavit must be filed with the complaint when the proceedings are instituted. *United States* v. *Zucca,* 351 U. S. 91.

No. 378: 247 F. 2d 378, judgment reversed and case remanded to District Court with directions to vacate the order holding petitioner in contempt and to dismiss the complaint.

Nos. 450 and 494: 247 F. 2d 123, 384, judgments reversed and cases remanded to District Court with directions to dismiss the complaints.

Frank J. Donner, Arthur Kinoy and *Marshall Perlin* for petitioner in No. 378.

Richard J. Burke for petitioner in No. 450.

Edward Bennett Williams and *Morris Shilensky* for petitioner in No. 494.

Solicitor General Rankin, Warren Olney, III, then Assistant Attorney General, *Beatrice Rosenberg* and *J. F. Bishop* for the United States in Nos. 378 and 450. *Mr. Rankin, Acting Assistant Attorney General McLean, Miss Rosenberg* and *Eugene L. Grimm* for the United States in No. 494.

---

*Together with No. 450, *Lucchese* v. *United States,* and No. 494, *Costello* v. *United States,* also on petitions for writs of certiorari to the same Court.

PER CURIAM.

The petitions for writs of certiorari are granted. In No. 378 the judgment of the Court of Appeals for the Second Circuit is reversed and the case is remanded to the District Court with directions to vacate the order holding the petitioner in contempt and to dismiss the complaint. In Nos. 450 and 494 the judgments of the Court of Appeals for the Second Circuit are reversed and the cases are remanded to the District Court with directions to dismiss the complaints. An affidavit showing good cause is a prerequisite to the initiation of denaturalization proceedings. The affidavit must be filed with the complaint when the proceedings are instituted. *United States* v. *Zucca,* 351 U. S. 91, 99–100.

UNITED STATES *v.* DIAMOND, ALIAS DUMANUS, THORNSON AND SLATER, ET AL.

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

No. 771. Decided April 7, 1958.

Certiorari granted and judgment affirmed.
Reported below: 255 F. 2d 749.

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

Robert L. Brock for David Diamond, respondent.

PER CURIAM.

The petition for writ of certiorari is granted and the judgment is affirmed.

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.

No. 54. Decided April 7, 1958.

Certiorari granted; judgment vacated; and cause remanded to District Court for determination in light of *Trop* v. *Dulles, ante,* p. 86.

Reported below: 238 F. 2d 239.

John W. Willis for petitioner.

Solicitor General Rankin for respondents.

PER CURIAM.

The petition for writ of certiorari and the motion to substitute William P. Rogers, present Attorney General of the United States, as a party respondent in the place and stead of Herbert Brownell, Jr., resigned, are granted. The judgment of the United States Court of Appeals for the Ninth Circuit is vacated and the cause is remanded to the United States District Court for determination in light of *Trop* v. *Dulles, ante,* p. 86, decided March 31, 1958.

DANDRIDGE *v.* UNITED STATES.

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

No. 609. Decided April 7, 1958.

Upon consideration of record and confession of error by Solicitor General, judgment of Court of Appeals reversed and case remanded to District Court with directions to permit defendant to change his plea of guilty.

101 U. S. App. D. C. 114, 247 F. 2d 105, reversed.

Bernard Dunau and *Anastasia Thannhauser Dunau* for petitioner.

Solicitor General Rankin, Beatrice Rosenberg and *Kirby W. Patterson* for the United States.

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 District of Columbia Circuit is reversed and the case is remanded to the District Court with directions to permit the defendant to change his plea.

COMMISSIONER OF INTERNAL REVENUE ET AL. *v.* P. G. LAKE, INC., ET AL.

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

No. 108. Argued March 11, 1958.—Decided April 14, 1958.

1. In each of the five cases here considered together, the taxpayer received present consideration for assignment of a so-called oil payment right (or sulphur payment right) carved out by the taxpayer from a larger mineral interest producing income taxable as ordinary income, subject to a depletion deduction. *Held:* The consideration received for the assignment was taxable as ordinary income, subject to a depletion deduction, and not as a long-term capital gain under § 117 of the Internal Revenue Code of 1939. Pp. 261–267.

   (a) The present consideration received by the taxpayer was paid for the right to receive future income, not for an increase in the value of the income-producing property. Pp. 264–267.

   (b) An earlier administrative practice (reversed in 1946) contrary to this holding will not be presumed to have been known to Congress and incorporated into the law by re-enactment, because it was not reflected in any published ruling or regulation. P. 265, n. 5.

   (c) Moreover, prior administrative practice is always subject to change through exercise by the administrative agency of its continuing rule-making power. P. 265, n. 5.

2. In the *Fleming* case, the taxpayers exchanged oil payment rights for fee simple interests in real estate. *Held:* This did not constitute a tax-free exchange of property of like kind within the meaning of § 112 (b)(1) of the Internal Revenue Code of 1939. Pp. 267–268.

241 F. 2d 65, 69, 71, 78, 84, reversed.

John N. Stull argued the cause for petitioners. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Rice* and *Melva M. Graney.*

Harry C. Weeks and *J. Paul Jackson* argued the cause for respondents. *Mr. Weeks* filed a brief for P. G. Lake, Inc., et al., and *Mr. Jackson* filed a brief for O'Connor et al., respondents.

Allen E. Pye filed a brief for Wrather et al., respondents.

Peter B. Wells filed a brief for Weed, respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

We have here, consolidated for argument, five cases involving an identical question of law. Four are from the Tax Court whose rulings may be found in 24 T. C. 1016 (the *Lake* case); 24 T. C. 818 (the *Fleming* case); 24 T. C. 1025 (the *Weed* case). (Its findings and opinion in the *Wrather* case are not officially reported.) Those four cases involved income tax deficiencies. The fifth, the *O'Connor* case, is a suit for a refund originating in the District Court. 143 F. Supp. 240. All five are from the same Court of Appeals, 241 F. 2d 71, 65, 78, 84, 69. The cases are here on writs of certiorari which we granted because of the public importance of the question presented. 353 U. S. 982.

The facts of the *Lake* case are closely similar to those in the *Wrather* and *O'Connor* cases. Lake is a corporation engaged in the business of producing oil and gas. It has a seven-eighths working interest [1] in two commercial oil

[1] An oil and gas lease ordinarily conveys the entire mineral interest less any royalty interest retained by the lessor. The owner of the lease is said to own the "working interest" because he has the right to develop and produce the minerals.

In *Anderson* v. *Helvering*, 310 U. S. 404, we described an oil payment as "the right to a specified sum of money, payable out of a specified percentage of the oil, or the proceeds received from the sale of such oil, if, as and when produced." *Id.*, at 410. A royalty interest is "a right to receive a specified percentage of all oil and

and gas leases. In 1950 it was indebted to its president in the sum of $600,000 and in consideration of his cancellation of the debt assigned him an oil payment right in the amount of $600,000, plus an amount equal to interest at 3 percent a year on the unpaid balance remaining from month to month, payable out of 25 percent of the oil attributable to the taxpayer's working interest in the two leases. At the time of the assignment it could have been estimated with reasonable accuracy that the assigned oil payment right would pay out in three or more years. It did in fact pay out in a little over three years.

In its 1950 tax return Lake reported the oil payment assignment as a sale of property producing a profit of $600,000 and taxable as a long-term capital gain under § 117 of the Internal Revenue Code of 1939. The Commissioner determined a deficiency, ruling that the purchase price (less deductions not material here) was taxable as ordinary income, subject to depletion. The *Wrather* case has some variations in its facts. In the *O'Connor* case the assignors of the oil payments owned royalty interests [2] rather than working interests. But these differences are not material to the question we have for decision.

The *Weed* case is different only because it involves sulphur rights, rather than oil rights. The taxpayer was the owner of a pooled overriding royalty in a deposit known as Boling Dome.[3] The royalty interest entitled

---

gas produced" but, unlike the oil payment, is not limited to a specified sum of money. The royalty interest lasts during the entire term of the lease. *Id.*, at 409.

[2] See note 1, *supra*.

[3] Boling Dome is a tract composed of various parcels of land. The owners of the royalty interests in sulphur produced from the separate parcels entered into a pooling agreement by which royalties from sulphur produced anywhere in Boling Dome were distributed pro rata among all the royalty interest holders. In that sense was the interest of each "pooled."

the taxpayer to receive $0.00966133 per long ton of sulphur produced from Boling Dome, irrespective of the market price. Royalty payments were made each month, based on the previous month's production.

In 1947, the taxpayer, in order to obtain a sure source of funds to pay his individual income taxes, agreed with one Munro, his tax advisor, on a sulphur payment assignment. The taxpayer assigned to Munro a sulphur payment totaling $50,000 and consisting of 86.254514 percent of his pooled royalty interest, which represented the royalty interest on 6,000,000 long tons of the estimated remaining 21,000,000 long tons still in place. The purchase price was paid in three installments over a three-year period. Most of the purchase price was borrowed by Munro from a bank with the sulphur payment assignment as security. The assigned sulphur payment right paid out within 28 months. The amounts received by the taxpayer in 1948 and 1949 were returned by him as capital gains. The Commissioner determined that these amounts were taxable as ordinary income, subject to depletion.

The *Fleming* case is a bit more complicated and presents an additional question not in the other cases. Here oil payment assignments were made, not for cash but for real estate. Two transactions are involved. Fleming and others with whom he was associated made oil payment assignments, the rights and interests involved being held by them for productive use in their respective businesses of producing oil. Each oil payment was assigned for an interest in a ranch. Each was in an amount which represented the uncontested fair value of the undivided interest in the ranch received by the assignor, plus an amount equal to the interest per annum on the balance remaining unpaid from time to time. The other transaction consisted of an oil payment assignment by an owner of oil and gas leases, held for productive use in the assignor's business, for the fee simple title to business

real estate. This oil payment assignment, like the ones mentioned above, was in the amount of the uncontested fair market value of the real estate received, plus interest on the unpaid balance remaining from time to time.

First, as to whether the proceeds were taxable as long-term capital gains under § 117 [4] or as ordinary income subject to depletion. The Court of Appeals started from the premise, laid down in Texas decisions, see especially *Tennant* v. *Dunn,* 130 Tex. 285, 110 S. W. 2d 53, that oil payments are interests in land. We too proceed on that basis; and yet we conclude that the consideration received for these oil payment rights (and the sulphur payment right) was taxable as ordinary income, subject to depletion.

---

[4] Section 117 (a) (1) provides in relevant part:
"The term 'capital assets' means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (l), or real property used in the trade or business of the taxpayer." 53 Stat. 50, as amended, 56 Stat. 846.

Section 117 (a) (4) provides:
"The term 'long-term capital gain' means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing net income." 53 Stat. 51, as amended, 56 Stat. 843.

Section 117 (b) provides:
"In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net capital gain, net capital loss, and net income:

"100 per centum if the capital asset has been held for not more than 6 months;

"50 per centum if the capital asset has been held for more than 6 months." 56 Stat. 843.

The purpose of § 117 was "to relieve the taxpayer from . . . excessive tax burdens on gains resulting from a conversion of capital investments, and to remove the deterrent effect of those burdens on such conversions." See *Burnet* v. *Harmel,* 287 U. S. 103, 106. And this exception has always been narrowly construed so as to protect the revenue against artful devices. See *Corn Products Refining Co.* v. *Commissioner,* 350 U. S. 46, 52.

We do not see here any conversion of a capital investment. The lump sum consideration seems essentially a substitute for what would otherwise be received at a future time as ordinary income. The pay-out of these particular assigned oil payment rights could be ascertained with considerable accuracy. Such are the stipulations, findings, or clear inferences. In the *O'Connor* case, the pay-out of the assigned oil payment right was so assured that the purchaser obtained a $9,990,350 purchase money loan at 3½ percent interest without any security other than a deed of trust of the $10,000,000 oil payment right, he receiving 4 percent from the taxpayer. Only a fraction of the oil or sulphur rights were transferred, the balance being retained.[5] Except in the *Fleming*

[5] Until 1946 the Commissioner agreed with the contention of the taxpayers in these cases that the assignment of an oil payment right was productive of a long-term capital gain. In 1946 he changed his mind and ruled that "consideration (not pledged for development) received for the assignment of a short-lived in-oil payment right carved out of any type of depletable interest in oil and gas in place (including a larger in-oil payment right) is ordinary income subject to the depletion allowance in the assignor's hands." G. C. M. 24849, 1946–1 Cum. Bull. 66, 69. This ruling was made applicable "only to such assignments made on or after April 1, 1946," I. T. 3895, 1948–1 Cum. Bull. 39. In 1950 a further ruling was made that represents the present view of the Commissioner. I. T. 4003, 1950–1 Cum. Bull. 10, 11, reads in relevant part as follows:

"After careful study and considerable experience with the application of G. C. M. 24849, *supra,* it is now concluded that there is no

case, which we will discuss later, cash was received which was equal to the amount of the income to accrue during the term of the assignment, the assignee being compensated by interest on his advance. The substance of what was assigned was the right to receive future income. The substance of what was received was the present value of income which the recipient would otherwise obtain in the future. In short, consideration was paid for the right to receive future income, not for an increase in the value of the income-producing property.

These arrangements seem to us transparent devices. Their forms do not control. Their essence is deter-

---

legal or practical basis for distinguishing between short-lived and long-lived in-oil payment rights. It is, therefore, the present position of the Bureau that the assignment of any in-oil payment right (not pledged for development), which extends over a period less than the life of the depletable property interest from which it is carved, is essentially the assignment of expected income from such property interest. Therefore, the assignment for a consideration of any such in-oil payment right results in the receipt of ordinary income by the assignor which is taxable to him when received or accrued, depending upon the method of accounting employed by him. Where the assignment of the in-oil payment right is donative, the transaction is considered as an assignment of future income which is taxable to the donor at such time as the income from the assigned payment right arises.

"Notwithstanding the foregoing, G. C. M. 24849, *supra,* and I. T. 3935, *supra,* do not apply where the assigned in-oil payment right constitutes the entire depletable interest of the assignor in the property or a fraction extending over the entire life of the property."

The pre-1946 administrative practice was not reflected in any published ruling or regulation. It therefore will not be presumed to have been known to Congress and incorporated into the law by re-enactment. See *Helvering* v. *N. Y. Trust Co.,* 292 U. S. 455, 467–468. Cf. *United States* v. *Leslie Salt Co.,* 350 U. S. 383, 389–397. Moreover, prior administrative practice is always subject to change "through exercise by the administrative agency of its continuing rule-making power." See *Helvering* v. *Reynolds,* 313 U. S. 428, 432.

mined not by subtleties of draftsmanship but by their total effect. See *Helvering* v. *Clifford,* 309 U. S. 331; *Harrison* v. *Schaffner,* 312 U. S. 579. We have held that if one, entitled to receive at a future date interest on a bond or compensation for services, makes a grant of it by anticipatory assignment, he realizes taxable income as if he had collected the interest or received the salary and then paid it over. That is the teaching of *Helvering* v. *Horst,* 311 U. S. 112, and *Harrison* v. *Schaffner, supra;* and it is applicable here. As we stated in *Helvering* v. *Horst, supra,* at 117, "The taxpayer has equally enjoyed the fruits of his labor or investment and obtained the satisfaction of his desires whether he collects and uses the income to procure those satisfactions, or whether he disposes of his right to collect it as the means of procuring them." There the taxpayer detached interest coupons from negotiable bonds and presented them as a gift to his son. The interest when paid was held taxable to the father. Here, even more clearly than there, the taxpayer is converting future income into present income.

Second, as to the *Fleming* case. The Court of Appeals in the *Fleming* case held that the transactions were tax-free under § 112 (b)(1) which provides:

> "No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment." 53 Stat. 37.

In the alternative and as a second ground, it held that this case, too, was governed by § 117.

We agree with the Tax Court, 24 T. C. 818, that this is not a tax-free exchange under § 112 (b)(1). Treasury Regulations 111, promulgated under the 1939 Act, provide in § 39.112 (b)(1)–1 as respects the words "like kind," as used in § 112 (b)(1), that "One kind or class of property may not . . . be exchanged for property of a different kind or class." The exchange cannot satisfy that test where the effect under the tax laws is a transfer of future income from oil leases for real estate. As we have seen, these oil payment assignments were merely arrangements for delayed cash payment of the purchase price of real estate, plus interest. Moreover, § 39.112 (a)–1 states that the "underlying assumption of these exceptions is that the new property is substantially a continuation of the old investment still unliquidated." Yet the oil payment assignments were not conversions of capital investments, as we have seen.

Reversed.

DESSALERNOS *v.* SAVORETTI, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE.

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

No. 287. Argued April 3, 1958.—Decided April 14, 1958.

In the circumstances of this case, petitioner was entitled to have his application for suspension of deportation considered under § 244 (a)(1) of the Immigration and Nationality Act of 1952.

244 F. 2d 178, judgment vacated and cause remanded to District Court with directions.

David W. Walters argued the cause and filed a brief for petitioner.

Maurice A. Roberts argued the cause for respondent. On the brief were *Solicitor General Rankin* and *Beatrice Rosenberg.*

PER CURIAM.

It was stipulated by the parties in the District Court that the sole question for decision is whether petitioner is entitled to have his application for suspension of deportation considered under § 244 (a)(1) of the Immigration and Nationality Act of 1952 (66 Stat. 163, 214; 8 U. S. C. § 1254 (a)(1)). We hold that petitioner is so entitled. The judgment of the Court of Appeals (244 F. 2d 178) is therefore vacated and the cause is remanded to the District Court with directions to enter an appropriate judgment declaring that petitioner is entitled to have his application for suspension of deportation considered by the United States Immigration and Naturalization Service under § 244 (a)(1).

So ordered.

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK joins, would dismiss the writ for lack of jurisdiction. In his

view the record fails to disclose a justiciable case or controversy because (1) the undisturbed administrative finding that petitioner "does not meet the requirement that his deportation [would] result in exceptional and extremely unusual hardship to himself," establishes that petitioner is not entitled to suspension of deportation under *either* subdivision (a)(1) or (a)(5) of § 244 of the Immigration and Nationality Act of 1952; and (2) the parties' stipulation in the District Court is ineffective to confer jurisdiction on this Court to decide the question sought to be presented. See *Swift & Co.* v. *Hocking Valley R. Co.*, 243 U. S. 281, 289; *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241. In holding on this record that subdivision (a)(1) governs petitioner's case the Court has, in his view, rendered what in effect is an advisory opinion.

MR. JUSTICE FRANKFURTER would join MR. JUSTICE HARLAN if he read the record to be as clear as the latter finds it to be. Being in sufficient doubt about the scope and meaning of the stipulation, he joins the Court's opinion. This leaves open, on the remand, the administrative determination of the issues under § 244 (a)(1).

Per Curiam.

BUTLER ET AL. *v.* WHITEMAN.

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

No. 200, Misc. Decided April 14, 1958.

Certiorari granted.

In this case arising under the Jones Act, petitioner's evidence presented an evidentiary basis for jury findings as to whether or not (1) the tug involved was in navigation, (2) the petitioner's decedent was a seaman and member of the crew of the tug within the meaning of the Jones Act, and (3) employer negligence played a part in producing decedent's death.

243 F. 2d 563, reversed and cause remanded for trial.

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 cause is remanded for trial. We hold that the petitioner's evidence presented an evidentiary basis for jury findings as to (1) whether or not the tug *G. W. Whiteman* was in navigation, *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370, 373; *Carumbo* v. *Cape Cod S. S. Co.*, 123 F. 2d 991; (2) whether or not the petitioner's decedent was a seaman and member of the crew of the tug within the meaning of the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688; *Senko* v. *LaCrosse Dredging Corp., supra; Gianfala* v. *Texas Co.*, 350 U. S. 879; *South Chicago Co.* v. *Bassett*, 309 U. S. 251; *Grimes* v. *Raymond Concrete Pile Co.*, 356 U. S. 252; and (3) whether or not employer negligence played a part in producing decedent's death. *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521; *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500; *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523.

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.

MR. JUSTICE HARLAN, whom MR. JUSTICE WHITTAKER joins, dissenting.

I think the evidence is insufficient to raise a question for the jury as to whether petitioner's decedent at the time of the accident was a seaman within the purview of the Jones Act.

Respondent was the owner of a wharf, barge and tug, all situated on the Mississippi River. The barge was moored to the wharf, and the tug was lashed to the barge. On October 7, 1953, the decedent met death by drowning in unclear circumstances. He was last seen alive running across the barge to the tug, and it was petitioner's theory of the case that the decedent had fallen into the river between the barge and the tug, and that respondent was liable under the Jones Act because of his negligent failure to provide a gangplank for crossing between the two vessels.

For some months before the accident the tug had been withdrawn from navigation because it was inoperable. During the entire year of 1953 the tug had neither captain nor crew and reported no earnings; the only evidence of its movement during the year related to an occasion on which it was towed to dry dock. At the time of the accident the tug was undergoing rehabilitation preparatory to a Coast Guard inspection, presumably in anticipation of a return to service. During the period of the tug's inactivity, the decedent was employed as a laborer doing odd jobs around respondent's wharf, and on the morning of the accident he had been engaged in cleaning the boiler of the tug.

In my opinion it taxes imagination to the breaking point to consider this unfortunate individual to have been

a seaman at the time of the accident within the meaning of the Jones Act, and I think that if a jury were so to find, its verdict would have to be set aside. *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187. Because I would affirm the judgment of the Court of Appeals on this ground, I do not reach the question whether the accident was attributable in any way to respondent's negligence.

GEORGIA ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 774. Decided April 14, 1958.

156 F. Supp. 711, affirmed.

Eugene Cook, Attorney General of Georgia, *E. Freeman Leverett,* Assistant Attorney General, *W. H. Swiggart, E. R. Leigh, Joseph L. Lenihan* and *W. L. Grubbs* for appellants.

Solicitor General Rankin, Assistant Attorney General Hansen, Robert W. Ginnane, Samuel R. Howell and *Isaac K. Hay* for the United States and the Interstate Commerce Commission, and *Henry L. Walker, Arthur J. Dixon* and *James A. Bistline* for the Southern Railway Co. et al., appellees.

PER CURIAM.

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

FIDELITY-PHILADELPHIA TRUST CO. ET AL., EXECUTORS, *v.* SMITH, COLLECTOR OF INTERNAL REVENUE.

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

No. 130. Argued January 30, 1958.—Decided April 28, 1958.

At the age of 76 and without a medical examination, petitioners' decedent purchased at regular rates three single-premium life insurance policies on her own life, payable to named beneficiaries, and, from the same companies at the same time, as required by these companies, three single-premium nonrefundable life annuity policies. The use and enjoyment of the annuity policies were entirely independent of the life insurance policies; but the size of each annuity was calculated so that, in the event the annuitant-insured died prematurely, the annuity premium, less the annuity payments already made, would combine with the life insurance premium, plus interest, to equal the amount of insurance proceeds to be paid, plus expenses. The decedent received the annuities throughout the remainder of her lifetime; but, paying a gift tax, she irrevocably assigned all rights and benefits under the insurance policies, including the rights to receive dividends, to change beneficiaries, and to surrender or assign the policies. Two policies were assigned to her children and the third to a trustee, the decedent retaining no beneficial or reversionary interest in the trust. *Held:* The proceeds of the life insurance policies should not be included in the decedent's estate for the purpose of the federal estate tax under § 811 (c)(1)(B) of the Internal Revenue Code of 1939. Pp. 275–281.

(a) *Helvering* v. *Le Gierse,* 312 U. S. 531, distinguished. Pp. 277–279.

(b) Under the assignment, the decedent had not become a life tenant who postpones the possession and enjoyment of the property by the remaindermen until her death. Pp. 278–279.

(c) Nor are the assignees like second annuitants in survivorship annuities or joint annuitants in joint and survivor annuities. P. 279, n. 5.

(d) The annuity payments were not income from property which the insured transferred to her children under the life insur-

ance policies, since the use and enjoyment of the annuity policies were entirely independent of the life insurance policies. Pp. 279–281.

241 F. 2d 690, reversed.

Robert T. McCracken argued the cause for petitioners. With him on the brief was *John B. Leake.*

Myron C. Baum argued the cause for respondent. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Baum.*

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

The question before the Court is whether the proceeds of certain insurance policies on the life of the decedent, payable to named beneficiaries and irrevocably assigned by the insured, should be included in the estate of the decedent for the purposes of the federal estate tax. The facts are not in dispute. In 1934 decedent, then aged 76, purchased a series of annuity-life insurance policy combinations. Three single-premium life insurance policies, at face values of $200,000, $100,000, and $50,000, respectively, were obtained without the requirement of a medical examination. As a condition to selling decedent each life insurance policy, the companies involved required decedent also to purchase a separate, single-premium, nonrefundable life annuity policy. The premiums for each life insurance policy and for each annuity policy were fixed at regular rates. The size of each annuity, however, was calculated so that in the event the annuitant-insured died prematurely the annuity premium, less the amount allocated to annuity payments already made, would combine with the companion life insurance premium, plus interest, to equal the amount of insurance proceeds to be paid.[1] Each annuity policy could have

[1] Of course, an additional amount is added to the premiums to compensate the insurance companies for expenses.

been purchased without the insurance policy for the same premium charged for it under the annuity-life insurance combination.

The decedent's children were primary beneficiaries of the insurance policies; the Fidelity-Philadelphia Trust Company, as trustee of a trust established by decedent, was named beneficiary of the interests of any of decedent's children who predeceased her. In the year of purchase, decedent assigned all rights and benefits under two of the life insurance policies to her children and under the other to the Fidelity-Philadelphia Trust Company as trustee. These rights and benefits included the rights to receive dividends, to change the beneficiaries, to surrender the policies, and to assign them. Dividends were received, but, as far as the record discloses, none of the other rights was exercised. A gift tax on these transfers was paid by the decedent in 1935. In 1938 decedent amended the above-mentioned trust so that it became irrevocable. As the Government concedes, the decedent retained no beneficial or reversionary interest in the trust.

The insured died in 1946. The proceeds of the three insurance policies were not included in her estate in the estate tax return. The Commissioner of Internal Revenue determined that these proceeds should have been included and assessed a deficiency accordingly. The adjusted tax was paid by the executors, and when claim for refund was denied, this action for refund followed. The District Court entered judgment for the taxpayers, but the Court of Appeals for the Third Circuit reversed. 241 F. 2d 690. We granted certiorari.[2] 354 U. S. 921.

---

[2] In agreement with the decision below are *Burr* v. *Commissioner,* 156 F. 2d 871 (C. A. 2d Cir.), and *Conway* v. *Glenn,* 193 F. 2d 965 (C. A. 6th Cir.). To the contrary is *Bohnen* v. *Harrison,* 199 F. 2d 492 (C. A. 7th Cir.), affirmed by an equally divided Court, 345 U. S. 946.

It is conceded by the parties that the question of whether the proceeds should be included in the estate is not determinable by the federal estate tax provision dealing with life insurance proceeds. Cf. *Helvering* v. *Le Gierse,* 312 U. S. 531. To support the decision below, the Government argues that the proceeds are includible in the estate under Section 811 (c)(1)(B) of the Internal Revenue Code of 1939, which includes, in the estate of the decedent, property, to the extent of the decedent's interest therein, which the decedent had transferred without adequate and full consideration, under which transfer the decedent

> "has retained for his life . . . (i) the possession or enjoyment of, or the right to income from, the property . . . ."

The Government contends that the annuity payments, which were retained until death, were income from property transferred by the decedent to her children through the use of the life insurance policies.

On the other hand, petitioners, executors of the estate, assert that the annuity payments were income from the annuity policies, which were separate property from the insurance policies, and that since decedent had assigned away the life insurance policies before death, she retained no interest in them at death.

The Government relies on *Helvering* v. *Le Gierse, supra,* where this Court also had before it the issue of the taxability of proceeds from a life insurance policy in an annuity-life insurance combination. After holding that the taxability of these proceeds was not to be determined for estate tax purposes according to the statutory provisions dealing with life insurance,[3] the Court held that

[3] Section 302 (g) of the Revenue Act of 1926, 44 Stat. 9, 71, exempted from the estate proceeds up to $40,000 "receivable . . . as insurance" by persons other than the executor. The proceeds in *Helvering* v. *Le Gierse* were not considered to have arisen from

the proceeds were includible in the estate under Section 302 (c) of the Revenue Act of 1926 because they devolved on the beneficiaries in a transfer which took "effect in possession or enjoyment at or after . . . death." 312 U. S., at 542. However, in reaching this conclusion the decision did not consider the problem in the case at bar, for in *Le Gierse* the insured had retained the rights and benefits of the insurance policy until death. The facts in the instant case on this point are fundamentally different. Prior to death, the decedent had divested herself of all interests in the insurance policies, including the possibility that the funds would return to her or her estate if the beneficiaries predeceased her.[4] The assignees became the "owners" of the policies before her death; they had received the right to the immediate and unlimited use of the policies to the full extent of their worth. The immediate value of the policies was always substantial. In the year of assignment their total cash surrender value was over $289,000; in the year of death it was over $326,000. Under the assignment, the decedent had not

---

"insurance" as Congress meant the word to be used because the ordinary "insurance risk" was not present. The insurance company had not undertaken to shift the risk of premature death from the insured and to distribute the risk among its other policyholders. On the contrary, by requiring a concurrent purchase of a nonrefundable annuity contract, the company had neutralized the risk at the expense of the "insured." The remaining risk, whether the annuitant would live beyond the actuarial prediction and after the insurance policy had been surrendered, was considered not an insurance risk but a risk of ordinary investment. Cf. Meisenholder, Taxation of Annuity Contracts under Estate and Inheritance Taxes, 39 Mich. L. Rev. 856, 883.

The principle that the proceeds are not considered "receivable . . . as insurance" applies whether at death the rights and benefits of the policies are in the hands of the insured or of another person. *Goldstone* v. *United States*, 325 U. S. 687, 690.

[4] Cf. *Goldstone* v. *United States*, *supra*.

become a life tenant who postpones the possession and enjoyment of the property by the remaindermen until her death.[5] Cf. *Helvering* v. *Bullard,* 303 U. S. 297; *Commissioner* v. *Estate of Church,* 335 U. S. 632. On the contrary, the assignees held the bundle of rights, the incidents of ownership, over property from which the decedent had totally divorced herself. Cf. *Chase National Bank* v. *United States,* 278 U. S. 327; *Goldstone* v. *United States,* 325 U. S. 687.

Illustrative of the distinction between *Helvering* v. *Le Gierse* and the case at bar is the fact that the Government has not endeavored here to sustain the tax under the statutory provision applied in that case. Instead of the provision taxing transfers "intended to take effect in possession or enjoyment at or after" the transferor's death,[6] the provision applied in *Le Gierse,* the Government relies on the provision taxing transfers in which the transferor has retained until death "the right to income from" the transferred property.[7] However, the Government's position that the annuities were income from prop-

---

[5] Nor are the assignees like second annuitants in survivorship annuities or joint annuitants in joint and survivor annuities. The donor's and donee's annuities have a common fund as the source so that if the source of the donor's annuity is extinguished, the donee's annuity is destroyed. The entire economic enjoyment of the second annuitant must, realistically speaking, await the death of the first annuitant, and a substantial portion of the surviving joint annuitant's enjoyment is similarly postponed. Cf., *e. g., Commissioner* v. *Wilder's Estate,* 118 F. 2d 281; *Commissioner* v. *Clise,* 122 F. 2d 998; *Mearkle's Estate* v. *Commissioner,* 129 F. 2d 386.

[6] Section 811 (c)(1)(C) of the Internal Revenue Code of 1939, as amended by Section 7 (a) of the Act of October 25, 1949, c. 720, 63 Stat. 891, 895.

[7] Section 811 (c)(1)(B) of the Internal Revenue Code of 1939, as amended by Section 7 (a) of the Act of October 25, 1949, c. 720, 63 Stat. 894. This provision was also a part of Section 302 (c) of the Revenue Act of 1926 at the time applicable in *Helvering* v. *Le Gierse.*

erty which the insured transferred to her children under the life insurance policies is not well taken.

To establish its contention, the Government must aggregate the premiums of the annuity policies with those of the life insurance policies and establish that the annuity payments were derived as income from the entire investment. This proposition cannot be established. Admittedly, when the policies were purchased, each life insurance-annuity combination was the product of a single, integrated transaction. However, the parties neither intended that, nor acted as if, any of the transactions would have a quality of indivisibility. Regardless of the considerations prompting the insurance companies to hedge their life insurance contracts with annuities, each time an annuity-life insurance combination was written, two items of property, an annuity policy and an insurance policy, were transferred to the purchaser. The annuity policy could have been acquired separately, and the life insurance policy could have been, and was, conveyed separately. The annuities arose from personal obligations of the insurance companies which were in no way conditioned on the continued existence of the life insurance contracts. These periodic payments would have continued unimpaired and without diminution in size throughout the life of the insured even if the life insurance policies had been extinguished.[8] Quite clearly the

---

[8] Where a decedent, not in contemplation of death, has transferred property to another in return for a promise to make periodic payments to the transferor for his lifetime, it has been held that these payments are not income from the transferred property so as to include the property in the estate of the decedent. *E. g., Estate of Sarah A. Bergan,* 1 T. C. 543, Acq., 1943 Cum. Bull. 2; *Security Trust & Savings Bank, Trustee,* 11 B. T. A. 833; *Seymour Johnson,* 10 B. T. A. 411; *Hirsh* v. *United States,* 68 Ct. Cl. 508, 35 F. 2d 982 (Ct. Cl. 1929); cf. *Welch* v. *Hall,* 134 F. 2d 366. In these cases the

annuity payments arose solely from the annuity policies. The use and enjoyment of the annuity policies were entirely independent of the life insurance policies. Because of this independence, the Commissioner may not, by aggregating the two types of policies into one investment, conclude that by receiving the annuities, the decedent had retained income from the life insurance contracts.[9]

Accordingly, the judgment of the Court of Appeals is

Reversed.

MR. JUSTICE BURTON, with whom MR. JUSTICE BLACK and MR. JUSTICE CLARK join, dissenting.

For the reasons stated by the court below, 241 F. 2d 690, and also in *Conway* v. *Glenn,* 193 F. 2d 965, and *Burr* v. *Commissioner,* 156 F. 2d 871, it seems to me that, for federal estate tax purposes, this case is indistinguishable from one in which a settlor places a sum in trust under such terms that he shall receive the income from it for life, and the principal shall be payable to designated beneficiaries upon his death. As the principal, in that event, would be includable in the settlor's estate for federal estate tax purposes, so here the proceeds of the insurance policies should be included in this decedent's estate. Accordingly, I would affirm the judgment of the Court of Appeals.

---

promise is a personal obligation of the transferee, the obligation is usually not chargeable to the transferred property, and the size of the payments is not determined by the size of the actual income from the transferred property at the time the payments are made.

[9] For the treatment by lower courts of the life insurance-annuity combination in a similar situation in the field of federal income taxation, cf. *Commissioner* v. *Meyer,* 139 F. 2d 256; *Edna E. Meredith,* 1 T. C. M. 847, affirmed, *Helvering* v. *Meredith,* 140 F. 2d 973; *John Koehrer,* 4 T. C. M. 219.

458778 O—58——22

DENVER UNION STOCK YARD CO. *v.* PRODUCERS LIVESTOCK MARKETING ASSOCIATION.

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

No. 106. Argued March 10, 1958.—Decided April 28, 1958.*

Under the Packers and Stockyards Act, a market agency registered and doing business at several different stockyards instituted an administrative proceeding challenging the validity of regulations issued by a stockyard company which provided that a market agency engaged in business at its stockyard shall not, in the "normal marketing area" thereof, solicit business for, or divert business to, any other market. The market agency introduced no evidence to show that the regulations were unreasonable but claimed that they were invalid on their face as a matter of law. The stockyard company moved to dismiss the complaint, and it was dismissed on the ground that the regulations could not be found invalid on their face. The Court of Appeals reversed and remanded the case to the Secretary of Agriculture with directions to issue an order requiring the stockyard company to cease and desist from issuing or enforcing the regulations. *Held:* The judgment is affirmed. Pp. 283–290.

(a) The regulations conflict with § 304 of the Act, which makes it "the duty" of every market agency "to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard" (meaning every stockyard where the market agency is registered), and they are forbidden by § 307, which makes unlawful "every unjust, unreasonable, or discriminatory regulation or practice." Pp. 286–287.

(b) In these circumstances, the taking of evidence as to whether the regulations were "reasonable" was not essential to the "full hearing" provided for in § 310 of the Act. Pp. 287–288.

---

*Together with No. 118, *Benson, Secretary of Agriculture,* v. *Producers Livestock Marketing Association,* also on certiorari to the same Court.

(c) Stockyards subject to the Act are public utilities and, as such, may not engage in discrimination or other monopolistic practices. Pp. 288–290.

241 F. 2d 192, affirmed.

Ashley Sellers argued the cause for petitioner in No. 106. With him on the brief were *Winston S. Howard, Albert L. Reeves, Jr., John D. Conner* and *Jesse E. Baskette.*

Neil Brooks argued the cause for petitioner in No. 118. With him on the brief were *Robert L. Farrington* and *Donald A. Campbell.*

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

Frederic P. Lee filed a brief for the American Stock Yards Association, as *amicus curiae,* urging reversal in No. 118.

Briefs of *amici curiae* urging affirmance were filed in No. 118 by *George E. Merker, Jr.* for the National Live Stock Producers Association, *William G. Davisson* for the Oklahoma Livestock Marketing Association et al., and *Allen Lauterbach* for the American Farm Bureau Federation.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This litigation started with a complaint filed by respondent, a market agency at the Denver Union stockyard, with the Secretary of Agriculture, alleging that certain Regulations issued by Denver Union Stock Yard Company are invalid under the Packers and Stockyards Act, 42 Stat. 159, as amended, 7 U. S. C. § 181 *et seq.* The Regulations complained of provide:

"No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Com-

pany property, or elsewhere, nor shall any other person upon Stock Yard Company property—

"(1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or

"(2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stock Yard; or

"(3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard." [1]

The complaint was entertained; and the Stock Yard Company admitted that it issued the Regulations and alleged that they were necessary to enable it "to furnish, upon reasonable request, without discrimination, reasonable stockyard services . . . and to enable the patrons of the Denver Union Stockyards to secure, upon reasonable request, without discrimination, reasonable stockyard services . . . ." The prayer in the answer was that the

---

[1] The Regulation goes on to state the applicability of the foregoing provisions.

"The normal marketing area from which livestock would normally come to the public market at this Stockyard, and which is the area to which this subdivision (c) shall apply, is defined as all of the state of Colorado except that part listed as follows:

"The area lying east of the line beginning with the westerly boundary of the County of Sedgwick where it intersects the Nebraska state line; thence south along the county line of Sedgwick and Phillips counties; thence west and south along the western boundary of Yuma county to its intersection with U. S. Highway 36; thence west to Cope and south along Colorado Highway 59 to Eads, Colorado; thence westerly along Highway 96 to Ordway; thence south on Highway 71 to Timpas; thence southwesterly via Highway 350 to Trinidad; thence south to New Mexico state line.

"The provisions of paragraph (c) do not apply on livestock solely used for breeding purposes."

Stock Yard Company be granted an oral hearing and that the complaint be dismissed. Thereafter the Stock Yard Company filed a motion to require respondent to produce for examination certain books and records. Respondent opposed the motion, electing to stand upon the illegality of the Regulations as a matter of law. The Examiner certified the question to the Judicial Officer for decision, recommending that the proceeding be dismissed. The Judicial Officer [2] dismissed the complaint, holding that he could not find the Regulations invalid on their face. 15 Agr. Dec. 638. The Court of Appeals reversed,[3] holding that the Regulations are an unlawful restriction on the statutory rights and duties of stockyards and market agencies under the Act. 241 F. 2d 192. It remanded the case to the Secretary of Agriculture with directions to issue a cease and desist order against the issuance or enforcement of the Regulations. The case is here by certiorari which we granted in view of the public importance of the issue raised. 353 U. S. 982.

The Act defines "market agency" as "any person engaged in the business of (1) buying or selling in commerce live stock at a stockyard on a commission basis or (2) furnishing stockyard services." § 301 (c). The Act also provides that "no person shall carry on the business of a market agency . . . at such stockyard unless he has registered with the Secretary . . . ." § 303. Respondent is registered not only with the Denver Union Stock Yard Co. but with other stockyards as well. One impact of the Regulations on respondent is therefore clear: having registered with this Stock Yard Company it may

---

[2] The authority of the Judicial Officer was delegated by the Secretary of Agriculture (10 Fed. Reg. 13769; 11 Fed. Reg. 177A–233; 18 Fed. Reg. 3219, 3648; 19 Fed. Reg. 11) pursuant to the Act of April 4, 1940, 54 Stat. 81, 5 U. S. C. § 516a *et seq.*

[3] The Court of Appeals had jurisdiction to review the case under 64 Stat. 1129, 5 U. S. C. § 1032.

not, in the "normal marketing area" of the Denver yard (which is defined in the Regulations to embrace a vast area in Colorado [4]), solicit business for, or divert it to, other markets. The market agency registered with the Denver Stock Yard Co. must, while working in the "normal marketing area" of that yard, solicit or do business exclusively for it and for none of the other stockyards with which it is registered.

Yet § 304 of the Act makes it "the duty" of every market agency "to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard." Section 301 (b) defines stockyard services to mean "services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of live stock." And § 307 prohibits and declares unlawful "every unjust, unreasonable, or discriminatory regulation or practice."

The words "at such stockyard" as used in § 304 obviously mean, as applied to a "market agency," every stockyard where that "market agency" is registered. From the Act it seems plain, therefore, that the duty of respondent would be to furnish a producer in the Denver area stockyard service at Kansas City, if the producer so desired. Stockyards and market agencies are made public utilities by the Act. *Stafford* v. *Wallace,* 258 U. S. 495, 516; *Swift & Co.* v. *United States,* 316 U. S. 216, 232. Their duty is to serve all, impartially and without discrimination. The Regulations bar both the market agency and the stockyard from performing their statutory duty. A market agency registered with Denver could not by force of the challenged Regulations furnish producers in the

[4] For the definition of the "normal marketing area" see note 1, *supra.*

Denver area stockyard services at Kansas City or at any other stockyard where the agency is also registered. The conflict seems clear and obvious; and no evidence could make it clearer.[5] The case is as simple to us as that of a utility that refuses to sell any power to a customer if the customer buys any power from a competitor; as clear as an attempt by a carrier by rail to deny service to one who ships by truck. Cf. *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1; *International Salt Co.* v. *United States,* 332 U. S. 392.

When an Act condemns a practice that is "unfair" or "unreasonable," evidence is normally necessary to determine whether a practice, rule, or regulation transcends the bounds. See *Associated Press* v. *Labor Board,* 301 U. S. 103; *Chicago Board of Trade* v. *United States,* 246 U. S. 231; *Sugar Institute* v. *United States,* 297 U. S. 553. But where an Act defines a duty in explicit terms, a hearing on the question of statutory construction is often all that is needed. See *Securities and Exchange Comm'n* v. *Ralston Purina Co.,* 346 U. S. 119 (public offering); *Addison* v. *Holly Hill Co.,* 322 U. S. 607 (area of production). It is, of course, true that § 310 of the Act provides for a "full hearing" on a complaint against a "regulation" of a stockyard. That was also true of the Act involved in *United States* v. *Storer Broadcasting Co.,* 351 U. S. 192. But we observed in that case that we never presume that Congress intended an agency "to waste time on applications that do not state a valid basis for a hearing." *Id.,* at 205.

The critical statutory words in the present case are from § 304 providing, "It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard

[5] Whether the Regulations as applied to "dealers" are valid is a question we do not reach.

services at such stockyard." The Secretary's emphasis in the argument was on the words "reasonable stockyard services." By analogy to the antitrust cases, a case is built for fact findings essential to a determination of what is "reasonable." See *Standard Oil Co.* v. *United States,* 221 U. S. 1; *Chicago Board of Trade* v. *United States, supra.* Certainly an evidentiary hearing would be necessary if, for example, a method of handling livestock at a particular stockyard was challenged as unreasonable. See *Morgan* v. *United States,* 298 U. S. 468; *Morgan* v. *United States,* 304 U. S. 1; *United States* v. *Morgan,* 307 U. S. 183. But that argument is misapplied here. It misconceives the thrust of the present Regulations, which are aimed at keeping market agencies registered at Denver from doing business for producers, who are in the "normal marketing area" of the Denver yard, at any other market. These Regulations bar them from rendering, not some stockyard services at the other yards, but any and all other stockyard services for those producers, except at Denver. "No" stockyard services cannot possibly be equated with "reasonable" stockyard services under this Act.

The argument *contra* is premised on the theory that stockyard owners, like feudal barons of old, can divide up the country, set the bounds of their domain, establish "no trespassing" signs, and make market agencies registering with them their exclusive agents. The institution of the exclusive agency is, of course, well known in the law; and the legal problem here would be quite different if the Act envisaged stockyards as strictly private enterprise. But, as noted, Congress planned differently. The Senate Report proclaimed that these "great public markets" are "public utilities." S. Rep. No. 39, 67th Cong., 1st Sess. 7. The House Report, in the same vein, placed this regulation of the stockyards on a par with the regulation of the railroads. H. R. Rep. No. 77, 67th Cong., 1st Sess. 10.

It was against this background that Chief Justice Taft wrote in *Stafford* v. *Wallace, supra,* at 514:

> "The object to be secured by the act is the free and unburdened flow of live stock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still as live stock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market."

He went on to say that the Act treats the stockyards "as great national public utilities," *id.,* at 516. His opinion echoes and re-echoes with the fear of monopoly in this field.

We are told, however, that the economics of the business has changed, that while at the passage of the Act most livestock purchases were at these stockyards, now a substantial portion—about 40 percent, it is said—takes place at private livestock markets such as feed yards and country points. From this it is argued that the present Regulation is needed to keep the business in the public markets, where there is regulation and competition, and out of the private markets where there is no competitive bidding and regulation. If the Act does not fit the present economics of the business, a problem is presented for the Congress. Though our preference were for monopoly and against competition, we should "guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 194.

We take the Act as written. As written, it is aimed at all monopoly practices, of which discrimination is one. When Chief Justice Taft wrote of the aim of the Act in

terms of the ends of a monopoly, he wrote faithfully to the legislative history. The Senate Report, *supra*, at 7, stated "It has been demonstrated beyond question that the history of the development of this industry has been the history of one effort after another to set up monopoly." The present Regulations, it seems, have had a long ancestry.

Affirmed.

MR. JUSTICE CLARK, concurring.

I agree that invalidity is evident on the face of the regulations issued by the Denver Union Stock Yard Company. Section 304 of the Packers and Stockyards Act, 42 Stat. 164, as amended, 7 U. S. C. § 205, requires a market agency registered at a given stockyard to furnish reasonable services at that stockyard on reasonable request of a customer. Respondent's complaint alleges that respondent is registered at other stockyards besides the Denver yard, and because of petitioner's motion to dismiss the complaint we take those allegations as true. Under § 304, the several registrations impose a duty on the part of respondent to offer Colorado customers reasonable service at each yard where it is registered. Since the Denver regulations prohibit respondent's fulfillment of that statutory duty, they would appear void on their face under § 307, which declares unlawful "every unjust, unreasonable, or discriminatory regulation or practice." 42 Stat. 165, as amended, 7 U. S. C. § 208.

The regulatory scheme devised by the Congress, however, makes it possible for invalidity on the face of the regulations to be overcome by evidence showing that their application and operation is not in fact unjust, unreasonable, or discriminatory. Primary jurisdiction is placed in the Secretary to make such a determination. Because of that, I should think the normal course of action where dismissal is found unwarranted would be to remand the case to the Secretary for a full hearing.

That procedure does not appear to be in order here, however, because the purpose and intended effect of the regulations is crystal clear. The president of the Denver stockyard, before the case took its present posture, filed an affidavit in the record alleging in substance that in the period July 1, 1951, to June 30, 1955, respondent market agency "continually diverted away from the Denver Union Stockyards a large volume of livestock" which normally would have been consigned to that yard, that respondent sold lambs "direct to many packers . . . including some located on the Atlantic Coast and in interior Iowa," and that "many like transactions were conducted by [respondent] in its own name or for its account by its wholly owned subsidiary, the Western Order Buyers, or by the employees of [respondent] or its said subsidiary." The affidavit further recites that, "As a result, the Denver Union Stock Yard Company in the early part of this year [1955] issued item 10 (c) of its rules and regulations which was designed to . . . eliminate an unjust, unreasonable, and discriminatory practice by [respondent] . . . ." The purpose and effect of the regulations is made certain by the additional statement that, "[I]t was felt that market agencies may not engage in transactions away from the Denver market inconsistent with the duties imposed upon them to render the best possible service *which, when boiled down, means that they must refrain from diverting the normal flow of livestock to this market if they are to continue to operate at the market.*" (Emphasis added.) With greater force than any other possible evidence, this frank statement reveals that petitioner intended to, and did, monopolize the livestock market in the entire State of Colorado, save a small area on the eastern border. Since the Denver stockyard itself would impose the only sanction possible for violation of the regulation, namely, cancellation of registration, the affidavit is a complete answer to any

evidence offered as to reasonableness in practical operation. The regulations, according to their author, bluntly say that to continue operation on the Denver market a registrant "must refrain" from selling Colorado livestock, unless from the small area mentioned above, on any other market. It would be a useless formality to remand in the light of such an irrefutable acknowledgment.

It also is worthy of note that petitioner elected to defend the regulations without any evidence when it moved to dismiss the complaint before the Secretary. Petitioner could have offered its presently proffered explanations then but chose not to do so. While such action does not preclude a remand now for a full hearing, petitioner's about-face on losing the battle lends no support to its cause.

For these reasons I join the judgment of affirmance.

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

The sole question presented by the case is this:

Under his powers and duties to effectuate the scheme designed by Congress through the Packers and Stockyards Act of 1921, for the regulation of the stockyards industry, is the Secretary of Agriculture barred from determining on the basis of evidence whether or not regulations are reasonable that are promulgated by the Denver Stockyards for the purpose of preventing the diversion of stockyard services from the Denver Stockyards that as a matter of normal business flow would go to the Denver yards, on the challenge to such regulations by a market agency registered at the Denver Stockyards to furnish "reasonable stockyard services" at that yard?

To deny the Secretary of Agriculture the power even to hear evidence as to the reasonableness of such regulations is to misconceive the whole scheme for the regional

regulation of the stockyards industry for which stockyards and market agencies are geographically licensed, and to deny to the Secretary of Agriculture powers of administration that Congress has conferred upon him.

While a regulation may, like the one in question, on its face—that is, abstractly considered—appear to be unreasonable because discriminatory, elucidation of such a regulation in the concrete, on the basis of its practical operation in light of evidence, may negative such appearance. It is for the Secretary of Agriculture to hear such relevant evidence and to assess it, subject to the appropriate scope of judicial review. This proceeding should therefore be remanded to the Secretary of Agriculture for appropriate action. These views are elaborated in MR. JUSTICE WHITTAKER'S opinion, which I join.

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

I respectfully dissent. The question presented is whether certain regulations issued by the owner of a posted stockyard are void on their face. Petitioner, the Denver Union Stock Yard Company, is the "stockyard owner" [1] of the Denver Union stockyard, a facility in Denver, Colorado, which constitutes a "stockyard" within the meaning of § 302 of the Packers and Stockyards Act,[2]

---

[1] By § 301 (a) of the Packers and Stockyards Act (42 Stat. 159, as amended, 7 U. S. C. § 181 *et seq.*) the term "stockyard owner" is defined to mean "any person engaged in the business of conducting or operating a stockyard."

[2] Section 302 of the Act defines a stockyard to be "any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce."

42 Stat. 159, as amended, 7 U. S. C. § 181 *et seq.*—hereinafter called the Act. In 1921 the Secretary of Agriculture, pursuant to § 302 (b) of the Act, "posted" that stockyard, and it thereupon became, and has since been, subject to the provisions of the Act. Under § 304, it became the "duty" of petitioner "to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard"; [3] and, under § 307, it also became its "duty" to "establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services" at that stockyard. Pursuant thereto petitioner filed with the Secretary on May 11, 1955, an amendment of its existing regulations to become effective May 25, 1955. The amended regulations, in pertinent part, provide:

> "No *market agency* or *dealer* [4] engaging *in business at this Stockyard* shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property—
>
> "(1) *Solicit* any business for other markets, for sale at outside feed yards or at country points, or *endeavor to secure* customers to sell or purchase livestock elsewhere; or

---

[3] Section 301 (b) defines the term "stockyard services" to mean "services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of live stock."

[4] Section 301 (d) of the Act defines the term "dealer" to mean "any person, *not a market agency*, engaged in the business of buying or selling in commerce live stock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser." (Emphasis supplied.)

"(2) In any manner divert *or attempt to divert* livestock from this market which would otherwise normally come to this Stock Yard; or

"(3) *Engage in any practice or device* which would impair or interfere with the normal flow of livestock to the public market at this Stockyard." [5] (Emphasis supplied.)

Sometime after the Denver Union stockyard was "posted," respondent, pursuant to the provisions of § 303, "registered" with the Secretary as a market agency—not as a "dealer"—on the Denver Union stockyard, and thereby acquired the status of a "market agency" under the Act "at such stockyard." Section 301 (c) defines the term "market agency" to mean: "[A]ny person engaged in the business of (1) buying or selling in commerce livestock *at a stockyard on a commission basis,* or (2) furnishing stockyard services." (Emphasis supplied.) By § 306 (a), it became the duty of respondent, as a "market agency at such stockyard," to print, file with the Secretary, and keep open to public inspection "at the [Denver] stockyard," a schedule showing all rates and charges for "stockyard services" to be furnished by it "at such stockyard"; and, under § 304, it became its duty "to furnish upon reasonable request, without discrimination, reason-

[5] The regulations also stated that the "area from which livestock would normally come to the public market at this Stockyard" is the State of Colorado, except approximately the eastern one-sixth of it.

The amended regulations are similar to preceding ones, effective June 1, 1938, which, among other things, said: "No person, without the express permission of this Company in writing, shall solicit any business in these yards for other markets, sales at outside feed yards or country points, or endeavor to secure customers to sell or purchase livestock elsewhere." Regulations of the Denver Union Stockyards Company (effective June 1, 1938), p. 4, § 11, Rules 10 and 11, on file in the Livestock Division, Agricultural Marketing Service, United States Department of Agriculture, Washington, D. C.

able stockyard services *at such stockyard.*" [6] (Emphasis supplied.)

Section 309 (a) provides, *inter alia,* that: "Any person complaining of anything done . . . by any stockyard owner . . . in violation of the provisions [of the Act] may . . . apply to the Secretary by petition which shall briefly state the facts, whereupon the complaint . . . shall be forwarded by the Secretary to the defendant, who shall be called upon . . . *to answer it in writing,* within a reasonable time to be specified by the Secretary." (Emphasis supplied.) The following section (§ 310), in relevant part, provides: "Whenever after *full hearing* upon a complaint . . . *the Secretary is of the opinion* that any . . . regulation . . . of a stockyard owner . . . for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, *the Secretary*—

> "(a) May determine and prescribe . . . what regulation . . . is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and
>
> "(b) May make an order that such owner or operator . . . (3) shall conform to and observe the regulation . . . so prescribed." (Emphasis supplied.)

---

[6] Section 312 of the Act is also relevant. It provides: "(a) It shall be unlawful for any *stockyard owner, market agency,* or *dealer* to engage in or use any *unfair, unjustly discriminatory, or deceptive practice or device* in connection with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce at a stockyard, of live stock.

"(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subdivision (a) *the Secretary* after notice *and full hearing* may make an order that he shall cease and desist from continuing such violation to the extent that *the Secretary finds* that it does or will exist." (Emphasis supplied.)

Invoking the Secretary's regulatory powers under § 310 (a), respondent, on July 7, 1955, filed a complaint with the Secretary, alleging that the quoted regulations were unauthorized because the Act authorized the stockyard owner "to establish 'regulations and practices [only] in respect to the furnishing of stockyard services'; and that [the] practice purported to be prescribed or established by [the regulation] does not . . . relate to the furnishing of stockyard services and is therefore unauthorized and invalid"; and, without waiving that contention, it further alleged that the regulation "is unjust, unreasonable and discriminatory, and should be set aside as unlawful"; it then proceeded to state its conclusions respecting the operation and effect of the regulations, and ultimately prayed that they "be set aside and annulled."

Thereupon the Secretary sent a copy of the complaint to petitioner, and, in a covering letter, stated that the complaint would be entertained as a "disciplinary proceeding" in accordance with § 202.6 (b) of his rules of practice; advised that petitioner was required to file an answer within 20 days from receipt of the complaint "containing a definite statement of the facts which constitute the grounds of defense"; and concluded that, under his rules of practice, "the burden of proof [would] be upon the complainant to establish the matters complained of." Petitioner answered, admitting that it was the "owner" of the "posted" Denver Union "stockyards"; that respondent was "registered" to do business thereon as a "market agency"; that it had published the questioned regulations, but specifically denied the conclusions concerning the interpretation and effect of the regulations, and generally denied all other averments of the complaint, and then proceeded to allege facts which it concluded made the regulations reasonable and necessary to prevent unfair and unjustly discriminatory practices by

458778 O—58——23

market agencies and dealers, registered as such at that stockyard, in connection with receiving and handling livestock, and to enable it to render, and to require market agencies to render, "reasonable stockyard services" at the Denver Union stockyard.

Soon afterward, petitioner, in preparing for the hearing, filed with the Secretary and served upon respondent a motion to produce for inspection certain of the latter's books and records, alleged to contain evidence relevant and material to the issues. Respondent then filed a "reply" to the motion in which it resisted production of the books and records upon the ground that the regulations were void on their face. Petitioner moved to strike that reply as not responsive to the motion to produce. After argument, the hearing examiner issued an "interim ruling," in which he said, "We cannot hold, as complainant asks, that respondent's regulation violates the law on its face. We must have facts to see whether the regulation, or action taken under it, is reasonable under the circumstances"; but he did not sustain the motion to produce. Instead he set the proceeding for hearing at Denver on January 24, 1956, and indicated that if, after respondent had produced its evidence, it appeared necessary to the presentation of petitioner's defense he would sustain the motion.

On December 23, 1955, respondent filed what it termed an "Election To Rest," reciting "that this complainant elects to stand upon the illegality of said regulation, as a matter of law," and that it would "not present evidence in this cause." Thereupon petitioner moved to dismiss the complaint for failure of respondent "to sustain the burden of making a prima facie case in support of its complaint." After hearing the parties upon that motion, the hearing examiner certified the proceeding to the Judicial

Officer [7] for decision, with a recommendation that it be dismissed. The Judicial Officer, after hearing the parties orally and upon briefs, concluded that the regulations were not void on their face and that, in the total absence of evidence, he could not find that the regulations were invalid, and dismissed the proceeding. 15 Agr. Dec. 638.

Pursuant to 5 U. S. C. § 1034, respondent filed in the Court of Appeals its petition against the United States and the Secretary of Agriculture to review the decision and order of the Judicial Officer.[8] The Denver Union Stock Yard Company intervened as a respondent. The Court of Appeals, concluding that "[t]he compulsion of the regulation is in immediate conflict with the requirement of Sec. 304 which contemplates and imposes the duty upon marketing agencies to render reasonable services to their customers at *every* stockyard where they do business," held that the regulations were void on their face and reversed the decision of the Judicial Officer, and also remanded the proceeding to the Secretary "with instructions to vacate the order dismissing [the] complaint and [to] enter an appropriate order requiring the Denver Union Stockyard Company to cease and desist from issuing or enforcing [the] regulation." 241 F. 2d, at 196–197. Upon petition of the Denver Union Stock Yard Company in No. 106, and of the Secretary of Agriculture in No. 118, we granted certiorari. 353 U. S. 982.

This Court now affirms. Its opinion, like that of the Court of Appeals, is based upon the conclusion that the

---

[7] Authority to review and determine such proceedings had been delegated by the Secretary of Agriculture to the Judicial Officer (10 Fed. Reg. 13769; 11 Fed. Reg. 177A–233; 18 Fed. Reg. 3219, 3648; 19 Fed. Reg. 11) pursuant to the Act of April 4, 1940, 54 Stat. 81, 5 U. S. C. § 516a.

[8] The Court of Appeals had jurisdiction to review the proceeding under 5 U. S. C. § 1032.

regulations conflict with the provisions of § 304 of the Act. The majority have expressed the basis of their conclusion as follows: "The market agency registered with the Denver Stock Yard Co. must, while working in the 'normal marketing area' of that yard, solicit or do business exclusively for it and for none of the other stockyards with which it is registered. Yet § 304 of the Act makes it 'the duty' of every market agency 'to furnish upon reasonable request, without discrimination, reasonable stockyard services *at such stockyard.*' . . . From the Act it seems plain, therefore, that the duty of respondent would be to furnish a producer *in the Denver area* stockyard service *at Kansas City,* if the producer so desired. . . . Their duty is *to serve all,* impartially and without discrimination. The Regulations bar both the market agency and the stockyard from performing their statutory duty. . . . The conflict seems clear and obvious; and no evidence could make it clearer." (Emphasis supplied.)

In my view, the reasoning and conclusion of both the Court of Appeals and this Court misinterpret the provisions of the Act, and the regulations as well.

The first, and most grievous, misinterpretation stems from the failure to appreciate that respondent's status, privileges and obligations, as a registered "market agency" at the Denver Union stockyard, are limited by the Act to "such stockyard," and that the challenged regulations apply only to a "market agency or dealer engaging in business at this Stockyard"—the Denver Union stockyard. As earlier shown, § 303 plainly states that after the Secretary has "posted" a particular stockyard "no person shall carry on the business of a market agency . . . *at such stockyard* unless he has registered with the Secretary [stating, among other things] the kinds of stockyard services . . . which he furnishes *at such stockyard.*" By equally clear language § 306 (a) makes it the duty of "every market agency *at such stockyard* [to print, file

with the Secretary] and keep open to public inspection *at the stockyard,* schedules showing all rates and charges for the stockyard services furnished by such person *at such stockyard.*" Section 304 is no less plain in stating that it is the duty of every "market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services *at such stockyard.*" (Emphasis supplied.) I submit that these provisions of the Act leave no room to doubt that a person by registering with the Secretary to do business as a market agency at a particular stockyard acquires the rights, and assumes the obligations, of a "market agency" only "at such stockyard." And inasmuch as the challenged regulations apply only to a "market agency or dealer engaging in business at this Stockyard"—the Denver Union stockyard—they cannot have any application or effect at any other stockyard. Registration to do business as a "market agency" at "such stockyard" does not give the registrant the status of a "market agency," or create the right or obligation to furnish "stockyard services," at all stockyards in the Nation, or at any place other than a particular stockyard where so registered as a "market agency." While a market agency is a public utility (*Stafford* v. *Wallace,* 258 U. S. 495; *Swift & Co.* v. *United States,* 316 U. S. 216, 232), it is such only on the posted stockyard where registered as a market agency. Doubtless one who has the status of a "market agency," and thus also of a public utility, at the Denver stockyard, may, by an additional registration under § 303, acquire a like status at another posted stockyard, yet he would not thereby become *one* market agency or *one* public utility covering the several stockyards where so registered. On the contrary, his status as a market agency and public utility on each of such posted stockyards would be just as several, separate and independent as though owned by different persons. In legal effect, a "market agency" and public utility on

one posted stockyard is a separate entity from a "market agency" and public utility on another, even though both be owned by the same person. And regulations promulgated by the "stockyard owner" of one of such stockyards, applicable to a "market agency" thereon, could have no application or effect at another posted stockyard or to a registered "market agency" thereon. Hence the question is not whether the challenged regulations might restrict a "market agency" on some other posted stockyard from furnishing reasonable stockyard services at such other stockyard, for the challenged regulations have no application to a "market agency" on such other stockyard, but apply only to a "market agency or dealer engaging in business at [the Denver Union] Stockyard."

The question then is whether the challenged regulations may be said, from their face as a matter of law, to obstruct a market agency on the Denver Union stockyard from furnishing just, reasonable and nondiscriminatory stockyard services at that stockyard, where, and only where, they apply. I think analysis of them shows that they do not upon their face in any way conflict with § 304 nor obstruct "the duty of [a] market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services *at such stockyard*"—the Denver Union stockyard—as required by that section. It will be observed that they prohibit a "market agency or dealer engaging in business at this Stockyard" from doing six things. The first subsection provides that they shall not (1) "*solicit* any business for other markets," (2) solicit any business "for sale at outside feed yards," (3) solicit any business for sale "at country points," or (4) "*endeavor to secure* customers to sell or purchase livestock elsewhere"; and the second subsection provides that they shall not (5) "[i]n any manner *divert* or *attempt to divert* livestock from this market . . ."; and the third subsection provides that they shall not (6) "[*e*]*ngage in any prac-*

tice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard." (Emphasis supplied.) Surely the regulations prohibiting a registered "market agency" on the Denver Union stockyard from soliciting business for other markets, and from soliciting business (livestock) for sale "at outside feed yards" or "at country points," and from endeavoring to induce customers not to buy or sell their livestock on the Denver stockyard, do not at all prohibit it from furnishing stockyard services (note 3) "at such stockyard" (§ 304); and, moreover, as shown, such a market agency is not authorized by the Act to furnish stockyard services "at outside feed yards," at "country points," or at any place other than the posted stockyard upon which it is registered as a market agency. § 303. And inasmuch as a "market agency," as distinguished from a "dealer," may not buy and sell livestock for its own account, but only on a "commission basis" for others, it cannot lawfully own any livestock to "divert," but it is in position to "attempt to divert" livestock from the Denver market, and thus to boycott it, by attempting to cause those who are owners of livestock to ship and sell elsewhere. A regulation prohibiting this surely cannot be said to prevent the market agency from furnishing stockyard services at the Denver yard. Lastly, I believe it cannot logically be contended that the regulation prohibiting a market agency on the Denver yard from engaging *"in any practice or device"* which would impair or interfere with the normal flow of livestock to the Denver stockyard could prevent such market agency from furnishing stockyard services at that stockyard.

It is plain and undisputed that the regulations may not—in the total absence of evidence, as here—be held void unless it is clear upon their face that there cannot be any circumstances under which they, or any of them, could be lawful, "just, reasonable, and nondiscriminatory."

§ 307. And only when it affirmatively and clearly so appears upon the face of the regulations may it be said that a proceeding to contest their validity, in which no evidence whatever is offered to sustain the complaint, constitutes the "full hearing" required by § 310. *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422.

Under the terms of the Act and of the regulations, which we have shown, it seems entirely clear that this is not such a case, and I think it must follow that the regulations cannot be said to be void on their face. The foregoing demonstrates the error of the pivotal conclusion of the Court of Appeals that § 304 "contemplates and imposes the duty upon marketing agencies [registered as such at the Denver Union stockyard] to render reasonable services . . . at *every* stockyard where they do business." (Emphasis by the Court of Appeals.) It also demonstrates, I think, the error of the basic conclusion of the opinion of this Court that: "From the Act it seems plain, therefore, that the duty of respondent would be to furnish a producer in the Denver area *stockyard service at Kansas City,* if the producer so desired. . . . *Their duty is to serve all,* impartially and without discrimination." (Emphasis supplied.)

It is indeed obvious that the Secretary, after the "full hearing" contemplated by § 310, might reasonably find from all the facts adduced at such "full hearing" (1) that the conduct of a "market agency" on the Denver stockyard in boycotting that yard by soliciting livestock for sale at other markets, or at outside feed yards, or at country points, or by endeavoring to induce livestock owners not to buy or sell on the Denver yard and to divert their livestock from the Denver market, constitutes an "unfair, unjustly discriminatory, or deceptive practice or device in connection with the receiving, marketing, buying or selling . . . delivery, shipment . . . or

handling, in commerce at a stockyard, of live stock," in violation of § 312 of the Act (note 6), and (2) that these regulations—or at least some of them—are a "just, reasonable, and nondiscriminatory [means] to be thereafter followed" (§ 310) to prevent such illegal practices by a market agency on that yard, and to enable the stockyard owner to furnish, and to require market agencies on that yard to furnish, "reasonable stockyard services," at the Denver stockyard. But, of course, the Secretary could not make findings in a vacuum—in the total absence of evidence as here. We must keep in mind that Congress, by § 307, made it the "duty" of petitioner to "establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services" at its posted stockyard, and that the questioned regulations were promulgated by petitioner pursuant to that duty. And we must not forget that Congress gave to the Secretary—not to the courts—the duty and power to determine what regulations of a stockyard owner are or will be just, reasonable and nondiscriminatory to be followed in the future, and prescribed the method for challenging, and for determining, the validity of such regulations. By § 309 (a) Congress prescribed that "[a]ny person complaining" shall file a complaint with the Secretary "stat[ing] the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon . . . to answer it in writing," and, by § 310, Congress prescribed that if "after full hearing upon [the] complaint . . . , *the Secretary is of the opinion* that any . . . regulation . . . of a stockyard owner . . . is or will be unjust, unreasonable, or discriminatory, *the Secretary*— (a) may determine and prescribe . . . what regulation . . . is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and (b) may make an order that such owner or operator . . . (3) shall con-

form to and observe the regulation . . . so prescribed." Only after "full hearing" of the facts and circumstances could the Secretary perform his duty under § 310 of determining "what regulation will be just, reasonable, and nondiscriminatory to be thereafter followed." By the terms of the Act, Congress left these determinations to the experienced and informed judgment of the Secretary and gave to him appropriate discretion to assess all factors relevant to the subject. *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 614. To determine whether the regulations are just, reasonable and nondiscriminatory the Secretary must "consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238. "Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances," *Associated Press* v. *Labor Board*, 301 U. S. 103, 132. "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the [Secretary's] discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 194. After such "full hearing" the Secretary might reasonably find, from all the facts and circumstances disclosed, that all of the regulations were just, reasonable and nondiscriminatory, or that only part of them met that test, or that none of them did so; but it is evident that he could reach no conclusion upon those matters in the total absence of any facts.

Respondent's complaint did not allege that the regulations were void on their face.[9] Rather respondent injected that question collaterally and for the first time by its "reply" to petitioner's motion for an order requiring respondent to produce certain of its records for inspection by petitioner as a step in the latter's preparation for the "full hearing" to be held upon the issues of fact and law that had been joined in the proceeding; and when the hearing officer, after considering that motion and reply, found that he could not determine whether the regulations were valid or invalid without fully hearing the facts, respondent filed its "Election To Rest" stating that "this complainant elects to stand upon the illegality of said regulation, as a matter of law" and that it would "not present evidence in this cause." Respondent thus refused to adduce evidence to sustain its burden of proof upon the issues tendered by its complaint, and hence withdrew its challenge of the need for, and the reasonableness of, the regulations. The Judicial Officer did not hold that the regulations were valid or invalid. He held only that the question could not be determined in a vacuum—without a "full hearing" of the facts—and dismissed the proceeding. In so doing, I believe he was entirely justified and that our analysis of the law and the regulations makes this clear.

It is worthy of note that though the questioned regulations apply to "dealers" as well as market agencies on the Denver stockyard, the validity of the regulations in respect to dealers is in no way here questioned. Yet—in the total absence of evidence and assuming certain facts—

---

[9] As shown in the statement, respondent alleged that the regulation did not "relate to the furnishing of stockyard services and is therefore unauthorized and invalid," and, alternatively, that the regulation "is unjust, unreasonable and discriminatory and should be set aside as unlawful."

this Court affirms the action of the Court of Appeals in striking down the regulations in whole on the ground that they are all void upon their face for conflict with § 304 of the Act. I believe it has been demonstrated that there is no such conflict, and that the regulations are not void on their face. In these circumstances, it was for the Secretary, under § 310, to say after "full hearing" of the facts and circumstances whether the regulations—or some part of them—were just, reasonable and nondiscriminatory; and to say "what regulation [would] be just, reasonable, and nondiscriminatory to be thereafter followed." For these reasons I would vacate the judgment of the Court of Appeals and remand the case to that court with instructions to direct the Secretary of Agriculture to himself initiate a proceeding, as he may do under § 309 (c), to determine whether the challenged regulations, or any of them, are just, reasonable and nondiscriminatory, and to determine, under § 310, after "full hearing" just "what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed."

PANAMA CANAL CO. *v.* GRACE LINE, INC., ET AL.

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

No. 251. Argued April 2–3, 1958.—Decided April 28, 1958.*

Certain American shipping companies using the Panama Canal sued in a Federal District Court to compel the Panama Canal Company to prescribe lower tolls for the use of the Canal and to refund tolls alleged to have been collected illegally in the past. That Company is an agency of the United States wholly owned by the United States and created by Congress for the purpose of operating and maintaining the Canal and conducting business operations incidental thereto. It is authorized, subject to the approval of the President, to fix and to change from time to time the tolls charged for the use of the Canal; but such tolls are required to be fixed in accordance with a formula stated in the Act. In a report to Congress, based partly on his interpretation of the Act and partly on his views as to proper cost-accounting methods, the Comptroller General expressed the opinion that the tolls being charged were too high under existing law, and that opinion was the basis of this suit. *Held:* The controversy at present is not one appropriate for judicial action. Pp. 310–319.

(a) The mere fact that the Company may sue and be sued in its corporate name does not necessarily mean that this suit can be maintained. P. 317.

(b) The initiation of a proceeding for readjustment of the tolls of the Canal is not a ministerial act but is a matter that Congress has left to the discretion of the Company, and such matters are excluded from the categories of cases subject to judicial review under § 10 of the Administrative Procedure Act. Pp. 317–318.

(c) The question whether the Company, as the creature of Congress and agent of the President, should now fix new tolls turns on doubtful or highly debatable inferences from large or loose statutory terms and on problems of cost accounting involving ques-

---

*Together with No. 252, *Grace Line, Inc., et al.* v. *Panama Canal Co.*, also on certiorari to the same Court.

tions of expert judgment requiring close analysis and nice choices, and it is so wide open and at large as to be left at this stage to agency discretion. Pp. 318–319.

243 F. 2d 844, reversed.

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

C. Dickerman Williams argued the cause for petitioners in No. 252 and respondents in No. 251. With him on the brief were *Gregory A. Harrison* and *J. Stewart Harrison.*

Briefs of *amici curiae* were filed by *Lawrence Hunt* for the Government of the United Kingdom of Great Britain and Northern Ireland, and *James M. Estabrook* for Aktieselskabet Dampskibsselskabet Svendborg et al.

Mr. Justice Douglas delivered the opinion of the Court.

Respondents, American shipping companies using the Panama Canal, brought this suit in the District Court to compel petitioner, the Panama Canal Co., to prescribe new tolls for the use of the Canal and to refund tolls which it was alleged had been illegally collected in the past. The District Court dismissed the complaint for lack of jurisdiction of the subject matter. 143 F. Supp. 539. The Court of Appeals refused relief for a refund but on other phases of the complaint entered a summary judgment for the respondent. 243 F. 2d 844. The cases are here on petitions for certiorari which we granted because of the importance of the questions presented. 355 U. S. 810.[1]

[1] In No. 251 we granted the Panama Canal Co.'s petition for certiorari and in No. 252 we granted a cross-petition filed by the respondents in No. 251. The Panama Canal Co. will hereinafter be referred to as the petitioner. It is not necessary to discuss the petitions separately under the view we take of these cases.

Petitioner was created by Congress in 1950. 64 Stat. 1041. It holds the assets of the Panama Canal and has the duty of operating and maintaining it. It may sue and be sued in its corporate name. Canal Zone Code, Tit. 2, § 248, 62 Stat. 1078, as amended, 64 Stat. 1038. Prior to 1950 the Panama Canal was operated by the President through the Governor of the Canal Zone. 37 Stat. 561. Business activities incident to that operation were conducted by the Panama Railroad Co., a federal corporation, 62 Stat. 1076, which was an agency and instrumentality of the United States, *ibid.* Those auxiliary business activities were "designed and used to aid" in the management and operation of the Canal. See *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401, 406. Since 1950 all those business activities have been carried on by petitioner, the Panama Canal Co., all of whose stock is held by the President or his designee, Canal Zone Code, Tit. 2, § 246 (a), the present designee being the Secretary of the Army.

The Hay-Pauncefote Treaty, proclaimed February 22, 1902, 32 Stat. 1903, provided in Article III that the "charges of traffic shall be just and equitable." Under the original Panama Canal legislation, 37 Stat. 562, the President was authorized to fix the tolls on six months' notice by proclamation. Under that Act the tolls were to be not less than 75¢ nor more than $1.25 per net registered ton. In 1937 the ceiling was lowered to $1 per net vessel ton, the minimum of 75¢ being retained. 50 Stat. 750. When President Truman in 1948 sought to increase the toll rate to the statutory maximum, 62 Stat. 1494, Congress asked the President to withhold action until the entire problem could be studied. See H. R. Rep. No. 1304, 81st Cong., 1st Sess. 7. President Truman agreed by revoking his proclamation, 64 Stat. A433, and agreeing to the study.

On the basis of that study Congress separated the governmental functions of the Canal from its transit and business functions, the latter to be operated by petitioner. See H. R. Doc. No. 460, 81st Cong., 2d Sess.; H. R. Rep. No. 2935, 81st Cong., 2d Sess. It was learned that if the Canal were operated at cost, the tolls would have to be raised to a prohibitive level. Congress therefore undertook to reduce the financial burden that was imposed upon the users of the Canal. The interest on the capital investment of the United States was reduced and interest accrued during the construction period was to be disregarded for the purposes of computing interest on the capital investment. Free transits of government-owned vessels were eliminated for accounting purposes. The supporting business activities previously operated by the Panama Railroad Co. were to bear a proportionate share of the cost of the Canal Zone Government from which they had been exempted. H. R. Doc. No. 460, 81st Cong., 2d Sess. And the "net costs of operation of the Canal Zone Government" were declared by Congress "to form an integral part of the costs of operation of the Panama Canal enterprise as a whole." See Canal Zone Code, Tit. 2, § 246 (e), 64 Stat. 1041.

It was to carry out these provisions that the Congress merged the functions of operating and maintaining the Canal with the business activities formerly carried on by the Panama Railroad Co. At the same time, the Congress, by the Act of September 26, 1950, 64 Stat. 1038, Canal Zone Code, Tit. 2, §§ 411, 412, made changes in the provisions for the fixing of tolls.

Section 411 provides:

> "The Panama Canal Company is authorized to prescribe and from time to time change (1) the rules for the measurement of vessels for the Panama Canal, and (2), subject to the provisions of the section next following, the tolls that shall be levied for the use of

the Panama Canal: *Provided, however,* That the rules of measurement, and the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section: *Provided further,* That the said corporation shall give six months' notice, by publication in the Federal Register, of any and all proposed changes in basic rules of measurement and of any and all proposed changes in rates of tolls, during which period a public hearing shall be conducted: *And provided further,* That changes in basic rules of measurement and changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive."

Section 412 (b) provides the formula which petitioner must employ in computing new tolls:

"Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government."

By § 412 (c) vessels operated by the United States, including naval ships, may "in the discretion of the President" be required to pay tolls. In the event they do not, tolls shall nevertheless be computed for that use and the

458778 O—58——24

amounts thereof "shall be treated as revenues of the Panama Canal Company for the purpose of prescribing the rates of tolls."

A Committee of the Congress in 1953 directed petitioner to determine the adequacy of the canal tolls. See H. R. Rep. No. 889, 83d Cong., 1st Sess. 10. Petitioner in reply stated that no increase in tolls was at that time indicated but that, should canal traffic decline, and should the decline appear likely to continue for an appreciable length of time, "the Company will promptly take the steps available to it to increase the rates of tolls." [2]

---

[2] The reply was in the form of a letter to the Speaker of the House from J. S. Seybold, President of petitioner, 100 Cong. Rec. (daily ed.) A1995, stating, *inter alia:*

"An initial study of the adequacy of tolls rates under the new legislation has now been completed by the Company. This study reveals that, largely as a result of the very high level of traffic using the canal in recent years without a corresponding increase in costs, the tolls rates that have been in effect since 1938 are still sufficient to cover all operating costs, including interest and depreciation, as required by the tolls statutes. This conclusion is based on the assumption that the Director of the Bureau of the Budget, who under the law must approve the valuation of the assets transferred to the Company from the agency formerly known as the Panama Canal, will concur generally in the valuations tentatively established by the Company upon which the interest and depreciation requirements for the most part have been based.

"In recent months, chiefly as the result of the cessation of hostilities in Korea, there has been some drop in traffic transiting the canal. The Company's study indicates that a further and more substantial decline in the volume of canal traffic during the next few years is to be expected primarily as the result of changing economic factors affecting world movements of petroleum and its products, iron ore, and coal. It is possible that by sometime during the fiscal year 1955 canal traffic will have declined to a point where revenues at existing rates will no longer be adequate to cover all charges. Should this condition materialize and should it appear reasonably certain that it will continue for an appreciable length of time, the Company will promptly take the steps available to it to increase the rates of tolls.

"In computing the tolls requirements for purposes of this study the

Petitioner, being a wholly owned government corporation, is subject to annual audit by the General Accounting Office. 59 Stat. 599, 31 U. S. C. § 850. And it is

---

Company has made what it believes to be an adequate allowance for depreciation giving due consideration to the factors of obsolescence and potential inadequacy of the capital assets includable in the tolls base. Estimates of the service lives used for the principal classes of plant and equipment have been approved by independent engineering consultants. A depreciation rate of 1 percent per annum from date of service has been used for the investment in the channel, harbors, lock structures, dams, breakwaters and similar long-lived facilities. Including this accrual the annual depreciation requirements of the Company are presently approximately $9 million.

"The tentative valuations used in the study result in a net interest-bearing investment of the Government in the Canal enterprise, as defined by law, of $274 million. At the rate of 2.342 percent currently established for repayment of interest costs as required by the Company's charter annual interest payments to the Treasury will amount to $6.4 million. It is expected that this amount will increase somewhat in the future years as the result of the generally rising trend of long term interest rates.

"No depreciation or return on the capital value of interest during the 1904–14 construction period has been included in the study because the legislative history of the present tolls statutes clearly indicates the intent of the Congress to exclude this item entirely from the tolls base. Likewise no provision has been made for amortization of lands and treaty rights because of lack of statutory authority, although these assets have been included in the investment for interest purposes.

"Using the tentative plant valuations developed by the Company and recomputing the operating costs and expenses accordingly, the aggregate net income of the Company from all sources for the 4-year period from the reorganization to June 30, 1955, under present tolls rates is estimated to be approximately $9 million after providing for all charges currently authorized and required by law. As previously indicated however, it appears that a possible decline in volume of Canal traffic coupled with rising interest and wage rates may necessitate an increase in the tolls rates in the near future. Current indications are that such an increase may be necessary by July 1, 1955, in which case public announcement of the new rates would be made 6 months earlier or January 1, 1955, as required by law."

provided that the Comptroller General shall report on this audit to the Congress with "such comments and information as may be deemed necessary to keep Congress informed of the operations and financial condition" of the corporation, "together with such recommendations" as the Comptroller General may deem advisable. 31 U. S. C. § 851.

The Comptroller General in 1955 expressed the view that the petitioner had allocated too high a share of the costs of the Canal Zone Government, of the corporate overhead, and of interest payments to the operations of the Canal and too little to its supporting or auxiliary activities. H. R. Doc. No. 160, 84th Cong., 1st Sess. According to his method of cost allocation, the canal operations showed a large surplus, the auxiliary or supporting activities a deficit. *Ibid.* He also claimed that the prices charged for the latter activities were inadequate. *Ibid.* He went on to give his construction of § 412 (b) of the Canal Zone Code, which was that the tolls must be computed exclusively on the basis of the cost of operating the Canal without reference to the losses incident to the auxiliary or supporting operations. *Ibid.* He thought this result to be unsound and recommended that § 412 (b) be amended to provide specifically that any losses of the auxiliary or supporting activities be included in the cost basis for the determination of the canal tolls. *Ibid.*

Petitioner vigorously opposes that construction of § 412 (b), maintaining that the Comptroller's methods of cost allocation and his conclusions violate both sound accounting practices and the Act. Petitioner in particular objects to the Comptroller General's view that the Act requires the computation of toll rates without regard to any deficit in the operation of the auxiliary or supporting business activities. Petitioner concludes that the downward revision of the tolls recommended by the Comp-

troller General is not in harmony with the congressional program and that no change in the toll formula is needed.

It was shortly after the Comptroller General's Report for 1954 was submitted to the Congress that respondents instituted this suit.

It is, we think, impermissible to conclude that, because petitioner may sue and be sued, this suit can be maintained. We deal here with a problem in the penumbra of the law where generally the Executive and the Legislative are supreme. We do not say, for we are not called upon to do so, that no justiciable issues can arise out of the toll-making procedure for the Panama Canal. All we hold is that the controversy at present is not one appropriate for judicial action.

Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. § 1009, excludes from the categories of cases subject to judicial review "agency action" that is "by law committed to agency discretion." We think the initiation of a proceeding for readjustment of the tolls of the Panama Canal is a matter that Congress has left to the discretion of the Panama Canal Co. Petitioner is, as we have seen, an agent or spokesman of the President in these matters. It is "authorized" to prescribe tolls and to change them. Canal Zone Code, Tit. 2, § 411. But the exercise of that authority is far more than the performance of a ministerial act. As we have seen, the present conflict rages over questions that at heart involve problems of statutory construction and cost accounting: whether an operating deficit in the auxiliary or supporting activities is a legitimate cost in maintaining and operating the Canal for purpose of the toll formula. These are matters on which experts may disagree; they involve nice issues of judgment and choice, *New York* v. *United States,* 331 U. S. 284, 335, which require the exercise of informed discretion. Cf. *United States ex rel. McLennan* v. *Wilbur,* 283 U. S. 414; *Interstate Commerce*

Commission v. *Humboldt S. S. Co.*, 224 U. S. 474, 484–485. The case is, therefore, quite unlike the situation where a statute creates a duty to act and an equity court is asked to compel the agency to take the prescribed action. Cf. *Virginian R. Co.* v. *System Federation*, 300 U. S. 515, 551; *Kansas City So. R. Co.* v. *Interstate Commerce Commission*, 252 U. S. 178. We put the matter that way since the relief sought in this action is to compel petitioner to fix new tolls. The principle at stake is no different than if mandamus were sought—a remedy long restricted, *Marbury* v. *Madison*, 1 Cranch 137, 166; *Decatur* v. *Paulding*, 14 Pet. 497, 514–517, in the main, to situations where ministerial duties of a nondiscretionary nature are involved. Where the matter is peradventure clear, where the agency is clearly derelict in failing to act, where the inaction or action turns on a mistake of law, then judicial relief is often available. *Harmon* v. *Brucker*, 355 U. S. 579, is a recent example. There the Secretary of the Army issued less than "honorable" discharges to soldiers, based on their activities prior to induction. The Court held that the "records," prescribed by Congress as the basis for his action, were only records of military service. But where the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion. See *Work* v. *Rives*, 267 U. S. 175, 183; *Wilbur* v. *Kadrie*, 281 U. S. 206, 219; *United States ex rel. Chicago Great Western R. Co.* v. *Interstate Commerce Commission*, 294 U. S. 50, 62–63. We then must infer that the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision.

We think this case is in that area. The petitioner, as agent of the President, is given questions of judgment requiring close analysis and nice choices. Peti-

tioner is not only agent for the President but a creature of Congress. It is on close terms with its committees, reporting to the Congress, airing its problems before them, looking to Congress for guidance and direction. It is at least arguable that Congress to date has sided with petitioner and against the Comptroller General in construing §§ 411 and 412 of the Code. For Congress, fully advised of the Comptroller General's views in his Report for 1954, approved the budgets for the Panama Canal Co. for 1956, 1957, and 1958, based on petitioner's interpretation of the statute and its methods of accounting and cost allocation, 69 Stat. 235–237, 70 Stat. 322–324, 71 Stat. 78.[3] That does not necessarily mean that the construction of the Act, pressed on us and on Congress by petitioner, is the correct one. It does, however, indicate that the question is so wide open and at large as to be left at this stage to agency discretion.[4] The matter should be far less cloudy, much more clear for courts to intrude.

Reversed.

---

[3] Congress has been repeatedly informed of the basic problem involved here, indeed of this very litigation. See, *e. g.*, Reports on Audit of Panama Canal Company and the Canal Zone Government, by the Comptroller General: For the Fiscal Year Ending June 30, 1954, H. R. Doc. No. 160, 84th Cong., 1st Sess. 1–3, 8–9, 12–18; For the Fiscal Year Ending June 30, 1955, H. R. Doc. No. 465, 84th Cong., 2d Sess. 2, 9–10, 17–24; For the Fiscal Year Ending June 30, 1956, H. R. Doc. No. 210, 85th Cong., 1st Sess. 2–5, 15–21. See also, Hearings before the Subcommittee on Panama Canal of the House Committee on Merchant Marine and Fisheries on H. R. 6917, 7645, and 7697, 84th Cong., 1st Sess. 159–165; Hearings before the Subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. 2167, 84th Cong., 2d Sess. 23, 68–70, 89–92, 101–102.

[4] A bill was introduced in the Senate in 1955, S. 2167, 84th Cong., 1st Sess., by Senator Magnuson which would give judicial review of agency action in fixing tolls. That bill was reported favorably by the Committee, S. Rep. No. 2375, 84th Cong., 2d Sess. But it never came to a vote. See 102 Cong. Rec. 11541, 12791, 13901.

ALASKA INDUSTRIAL BOARD ET AL. *v.* CHUGACH ELECTRIC ASSOCIATION, INC., ET AL.

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

No. 303. Argued April 8, 1958.—Decided April 28, 1958.

In Alaska, an employee suffered an injury in the course of his employment that resulted in the amputation of an arm, amputation of four toes on his left foot, and, sometime later, amputation of his right leg below the knee. The left foot had not healed three years later, and the employee continued unable to work or to obtain employment. His employer and its insurer (respondents here) paid him "temporary disability" payments of $95 per week for 38 weeks. Then they concluded that he had been totally and permanently disabled since the date of the last amputation and was entitled under the Alaska Workmen's Compensation Act to a lump-sum award of $8,100 and no more. They sent him a check for that amount (less the total already paid for "temporary disability") and discontinued the "temporary disability" payments. He then applied to the Alaska Industrial Board, which awarded him "temporary disability" payments from the date of the last amputation, on the ground that his temporary disability "continues to this date, no end medical results having been reached." Respondents sued in a Federal District Court to set aside that award. *Held:*

1. Under the Act, the fact that the employee had become entitled to a lump-sum payment for "total and permanent disability" did not preclude a later award for continuing "temporary disability." Pp. 323–324.

2. For "all injuries causing temporary disability," the Act provides for awards based on the employee's "average daily wage earning capacity"; their purpose is to compensate the employee for lost wages during the healing period and until he is able to return to work; and there is a factual basis for such awards as long as a continuing ability to do some work exists. P. 324.

3. Respondents' contentions that the employee's claim was not timely filed and that for other reasons also the Board had no jurisdiction to enter its latest award were decided adversely to them by the Court of Appeals; they filed no cross-petition here; and, there-

fore, those questions are not open to respondents at this stage. Pp. 324–325.

245 F. 2d 855, reversed and cause remanded to the District Court for further proceedings.

John H. Dimond argued the cause for petitioners. On the brief were *J. Gerald Williams,* Attorney General of Alaska, for the Alaska Industrial Board, and *Mr. Dimond* for Jenkins, petitioners.

Frederick O. Eastaugh argued the cause for respondents. With him on the brief was *Ralph E. Robertson.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case presents an important question under the Alaska Workmen's Compensation Act, 2 Alaska Comp. L. Ann., 1949, § 43–3–1 *et seq.* Petitioner Jenkins, an employee of respondent Chugach Electric Association, was injured in the course of his employment. Three surgical operations were required: amputation of his left arm at the shoulder; amputation of four toes on his left foot; and later, amputation of his right leg below the knee. Though the injury occurred in September 1950, the left foot had not healed three years later. As a result Jenkins was for a rather long period totally disabled. Respondents made "temporary disability" [1] payments to

[1] Section 43–3–1 of the Act makes the following provision for "temporary disability":

"For all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule.

"Payment for such temporary disability shall be made at the time

Jenkins for approximately 38 weeks ($95.34 a week or a total of $3,645). At that point they decided that Jenkins had been totally and permanently disabled [2] since the date of the last amputation and was therefore entitled to a lump-sum award of $8,100 under the Act and no more.[3] They thereupon sent him a check for that amount less the $3,645 already received, *viz.*, $4,455.

---

compensation is customarily paid for labor performed or services rendered at the plant or establishment of the employer liable therefor and not less than once a month in any event.

"The average daily wage earning capacity of an injured employee in case of temporary disability shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his daily wage earning capacity. If such earnings do not fairly and reasonably represent his daily wage earning capacity, the Industrial Board shall fix such daily wage earning capacity as shall be reasonable and have a due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition."

[2] Section 43–3–1 of the Act defines total and permanent disability as follows:

"The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, or hearing in both ears, shall constitute total and permanent disability and be compensated according to the provisions of this Act with reference to total and permanent disability.

"Amputation between the elbow and the wrist shall be considered equivalent to the loss of an arm, and amputation between the knee and the ankle shall be considered equivalent to the loss of a leg."

[3] Section 43–3–1 of the Act provides:

"Where any such employee receiving an injury arising out of, and in the course of his or her employment, as the result of which he or she is totally and permanently disabled, he or she shall be entitled to receive compensation as follows:

"If such employee was at the time of his injury married he shall be entitled to receive Seven Thousand Two Hundred Dollars ($7,200.00) with Nine Hundred Dollars ($900.00) additional for each child under the age of eighteen (18) years, but the total to be paid shall not exceed Nine Thousand Dollars ($9,000.00)."

Jenkins then applied to the Alaska Industrial Board for continuing benefits for temporary disability, despite his receipt of the lump-sum award for total and permanent disability. The Board allowed him temporary disability from the date of the last amputation. This temporary disability, said the Board, "continues to this date, no end medical result having been reached."

Respondents thereupon instituted this action in the District Court to set aside the Board's decision. That court reversed the Board, holding that an award of temporary disability could not be granted under the Act for physical disability arising from the same accident in which a scheduled, lump-sum award for total permanent disability had been granted. 122 F. Supp. 210. The Court of Appeals, sitting *en banc,* affirmed, by a divided vote, modifying the judgment. 245 F. 2d 855. By that modification the lump-sum award was not to be reduced by the amount received as temporary disability prior to that time. The case is here on a petition for certiorari. 355 U. S. 810.

The Court of Appeals reasoned that the lump-sum award for total and permanent disability was intended to represent a capitalization of future earnings. It concluded, therefore, that Jenkins had been compensated by the lump-sum award for any loss of future earnings and that he could not get a further award for loss of earnings, the lump-sum award being intended "as a maximum award." *Id.,* at 862.

We read the Act differently. The lump-sum awards for total and permanent disability under this Compensation Act ignore wage losses. Whatever the employee may have made before, whatever his wages may be after the injury, the award is the same. To that extent it is an arbitrary amount. But it is the expression of a legislative judgment that on average there has been a degree of impairment, and whatever may be the fact in a par-

ticular case, the lump sum should be paid without more. See 2 Larson, Workmen's Compensation, § 58–10.

There may, nevertheless, be a continuing ability to do some work; and as long as that remaining ability exists there is a factual basis for temporary disability awards. That seems to be the theory of the Act for it extends those awards to "all injuries causing temporary disability" and bases them on the "average daily wage earning capacity" of the injured employee,[4] as determined by the Board. That award takes care of the lost wages during the healing period and until the employee is able to return to work though perhaps at a different job and at reduced pay. It also compensates him for any temporary loss of earning power based on the "wage earning capacity" [5] that remains after the injury. The Court of Appeals assumed there was "no remaining ability to work" and therefore "no foundation for temporary disability benefits." 245 F. 2d, at 862. But the Act, we think, is drawn on a different hypothesis. It seems to provide a system of temporary disabilities to all who are injured, whether their injuries are disfigurement,[6] partial permanent disability,[7] total and permanent disability,[8] or so minor as to fall in lesser categories. Any other reading would seem to be hostile to the benign purpose of this legislation. Cf. *Baltimore & Phila. S. Co.* v. *Norton*, 284 U. S. 408, 414.

Respondents maintain that Jenkins' claim was not timely filed and that for other reasons also the Board had

---

[4] Note 1, *supra.*

[5] Note 1, *supra.*

[6] Section 43–3–1 provides:

"The Industrial Board may award proper and equitable compensation for serious head, neck, facial, or other disfigurement, not exceeding, however, the sum of Two Thousand Dollars ($2,000.00)."

[7] Section 43–3–1 provides a schedule of partial permanent liability for losses of thumbs, toes, fingers, arms, legs, eyes, nose, and ear.

[8] See note 2, *supra.*

no jurisdiction to enter this award. These questions were decided adversely to respondents by the Court of Appeals and no cross-petition was filed here. Those questions are therefore not open to respondents at this stage. *LeTulle* v. *Scofield,* 308 U. S. 415, 421–422.

The judgment is reversed and the cause is remanded to the District Court for proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE WHITTAKER, believing that an injured workman cannot be, or be legally compensated as, both "totally and permanently disabled" and "temporarily totally disabled" at one and the same time under the Alaska Workmen's Compensation Act, would affirm for the reasons stated by the Court of Appeals, 245 F. 2d, at 862.

SINKLER *v.* MISSOURI PACIFIC RAILROAD CO.

CERTIORARI TO THE COURT OF CIVIL APPEALS OF TEXAS, NINTH SUPREME JUDICIAL DISTRICT.

No. 133. Argued March 12–13, 1958.—Decided April 28, 1958.

When a railroad employee's injury is caused in whole or in part by the fault of others performing, under contract, operational activities of his employer, such others are "agents" of the employer within the meaning of § 1 of the Federal Employers' Liability Act. Pp. 326–332.

295 S. W. 2d 508, reversed and cause remanded.

Cornelius O. Ryan argued the cause for petitioner. With him on the brief were *Robert H. Kelley* and *J. Edwin Smith.*

Roy L. Arterbury argued the cause for respondent. With him on the brief was *Walter F. Woodul.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The petitioner was employed by the respondent railroad as a cook on the private car of respondent's general manager. He was working on the car when a switching crew, employed by the Houston Belt & Terminal Railway Company (hereinafter the Belt Railway), undertook to switch the car from one track to another in the Union Station at Houston, Texas. Through the fault of the switching crew, the car was caused violently to collide with another railroad car in the station, and the petitioner was injured. He recovered a judgment against the respondent in an action brought under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. §§ 51–60, in the District Court of Harris County, Texas.

The Court of Civil Appeals for the Ninth Supreme Judicial District of Texas reversed upon the ground that the FELA did not subject the respondent to liability for injuries of its employee caused by the fault of employees of the Belt Railway. 295 S. W. 2d 508. The Supreme Court of Texas denied the petitioner's application for writ of error. We granted certiorari. 355 U. S. 809.

Neither the respondent railroad nor its predecessors have, since 1905, performed switching operations in the Houston terminal area. Switching is a vital operational activity of railroading consisting in the breaking up and assembly of trains and the handling of cars in interchange with other carriers. This function, in the Houston area, has been contracted by the respondent and its predecessors, and other carriers, to the Belt Railway, a carrier specially organized for that purpose.

The Belt Railway was organized by several carriers, including the predecessors of the respondent,[1] to own and operate the Union Station and to perform these switching operations. The organizing carriers, or their successors, own the Belt Railway's stock and are represented on its Board of Directors in proportion to their holdings. The respondent owns one-half of the stock and designates one-half of the directors. The Belt Railway receives some income from nonstockholding carriers but the carrier stockholders otherwise share the net expenses of its operations according to an agreed formula. The Belt Railway employs its own switching crews and other

[1] The stock of the Belt Railway was originally subscribed to by four railroad corporations. The two which were predecessors in interest to the present respondent were the Beaumont, Sour Lake & Western and the St. Louis, Brownsville & Mexico. This suit was brought originally against Thompson, Trustee in Bankruptcy for these two roads. Upon their reorganization as part of the Missouri Pacific, the respondent was substituted as party defendant.

personnel, and owns and operates the facilities and rolling stock used in the switching operations.

A railroad's liability under § 1 of the FELA is to compensate its employees in damages for injuries resulting in whole or in part from the fault of "any of the officers, agents, or employees" of such carrier. 45 U. S. C. § 51. No question of liability for the fault of officers or employees of the respondent is here raised, but only whether the petitioner's injuries were due to the fault of "agents" of the respondent within the meaning of the section.

The Court of Civil Appeals held that, since the Belt Railway was an independent contractor under lawful contract with respondent to do the switching operations on its behalf, the petitioner's injuries were not caused by respondent's "agents." The Court of Civil Appeals applied the general rule that the doctrine of *respondeat superior* does not extend to independent contractors and concluded that, since the evidence was insufficient to show that the respondent exercised control over the details of the Belt Railway's operations, the fault of its switching crew was not imputable to the respondent.[2]

It should first be noted that some common-law jurisdictions recognized an exception to the general rule of *respondeat superior* when a railroad engaged an independent contractor to perform operational activities required to carry out the franchise. In that circumstance the railroad was held liable for the fault of the servants of the independent contractor even though the railroad did not control the manner or method by which the latter did the contracted work. Different theories supported this

---

[2] The jury, in response to special issues submitted to it by the trial judge, had expressly found that the Belt Railway "submits itself to the right of control and supervision of the other [respondent] with respect to all the details of such work."

liability, depending upon whether the person injured was an employee of the railroad, a passenger, or a third party. In the case of the employee the theory was phrased as a nondelegable duty of care springing from the contractual relationship between employer and employee, *Floody* v. *Great Northern R. Co.,* 102 Minn. 81, 112 N. W. 875, or as a duty springing from the franchise to see that no wrong is done through the exercise by other persons of chartered powers. *North Chicago Street R. Co.* v. *Dudgeon,* 184 Ill. 477, 56 N. E. 796. However phrased, substantial authority in common-law decisions supported recovery by the railroad employee from his employer for injuries caused by the fault of employees of an independent contractor performing a part of the employer's railroad operations.[3]

However, in interpreting the FELA, we need not depend upon common-law principles of liability. This statute, an avowed departure from the rules of the common law, cf. *Rogers* v. *Missouri Pacific R. Co.,* 352 U. S. 500, 507–509, was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U. S. 54. The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier. *Kernan* v. *American Dredging Co.,* 355 U. S. 426, 431, 438. The Senate Committee

[3] *Wabash, St. L. & P. R. Co.* v. *Peyton,* 106 Ill. 534, 46 Am. Rep. 705; *Burnes* v. *Kansas City, Ft. S. & M. R. Co.,* 129 Mo. 41, 31 S. W. 347; *Story* v. *Concord & M. R. Co.,* 70 N. H. 364, 48 A. 288; *Gulf, C. & S. F. R. Co.* v. *Shelton,* 96 Tex. 301, 72 S. W. 165; *Gulf, C. & S. F. R. Co.* v. *Shearer,* 1 Tex. Civ. App. 343, 21 S. W. 133; *Fort Worth & D. C. R. Co.* v. *Smith,* 39 Tex. Civ. App. 92, 87 S. W. 371; but see *Brady* v. *Chicago & G. W. R. Co.,* 114 F. 100.

458778 O—58——25

which reported the Act stated that it was designed to achieve the broad purpose of promoting

> "the welfare of both employer and employee, by adjusting the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden." S. Rep. No. 460, 60th Cong., 1st Sess. 3.

Thus while the common law had generally regarded the torts of fellow servants as separate and distinct from the torts of the employer, holding the latter responsible only for his own torts, it was the conception of this legislation that the railroad was a unitary enterprise, its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor. Hence a railroad worker may recover from his employer for an injury caused in whole or in part by a fellow worker, not because the employer is himself to blame, but because justice demands that one who gives his labor to the furtherance of the enterprise should be assured that all combining their exertions with him in the common pursuit will conduct themselves in all respects with sufficient care that his safety while doing his part will not be endangered. If this standard is not met and injury results, the worker is compensated in damages.

This broad purpose controls our decision in determining whether the Belt Railway and its switching crew were "agents" of the respondent within the meaning of the section.[4] Plainly an accommodating scope must be given

---

[4] It may be significant that there was omitted from the section as enacted the language in the original bills which would have imposed liability upon a carrier for the fault "of any other person subject to

to the word "agents" to give vitality to the standard governing the liability of carriers to their workers injured on the job.[5] See *Kernan* v. *American Dredging Co., supra,* at 431–432, 438–439.

In the present case the respondent, rather than doing the necessary switching incident to its business in the Houston Terminal area, arranged that the Belt Railway should supply the crews and equipment to perform this operation on its behalf. But the evidence clearly establishes that the respondent's trains, when under the control of the Belt Railway's switching crews, were being handled to further the task of the respondent's enterprise. While engaged in switching and handling respondent's cars and trains about the terminal area, the Belt Railway employees on the job were, for purposes of the FELA, as much a part of the respondent's total enterprise as was the petitioner while engaged in his regular work on the respondent's car.

It is manifest that the corporate autonomy of the Belt Railway, and its freedom from detailed supervision of its operations by respondent, are irrelevant inasmuch as the switching crew of the Belt Railway Company at the moment of the collision in the station was engaged in furthering the operational activities of respondent. We therefore hold that when a railroad employee's injury is caused in whole or in part by the fault of others performing, under contract, operational activities of his employer,

---

its control." Hearings before the Senate Committee on Education and Labor on S. 5307, 60th Cong., 1st Sess. 3, 34; Hearings before the House Committee on the Judiciary on H. R. 17036, 60th Cong., 1st Sess. 3, 34.

[5] Respondent's reliance on *Robinson* v. *Baltimore & O. R. Co.*, 237 U. S. 84, and *Linstead* v. *Chesapeake & O. R. Co.*, 276 U. S. 28, is misplaced. The issue in each of those cases was whether the plaintiff was an employee of the defendant railroad.

such others are "agents" of the employer within the meaning of § 1 of FELA.

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

Reversed and remanded.

MR. JUSTICE CLARK concurs in the result, believing that for purposes of the FELA, the Belt Railway was performing a nondelegable duty of respondent's at the time of petitioner's injury.

MR. JUSTICE WHITTAKER, believing that petitioner was not only respondent's employee but, in the circumstances of this case, was also its *passenger* at the time and place in question and that respondent's franchised carrier responsibilities to him as its passenger were nondelegable, concurs in the result of this opinion.

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

This case is a further step in a course of decisions through which the Court has been rapidly converting the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. §§ 51–60 (and the Jones Act, which incorporates the FELA, 41 Stat. 1007, 46 U. S. C. § 688), into what amounts to a workmen's compensation statute.

This process recently gained marked momentum with *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 524, 559, decided at the 1956 Term, where the Court in effect established a "scintilla" rule in these cases for judging the sufficiency of the evidence on the issue of "causation." In subsequent decisions that rule has been extended, *sub silentio,* to cover also the issue of "negligence." [1] More

[1] *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*

recently in *Kernan* v. *American Dredging Co.*, 355 U. S. 426, decided a few months ago, the Court still further expanded these enactments to embrace a concept of absolute liability for violation of any statutory duty occasioning injury to one entitled to sue under them. And today we are told that ". . . when a railroad employee's injury is caused in whole or in part by the fault of others performing, under contract, operational activities of his employer, such others are 'agents' of the employer within the meaning of § 1 of FELA." This is held to be so even though it has long been customary in railroading for carriers to delegate to others activities such as the switching operation here, see *Fort Worth Belt R. Co.* v. *United States,* 22 F. 2d 795, and notwithstanding that under traditional common-law concepts those performing such specialized activities would be regarded as independent contractors.[2] See, *e. g., Brady* v. *Chicago & G. W. R. Co.,* 114 F. 100, 108–112; *Moleton* v. *Union Pacific R. Co.,* 118 Utah 107, 114–115, 219 P. 2d 1080, 1084.

In light of the FELA and its legislative history it is difficult to regard any of these developments as other than the products of freewheeling. The FELA ". . . is founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has

---

R. Co., 353 U. S. 920; *Deen* v. *Gulf, Colorado & S. F. R. Co.,* 353 U. S. 925; *Thomson* v. *Texas & P. R. Co.,* 353 U. S. 926; *Ringhiser* v. *Chesapeake & O. R. Co.,* 354 U. S. 901; *McBride* v. *Toledo Terminal R. Co.,* 354 U. S. 517; *Gibson* v. *Thompson,* 355 U. S. 18; *Stinson* v. *Atlantic Coast Line R. Co.,* 355 U. S. 62; *Honeycutt* v. *Wabash R. Co.,* 355 U. S. 424; *Ferguson* v. *St. Louis-San Francisco R. Co.,* 356 U. S. 41; *Butler* v. *Whiteman,* 356 U. S. 271.

[2] Although the Court in footnote 2 of its opinion refers to the jury's special finding that Belt Railway was under the "control and supervision" of respondent, I do not understand that any reliance is placed upon that finding here. It seems enough to say that this finding was without support in the evidence, as the state appellate court held.

imported into those terms." *Urie* v. *Thompson,* 337 U. S. 163, 182. See also dissenting opinions in *Rogers* v. *Missouri Pacific R. Co., supra,* at 524, 538–539, 559, 563–564; and in *Kernan* v. *American Dredging Co., supra,* at 441, 451–452. The only such qualifications which Congress has yet seen fit to enact are those effected by §§ 3 and 4 of the Act, modifying or abolishing the common-law defenses of contributory negligence and assumption of risk. 35 Stat. 66, 45 U. S. C. § 53; 35 Stat. 66, as amended, 45 U. S. C. § 54. More particularly, when a well-known legal term like "agents" is used in legislation, it should be taken as carrying its ordinary meaning unless the statute indicates the contrary. Cf. *Hull* v. *Philadelphia & R. R. Co.,* 252 U. S. 475, 479. The principle of "accommodating scope" to which the Court resorts for justification of the expansive meaning now given that term is, as applied here, a new rule of statutory construction of which I have not been aware until today.

I must dissent.

JUNG ET AL. *v.* K. & D. MINING CO., INC., ET AL.

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

No. 619. Decided April 28, 1958.

On May 10, 1955, the Federal District Court dismissed petitioners' first amended complaint in this case and granted petitioners 20 days from that date to file an amended complaint. On May 27, 1955, the Court overruled petitioners' motion to vacate that order but granted petitioners leave to file an amended complaint within 20 days from that date. Petitioners did not file an amended complaint; but, on March 25, 1957, filed a paper electing to stand on their first amended complaint. On the same day, the Court dismissed the cause of action. On April 16, 1957, petitioners filed notice of appeal "from final judgment entered in this action on March 25, 1957." The Court of Appeals held that the District Court's order of May 27, 1955, became its final judgment when petitioners failed to file an amended complaint within the 20 days allowed thereby, and it dismissed the appeal as untimely. *Held:* The final judgment in the case was the District Court's order of March 25, 1957, dismissing the cause of action, and the appeal was timely under Rule 73 (a) of the Federal Rules of Civil Procedure. Pp. 335–338.

246 F. 2d 281, reversed and cause remanded.

Zeamore A. Ader for petitioners.

Samuel J. Wettrick and *Floyd F. Shields* for respondents.

PER CURIAM.

Petitioners seek our writ of certiorari to review the judgment of the Court of Appeals dismissing their appeal as untimely.

The facts are undisputed. Petitioners brought this action to recover the purchase price of securities alleged

to have been worthless and fraudulently sold to them by respondents in violation of § 12 of the Securities Act of 1933, as amended (48 Stat. 84, 15 U. S. C. § 77*l*), and of § 10 (b) of the Securities Exchange Act of 1934, as amended (48 Stat. 891, 15 U. S. C. § 78j (b)). Respondents moved to dismiss petitioners' first amended complaint for failure to state a claim upon which relief could be granted. On May 10, 1955, the District Court sustained the motion, dismissed the complaint, and granted petitioners "twenty days from this date within which to file an amended complaint." On May 27, 1955, petitioners moved to vacate the order of May 10 dismissing the first amended complaint or, in the alternative, to extend the time to file an amended complaint. On that date (May 27, 1955) the Court overruled petitioners' motion to vacate the order of May 10, but granted leave to petitioners to file an amended complaint within 20 days from May 27, 1955. Petitioners did not file an amended complaint. On March 25, 1957, petitioners filed an instrument in the case by which they elected to stand on their first amended complaint. On that day (March 25, 1957) the Court ordered that "this cause of action be and it hereby is dismissed without costs." On April 16, 1957, petitioners filed notice of appeal "from final judgment entered in this action on March 25, 1957." Respondent moved in the Court of Appeals to dismiss the appeal as untimely. The Court of Appeals, holding that the order of May 27, 1955, became the District Court's final judgment in the case when petitioners failed to file an amended complaint within the 20 days thereby allowed for that purpose, sustained the motion and dismissed the appeal of April 16, 1957, as not taken within 30 days from the entry of the judgment. 246 F. 2d 281.

We think that the District Court's order of May 27, 1955, denying petitioners' motion to vacate the order of

May 10, 1955, but granting further leave to petitioners to amend their complaint, did not constitute the final judgment in the case. It did not direct "that all relief be denied" (Rule 58 of Federal Rules of Civil Procedure) but left the suit pending for further proceedings "either by amendment of the [complaint] or entry of a final judgment." *Missouri & Kansas Interurban R. Co.* v. *City of Olathe,* 222 U. S. 185, 186. The situation did "not differ from an order sustaining a demurrer with leave to amend; another order of absolute dismissal after expiration of the time allowed for amendment is required to make a final disposition of the cause." *Cory Bros. & Co., Ltd.,* v. *United States,* 47 F. 2d 607. Cf. *United States* v. *F. & M. Schaefer Brewing Co.,* 356 U. S. 227; *Clark* v. *Kansas City,* 172 U. S. 334; *Crutcher* v. *Joyce,* 134 F. 2d 809; *Western Electric Co.* v. *Pacent Reproducer Corp.,* 37 F. 2d 14, and *Riverside Oil & Rfg. Co.* v. *Dudley,* 33 F. 2d 749.

Although to be sure nearly two years elapsed between the time petitioners were given leave to file an amended complaint and their motion of March 25, 1957, the defendants also did not, as they so easily could have done, nor did the District Court exercising power *sua sponte* over its own calendar, take any step to put a definitive end to the case and thereby fix an unequivocal terminal date for appealability. The undesirability of useless delays in litigation is more than offset by the hazards of confusion or misunderstanding as to the time for appeal.

It was the District Court's order of March 25, 1957, dismissing "this cause of action," that constituted the final judgment in the case. It directed "that all relief be denied" and required "the clerk [to] enter judgment" accordingly (Rule 58). The appeal of April 16, 1957, was taken within 30 days from the date of entry of the judg-

ment and hence was timely under 73 (a) of Federal Rules of Civil Procedure.

The writ of certiorari is granted and the judgment of the Court of Appeals is reversed and the cause is remanded to that court for further proceedings not inconsistent with this opinion.

So ordered.

NEW YORKER MAGAZINE, INC., *v.* GEROSA, COMPTROLLER OF THE CITY OF NEW YORK, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 816. Decided April 28, 1958.

Appeal dismissed for want of a substantial federal question. Reported below: 3 N. Y. 2d 362, 144 N. E. 2d 367.

Wilbur H. Friedman, Joseph M. Proskauer and *Marvin E. Frankel* for appellant.

Peter Campbell Brown, Stanley Buchsbaum and *Morris L. Heath* for appellees.

A brief of *amici curiae* supporting appellant was filed by *Alfred H. Wasserstrom* for the Hearst Corporation, and *George G. Tyler* for Time, Inc.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250.

VAN NEWKIRK *v.* McNEILL, SUPERINTENDENT, MATTEAWAN STATE HOSPITAL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 497, Misc. Decided April 28, 1958.

Appeal dismissed and certiorari denied.

PER CURIAM.

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

PHILYAW *v.* ARKANSAS.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 821. Decided April 28, 1958.

Appeal dismissed and certiorari denied.
Reported below: 228 Ark. 71, 305 S. W. 2d 851.

George F. Edwardes 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.

CAINE *v.* CALIFORNIA.

APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF CALIFORNIA, SAN MATEO COUNTY.

No. 826. Decided April 28, 1958.

Appeal dismissed for want of a substantial federal question.

A. Noble McCartney for appellant.

Eugene K. Kennedy for appellee.

PER CURIAM.

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

POGOR ET AL. *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 874. Decided April 28, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: 3 N. Y. 2d 836, 941, 144 N. E. 2d 722, 145 N. E. 2d 387.

Bernard Tompkins for appellants.

Frank S. Hogan and *Richard G. Denzer* for appellee.

PER CURIAM.

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

CHAUFFEURS, TEAMSTERS & HELPERS LOCAL UNION 795 ET AL. *v.* NEWELL, DOING BUSINESS AS EL DORADO DAIRY.

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

No. 847. Decided April 28, 1958.

Certiorari granted and judgment reversed.
181 Kan. 898, 182 Kan. 205, 317 P. 2d 817, 319 P. 2d 171, reversed.

Payne H. Ratner for petitioners.

PER CURIAM.

The petition for writ of certiorari is granted and the judgment of the Supreme Court of Kansas is reversed. *Thornhill* v. *Alabama,* 310 U. S. 88, 98, *Third.*

NATIONAL LABOR RELATIONS BOARD *v.* WOOSTER DIVISION OF BORG-WARNER CORP.

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

No. 53. Argued November 20–21, 1957.—Decided May 5, 1958.*

In collective-bargaining negotiations with certain of its employees under the National Labor Relations Act, as amended, an employer, in 1953, conditioned any collective-bargaining agreement on the employees' acceptance of two clauses which they were unwilling to accept: (1) a "ballot" clause calling for a pre-strike secret vote of such employees (union and nonunion) as to the employer's last offer, and (2) a "recognition" clause which excluded, as a party to the contract, the International Union which had been certified by the National Labor Relations Board as the employees' exclusive bargaining agent and substituted for it the agent's uncertified local affiliate. The Board held that the employer's insistence upon either of such clauses as a condition of its executing the collective-bargaining contract as to wages, hours and other conditions of employment amounted to a refusal to bargain, in violation of § 8 (a) (5) of the Act, as amended, and it ordered the employer to cease and desist from such insistence. *Held:* The Board's order is sustained. Pp. 343–350.

(a) Read together, §§ 8 (a) (5) and 8 (d) establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to "wages, hours, and other terms and conditions of employment"; that duty is limited to those subjects; and, within that area, neither party is obligated to yield. As to other matters, each party is free to bargain or not to bargain, and to agree or not to agree. Pp. 348–349.

(b) That the employer has bargained in good faith with respect to subjects of mandatory bargaining does not license it to refuse to enter into a collective-bargaining contract on the ground that the contract does not include some proposal which in turn is not a

---

*Together with No. 78, *Wooster Division of Borg-Warner Corp.* v. *National Labor Relations Board*, also on certiorari to the same Court.

subject of mandatory bargaining. Such refusal is, in substance, a refusal to bargain on the subjects which are within the scope of mandatory bargaining. P. 349.

(c) The two clauses in question were lawful, and the employer had a right to propose them; but it could not lawfully insist upon them as a condition to its entering a collective-bargaining contract. P. 349.

(d) The "ballot" clause here involved does not deal with "wages, hours, and other terms and conditions of employment" and, therefore, is not a subject of mandatory bargaining. Pp. 349–350.

(e) The "recognition" clause here involved does not deal with "wages, hours, and other terms and conditions of employment" and, therefore, is not a subject of mandatory bargaining. P. 350.

236 F. 2d 898, affirmed in part, reversed in part and remanded.

Dominick L. Manoli argued the cause for the National Labor Relations Board. With him on the brief were *Solicitor General Rankin, Jerome D. Fenton, Stephen Leonard* and *Irving M. Herman.*

James C. Davis argued the cause for the Wooster Division of Borg-Warner Corporation. With him on the brief was *Robert W. Murphy.*

Harold A. Cranefield and *Lowell Goerlich* filed a brief for the International Union, United Automobile, Aircraft & Agricultural Implement Workers of America (UAW–AFL–CIO), as *amicus curiae.*

MR. JUSTICE BURTON delivered the opinion of the Court.

In these cases an employer insisted that its collective-bargaining contract with certain of its employees include: (1) a "ballot" clause calling for a pre-strike secret vote of those employees (union and nonunion) as to the employer's last offer, and (2) a "recognition" clause which excluded, as a party to the contract, the International Union which had been certified by the National Labor Relations Board as the employees' exclusive bargaining

agent, and substituted for it the agent's uncertified local affiliate. The Board held that the employer's insistence upon either of such clauses amounted to a refusal to bargain, in violation of § 8 (a)(5) of the National Labor Relations Act, as amended.[1] The issue turns on whether either of these clauses comes within the scope of mandatory collective bargaining as defined in § 8 (d) of the Act.[2] For the reasons hereafter stated, we agree with the Board that neither clause comes within that definition. Therefore, we sustain the Board's order directing the employer to cease insisting upon either clause as a condition precedent to accepting any collective-bargaining contract.

Late in 1952, the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO (here called International) was certified by the Board to the Wooster (Ohio) Division of the Borg-Warner Corporation (here called the company) as the elected representative of an appropriate unit of the company's employees. Shortly thereafter, International chartered Local No. 1239, UAW–CIO (here called the Local). Together the unions presented the company with a comprehensive collective-bargaining agreement. In the "recognition" clause, the unions described themselves as both the "International Union,

---

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

. . . . . .

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

. . . . . .

"SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ." 61 Stat. 140, 141, 143, 29 U. S. C. §§ 158 (a)(5), 159 (a).

[2] See § 8 (d) as set forth in the text of the opinion, *infra*, p. 348.

United Automobile, Aircraft and Agricultural Implement Workers of America and its Local Union No. 1239, U. A. W.–C. I. O. . . . ."

The company submitted a counterproposal which recognized as the sole representative of the employees "Local Union 1239, affiliated with the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW–CIO)." The unions' negotiators objected because such a clause disregarded the Board's certification of International as the employees' representative. The negotiators declared that the employees would accept no agreement which excluded International as a party.

The company's counterproposal also contained the "ballot" clause, quoted in full in the margin.[3] In sum-

---

[3] "5. RESPONSIBILITIES OF THE COMPANY AND THE UNION

"5.4 It is agreed by both the Company and the Union that it is their mutual intent to provide peaceful means for the settlement of all disputes that may arise between them. To assist both parties to carry out this intent in good faith, it is agreed that it is essential that three basic steps be taken with respect to each dispute, in order to permit the greatest opportunity for satisfactory settlement: such steps shall include (1) a clear definition of the issue or issues, officially made known to all employees in the bargaining unit; (2) a reasonable period of good faith bargaining on the issues as defined, after such issues have been made known to all employees in the bargaining unit; and (3) an opportunity for all employees in the bargaining unit to vote, by secret, impartially supervised, written ballot, on whether to accept or reject the Company's last offer, and on any subsequent offers made.

"5.5 It is mutually agreed that the definition of issues referred to in Section 5.4 will include the proposals and counter-proposals of each party; that the reasonable period of good faith bargaining referred to in Section 5.4 shall be at least 30 days, with full discussion of the issue taking place during that period; and that the secret written ballot referred to in Section 5.4 shall be supervised by a representative of the United States Mediation and Conciliation Serv-

458778 O—58——26

mary, this clause provided that, as to all nonarbitrable issues (which eventually included modification, amendment or termination of the contract), there would be a 30-day negotiation period after which, before the union could strike, there would have to be a secret ballot taken among all employees in the unit (union and nonunion) on the company's last offer. In the event a majority of the employees rejected the company's last offer, the company would have an opportunity, within 72 hours, of making a new proposal and having a vote on it prior to any strike. The unions' negotiators announced they would not accept this clause "under any conditions."

From the time that the company first proposed these clauses, the employees' representatives thus made it clear

---

ice, or by some other party mutually agreed upon by the Company and the Union. The Company and the Union further agree that such a ballot shall be taken on Company premises, at reasonable and convenient times, and with proper safeguards, similar to those observed in NLRB elections, being taken to insure freedom of choice and a fair election.

"5.6 It is further mutually agreed that if a majority of employees in the bargaining unit reject the Company's last offer, and the Company makes a subsequent offer within 72 hours from the time the results of the election are known, another secret, impartially supervised written ballot will be taken within the following 72 hours.

"5.7 It is further mutually agreed that the question of whether or not this Agreement is to be terminated is one of the issues subject to vote by such a secret, impartially supervised, written ballot.

"5.8 It is further mutually agreed that during the life of this Agreement the Company will not engage in any form of lockout, and the Union will not cause or permit the members of the bargaining unit to take part in any sit-down, stay-in, or slow-down, or any curtailment of work or restriction of production or interference with production, or take part in any strike or stoppage of any kind, or picket the plant, on any matter subject to arbitration, and not in any other matter, until all the bargaining procedure outlined in this Agreement, (including the Grievance Procedure, where applicable, and in all cases the three steps outlined in this Article), have been completely fulfilled." 113 N. L. R. B. 1288, 1310–1311.

that each was wholly unacceptable. The company's representatives made it equally clear that no agreement would be entered into by it unless the agreement contained both clauses. In view of this impasse, there was little further discussion of the clauses, although the parties continued to bargain as to other matters. The company submitted a "package" proposal covering economic issues but made the offer contingent upon the satisfactory settlement of "all other issues . . . ." The "package" included both of the controversial clauses. On March 15, 1953, the unions rejected that proposal and the membership voted to strike on March 20 unless a settlement were reached by then. None was reached and the unions struck. Negotiations, nevertheless, continued. On April 21, the unions asked the company whether the latter would withdraw its demand for the "ballot" and "recognition" clauses if the unions accepted all other pending requirements of the company. The company declined and again insisted upon acceptance of its "package," including both clauses. Finally, on May 5, the Local, upon the recommendation of International, gave in and entered into an agreement containing both controversial clauses.

In the meantime, International had filed charges with the Board claiming that the company, by the above conduct, was guilty of an unfair labor practice within the meaning of § 8 (a)(5) of the Act. The trial examiner found no bad faith on either side. However, he found that the company had made it a condition precedent to its acceptance of any agreement that the agreement include both the "ballot" and the "recognition" clauses. For that reason, he recommended that the company be found guilty of a *per se* unfair labor practice in violation of § 8 (a)(5). He reasoned that, because each of the controversial clauses was outside of the scope of mandatory bargaining as defined in § 8 (d) of the Act, the com-

pany's insistence upon them, against the permissible opposition of the unions, amounted to a refusal to bargain as to the mandatory subjects of collective bargaining. The Board, with two members dissenting, adopted the recommendations of the examiner. 113 N. L. R. B. 1288, 1298. In response to the Board's petition to enforce its order, the Court of Appeals set aside that portion of the order relating to the "ballot" clause, but upheld the Board's order as to the "recognition" clause. 236 F. 2d 898.

Because of the importance of the issues and because of alleged conflicts among the Courts of Appeals,[4] we granted the Board's petition for certiorari in No. 53, relating to the "ballot" clause, and the company's cross-petition in No. 78, relating to the "recognition" clause. 353 U. S. 907.

We turn first to the relevant provisions of the statute. Section 8 (a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ."[5] Section 8 (d) defines collective bargaining as follows:

> "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel

---

[4] *Labor Board* v. *Darlington Veneer Co.*, 236 F. 2d 85 (C. A. 4th Cir.); *Labor Board* v. *Corsicana Cotton Mills*, 178 F. 2d 344 (C. A. 5th Cir.). Cf. *Allis-Chalmers Mfg. Co.* v. *Labor Board*, 213 F. 2d 374 (C. A. 7th Cir.).

[5] See note 1, *supra*.

> either party to agree to a proposal or require the making of a concession . . . ." 61 Stat. 142, 29 U. S. C. § 158 (d).

Read together, these provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to "wages, hours, and other terms and conditions of employment . . . ." The duty is limited to those subjects, and within that area neither party is legally obligated to yield. *Labor Board* v. *American Insurance Co.*, 343 U. S. 395. As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree.

The company's good faith has met the requirements of the statute as to the subjects of mandatory bargaining. But that good faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining. We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining. This does not mean that bargaining is to be confined to the statutory subjects. Each of the two controversial clauses is lawful in itself.[6] Each would be enforceable if agreed to by the unions. But it does not follow that, because the company may propose these clauses, it can lawfully insist upon them as a condition to any agreement.

Since it is lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without, the issue here is whether either the "ballot" or the "recognition" clause is a subject within the phrase "wages, hours, and other terms and conditions of employment" which defines mandatory bargaining. The "ballot" clause is not within that definition. It re-

---

[6] See §§ 201 (c) and 203 (c) of the Act, 61 Stat. 152, 154, 29 U. S. C. §§ 171 (c) and 173 (c).

lates only to the procedure to be followed by the employees among themselves before their representative may call a strike or refuse a final offer. It settles no term or condition of employment—it merely calls for an advisory vote of the employees. It is not a partial "no-strike" clause. A "no-strike" clause prohibits the employees from striking during the life of the contract. It regulates the relations between the employer and the employees. See *Labor Board* v. *American Insurance Co., supra,* at 408, n. 22. The "ballot" clause, on the other hand, deals only with relations between the employees and their unions. It substantially modifies the collective-bargaining system provided for in the statute by weakening the independence of the "representative" chosen by the employees. It enables the employer, in effect, to deal with its employees rather than with their statutory representative. Cf. *Medo Photo Corp.* v. *Labor Board,* 321 U. S. 678.

The "recognition" clause likewise does not come within the definition of mandatory bargaining. The statute requires the company to bargain with the certified representative of its employees. It is an evasion of that duty to insist that the certified agent not be a party to the collective-bargaining contract. The Act does not prohibit the voluntary addition of a party, but that does not authorize the employer to exclude the certified representative from the contract.

Accordingly, the judgment of the Court of Appeals in No. 53 is reversed and the cause remanded for disposition consistent with this opinion. In No. 78, the judgment is affirmed.

No. 53—*Reversed and remanded.*
No. 78—*Affirmed.*

MR. JUSTICE FRANKFURTER joins this opinion insofar as it holds that insistence by the company on the "recognition" clause, in conflict with the provisions of the Act

requiring an employer to bargain with the representative of his employees, constituted an unfair labor practice. He agrees with the views of MR. JUSTICE HARLAN regarding the "ballot" clause. The subject matter of that clause is not so clearly outside the reasonable range of industrial bargaining as to establish a refusal to bargain in good faith, and is not prohibited simply because not deemed to be within the rather vague scope of the obligatory provisions of § 8 (d).

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

I agree that the company's insistence on the "recognition" clause constituted an unfair labor practice, but reach that conclusion by a different route from that taken by the Court. However, in light of the finding below that the company bargained in "good faith," I dissent from the view that its insistence on the "ballot" clause can support the charge of an unfair labor practice.

Over twenty years ago this Court said in its first decision under the Wagner Act: "The theory of the Act is that *free opportunity for negotiation* with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45. (Italics added.) Today's decision proceeds on assumptions which I deem incompatible with this basic philosophy of the original labor Act, which has retained its vitality under the amendments effected by the Taft-Hartley Act. See *Labor Board* v. *American National Insurance Co.*, 343 U. S. 395, 401–404. I fear that the decision may open the door to an intrusion by the Board into the substantive aspects of the bargaining process which goes beyond anything contemplated by the

National Labor Relations Act or suggested in this Court's prior decisions under it.

The Court considers both the "ballot" and "recognition" clauses to be outside the scope of the mandatory bargaining provisions of § 8 (d) of the Act, which in connection with §§ 8 (a)(5) and 8 (b)(3) imposes an obligation on an employer and a union to ". . . confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ." From this conclusion it is said to follow that although the company was free to "propose" these clauses and "bargain" over them, it could not "insist" on their inclusion in the collective bargaining contract as the price of agreement, and that such insistence was a *per se* unfair labor practice because it was tantamount to a refusal to bargain on "mandatory" subjects. At the same time the Court accepts the Trial Examiner's unchallenged finding that the company had bargained in "good faith," both with reference to these clauses and all other subjects, and holds that the clauses are lawful in themselves and ". . . would be enforceable if agreed to by the unions."

Preliminarily, I must state that I am unable to grasp a concept of "bargaining" which enables one to "propose" a particular point, but not to "insist" on it as a condition to agreement. The right to bargain becomes illusory if one is not free to press a proposal in good faith to the point of insistence. Surely adoption of so inherently vague and fluid a standard is apt to inhibit the entire bargaining process because of a party's fear that strenuous argument might shade into forbidden insistence and thereby produce a charge of an unfair labor practice. This watered-down notion of "bargaining" which the Court imports into the Act with reference to matters not within the scope of § 8 (d) appears as foreign to the labor field as it would be to the commercial world. To me all of this adds up to saying that the Act limits *effective*

"bargaining" to subjects within the three fields referred to in § 8 (d), that is "wages, hours, and other terms and conditions of employment," even though the Court expressly disclaims so holding.

I shall discuss my difficulties with the Court's opinion in terms of the "ballot" clause. The "recognition" clause is subject in my view to different considerations.

I.

At the start, I question the Court's conclusion that the "ballot" clause does not come within the "other terms and conditions of employment" provision of § 8 (d). The phrase is inherently vague and prior to this decision has been accorded by the Board and courts an expansive rather than a grudging interpretation. Many matters which might have been thought to be the sole concern of management are now dealt with as compulsory bargaining topics. *E. g., Labor Board* v. *J. H. Allison & Co.*, 165 F. 2d 766 (merit increases). And since a "no-strike" clause is something about which an employer can concededly bargain to the point of insistence, see *Shell Oil Co.*, 77 N. L. R. B. 1306, I find it difficult to understand even under the Court's analysis of this problem why the "ballot" clause should not be considered within the area of bargaining described in § 8 (d). It affects the employer-employee relationship in much the same way, in that it may determine the timing of strikes or even whether a strike will occur by requiring a vote to ascertain the employees' sentiment prior to the union's decision.

Nonetheless I shall accept the Court's holding that this clause is not a condition of employment, for even though the union would accordingly not be *obliged* under § 8 (d) to bargain over it, in my view it does not follow that the company was *prohibited* from insisting on its inclusion in the collective bargaining agreement. In other words,

I think the clause was a permissible, even if not an obligatory, subject of good faith bargaining.

The legislative history behind the Wagner and Taft-Hartley Acts persuasively indicates that the Board was never intended to have power to prevent good faith bargaining as to any subject not violative of the provisions or policies of those Acts. As a leading proponent for the Wagner Act explained:

> "When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, 'Here they are, the legal representatives of your employees.' What happens behind those doors is not inquired into, and the bill does not seek to inquire into it." 79 Cong. Rec. 7660.

The Wagner Act did not contain the "good faith" qualification now written into the bargaining requirements of § 8 (d), although this lack was remedied by early judicial interpretation which implied from former § 8 (5), 49 Stat. 453, the requirement that an employer bargain in good faith. *E. g., Labor Board* v. *Griswold Mfg. Co.,* 106 F. 2d 713. But apart from this essential check on the bargaining process, the Board possessed no statutory authority to regulate the *substantive* scope of the bargaining process insofar as lawful demands of the parties were concerned. Nevertheless, the Board engaged occasionally in the practice of determining that certain contract terms urged by unions were conditions of employment and thereby imposing on employers an affirmative duty to bargain as to such terms rather than insist upon their unilateral determination, *e. g., Singer Mfg. Co.,* 24 N. L. R. B. 444, or conversely of determining that certain clauses were not conditions of employment and thereby prohibiting an employer from bargaining over

them. *E. g., Jasper Blackburn Products Corp.,* 21 N. L. R. B. 1240.

These early intrusions of the Board into the substantive aspects of the bargaining process became a matter of concern to Congress, and in the 1947 Taft-Hartley amendments to the Wagner Act, Congress took steps to curtail them by writing into § 8 (d) the particular fields as to which it considered bargaining *should* be required. The bill originally passed by the House of Representatives contained a definition of the term "collective bargaining" which restricted the area of compulsory negotiation to specified subjects, such as wages, hours, discharge or seniority provisions, safety conditions, and vacations. § 2 (11), H. R. 3020, 80th Cong., 1st Sess. The House Report on this bill, submitted by its sponsor, noted that the suggested provision would *require* unions and employers to bargain collectively as to specified topics and would limit that area ". . . to matters of interest to the employer and to the individual man at work." H. R. Rep. No. 245, 80th Cong., 1st Sess. 7. In explaining the need for specifying the topics over which bargaining was *mandatory,* and thereby establishing "objective standards" for the Board to follow, the Report continues:

> ". . . [T]he present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make. . . . [Discussion of Board cases.]
>
> . . . . . .
>
> "These cases show that unless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective-bargaining agreements." *Id.,* at 19–20.

The Senate amendment to the House bill recast these provisions to read in substantially the form of present § 8 (d). That is, the Senate provisions contained no elaboration of compulsory bargaining topics, but used the general phrase: "wages, hours, and other terms and conditions of employment." In commenting on these changes, the managers of the House Conference appended a statement to the House Conference Report which observed:

> ". . . [T]he Senate amendment, while it did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, had to a very substantial extent the same effect as the House bill in this regard, since it rejected, as a factor in determining good faith, the test of making a concession and thus prevented the Board from determining the merits of the positions of the parties." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 34.

The foregoing history evinces a clear congressional purpose to assure the parties to a proposed collective bargaining agreement the greatest degree of freedom in their negotiations, and to require the Board to remain as aloof as possible from regulation of the bargaining process in its substantive aspects.

The decision of this Court in 1952 in *Labor Board* v. *American National Insurance Co., supra,* was fully in accord with this legislative background in holding that the Board lacked power to order an employer to cease bargaining over a particular clause because such bargaining under the Board's view, entirely apart from a showing of bad faith, constituted *per se* an unfair labor practice. There an employer insisted during negotiations upon the union's acceptance of a "management functions" clause which would vest exclusively in management during the period of the collective bargaining agreement the right to select, hire, and promote employees, to discharge for

cause and maintain discipline, and to determine work schedules. The arguments advanced by the Board in that case in support of its conclusion that the employer had committed an unfair labor practice through its insistence on this clause were strikingly similar to those before us here. It was said that such a clause was "in derogation of" statutory rights to bargain given to the employees, and that insistence upon it was tantamount to refusal to bargain as to all statutory subjects covered by it.

But this Court, in reversing the Board, emphasized that flexibility was an essential characteristic of the process of collective bargaining, and that whether the topics contained in the disputed clause should be allocated exclusively to management or decided jointly by management and union ". . . is an issue for determination across the bargaining table, not by the Board." 343 U. S., at 409. It is true that the disputed clause related to matters which concededly were "terms and conditions of employment," but the broad rationale of the Court's opinion undercuts an attempt to distinguish the case on any such ground. "Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements. . . . The duty to bargain collectively is to be enforced by application of the good faith bargaining standards of Section 8 (d) to the facts of each case . . . ." 343 U. S., at 408–409.

I therefore cannot escape the view that today's decision is deeply inconsistent with legislative intention and this Court's precedents. The Act sought to compel management and labor to meet and bargain in good faith as to certain topics. This is the *affirmative* requirement of § 8 (d) which the Board is specifically empowered to enforce, but I see no warrant for inferring from it any power in the Board to *prohibit* bargaining in good faith as to lawful matters not included in § 8 (d). The Court rea-

sons that such conduct on the part of the employer, when carried to the point of insistence, is in substance equivalent to a refusal to bargain as to the statutory subjects, but I cannot understand how this can be said over the Trial Examiner's unequivocal finding that the employer did in fact bargain in "good faith," not only over the disputed clauses but also over the statutory subjects.

It must not be forgotten that the Act requires bargaining, *not* agreement, for the obligation to bargain ". . . does not compel either party to agree to a proposal or require the making of a concession." § 8 (d). Here the employer concededly bargained but simply refused to *agree* until the union would accept what the Court holds would have been a lawful contract provision. It may be that an employer or union, by adamant insistence in good faith upon a provision which is not a statutory subject under § 8 (d), does in fact require the other party to bargain over it. But this effect is traceable to the economic power of the employer or union in the circumstances of a given situation and should not affect our construction of the Act. If one thing is clear, it is that the Board was not viewed by Congress as an agency which should exercise its powers to aid a party to collective bargaining which was in an economically disadvantageous position.

The most cursory view of decisions of the Board and the circuit courts under the National Labor Relations Act reveals the unsettled and evolving character of collective bargaining agreements. Provisions which two decades ago might have been thought to be the exclusive concern of labor or management are today commonplace in such agreements.[1] The bargaining process should be left fluid,

[1] A variety of topics have been held to be subjects over which an employer must bargain. *E. g., Inland Steel Co.* v. *Labor Board,* 170 F. 2d 247 (pension and retirement plans); *Union Mfg. Co.,* 76 N. L. R. B. 322 (bonuses).

free from intervention of the Board leading to premature crystallization of labor agreements into any one pattern of contract provisions, so that these agreements can be adapted through collective bargaining to the changing needs of our society and to the changing concepts of the responsibilities of labor and management. What the Court does today may impede this evolutionary process. Under the facts of this case, an employer is precluded from attempting to limit the likelihood of a strike. But by the same token it would seem to follow that unions which bargain in good faith would be precluded from insisting upon contract clauses which might not be deemed statutory subjects within § 8 (d).

As unqualifiedly stated in *Labor Board* v. *American National Insurance Co., supra,* p. 357, it is through the "good faith" requirement of § 8 (d) that the Board is to enforce the bargaining provisions of § 8. A determination that a party bargained as to statutory or nonstatutory subjects in good or bad faith must depend upon an evaluation of the total circumstances surrounding any given situation. I do not deny that there may be instances where unyielding insistence on a particular item may be a relevant consideration in the over-all picture in determining "good faith," for the demands of a party might in the context of a particular industry be so extreme as to constitute some evidence of an unwillingness to bargain. But no such situation is presented in this instance by the "ballot" clause. "No-strike" clauses, and other provisions analogous to the "ballot" clause limiting the right to strike, are hardly novel to labor agreements.[2] And in any event the

[2] It was stipulated by the parties during hearings on the charge of unfair labor practices that collective bargaining agreements between several unions and companies have incorporated clauses requiring, in one form or another, secret ballots of employees before the union is able to call a strike. The clauses varied in defining employees to

uncontested finding of "good faith" by the Trial Examiner forecloses that issue here.

Of course an employer or union cannot insist upon a clause which would be illegal under the Act's provisions, *Labor Board* v. *National Maritime Union,* 175 F. 2d 686, or conduct itself so as to contravene specific requirements of the Act. *Medo Photo Supply Corp.* v. *Labor Board,* 321 U. S. 678. But here the Court recognizes, as it must, that the clause is lawful under the Act,[3] and I think it

include only union members or all those working in the unit represented by the union and gave varying effect to the employee vote. The clause here involved does not purport to make the vote of the employees binding on the union.

[3] I find no merit in the union's position that the "ballot" clause is unlawful under the Act since in derogation of the representative status of the union. The statute and its legislative background undermine any such argument, for the Taft-Hartley Act incorporates in two sections provisions for a pre-strike ballot of employees and earlier drafts of the Act would have made an employee ballot *mandatory* as a condition precedent to all strikes.

The Hartley bill, as passed by the House, provided that employees should be informed in writing of issues in dispute and that a secret ballot of employees should be held on the employer's last offer of settlement and on the question of a strike. Only if the employees rejected the last offer and voted to strike could the union authorize a strike. § 2 (11), H. R. 3020, 80th Cong., 1st Sess. The Report on the bill states that ". . . at least the more irresponsible strikes . . . will be greatly reduced by requiring strike votes after each side has had an opportunity to state its position and to urge its fairness upon those called upon to do the striking." H. R. Rep. No. 245, 80th Cong., 1st Sess. 22.

These mandatory provisions were later discarded, and in their place Congress enacted § 203 (c) in Title II of the Taft-Hartley Act, 61 Stat. 154, 29 U. S. C. § 173 (c), under which the Director of the Federal Mediation and Conciliation Service is in certain situations to seek to induce the parties in dispute to agree voluntarily to an employee vote on the employer's last offer prior to a strike. In commenting on this change, the managers of the House Conference stated: "While the vote on the employer's last offer by secret ballot

clear that the company's insistence upon it violated no statutory duty to which it was subject. The fact that the employer here *did* bargain with the union over the inclusion of the "ballot" clause in the proposed agreement distinguishes this case from the situation involved in the *Medo Photo Supply Corp.* case, *supra,* where an employer, without the sanction of a labor agreement contemplating such action, negotiated *directly* with its employees in reference to wages. This Court upheld the finding of an unfair labor practice, observing that the Act ". . . makes it the duty of the employer to *bargain collectively with the chosen representatives* of his employees. The obligation being exclusive . . . , it exacts 'the negative duty to treat with no other.'" 321 U. S., at 683–684. (Italics added.) Bargaining directly with employees ". . . would be subversive of the mode of collective bargaining which the statute has ordained . . . ." 321 U. S., at 684. The important consideration is that the Act does not purport to define the terms of an agreement but simply secures the representative status of the union for purposes of bargaining. The controlling distinction from *Medo Photo* is that the employer here has not sought to bargain with anyone else over the terms of the agreement being negotiated.

---

is not compulsory as it was in the House bill, it is expected that this procedure will be extensively used and that it will have the effect of preventing many strikes which might otherwise take place." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 63. The inescapable conclusion in view of this legislative history is that Congress, instead of making the pre-strike ballot *mandatory,* intended to leave such ballot clauses to the *decision of the parties* to a labor agreement to be arrived at through the normal collective bargaining process. Cf. § 201 (c) of Title II, 61 Stat. 152, 29 U. S. C. § 171 (c). There is a further provision for a pre-strike ballot in § 209 (b) of Title II, 61 Stat. 156, 29 U. S. C. § 179 (b), which relates to disputes which imperil national health or safety.

458778 O—58——27

II.

The company's insistence on the "recognition" clause, which had the effect of excluding the International Union as a party signatory to agreement and making Local 1239 the sole contracting party on the union side, presents a different problem. In my opinion the company's action in this regard did constitute an unfair labor practice since it contravened specific requirements of the Act.

Section 8 (a)(5) makes it an unfair labor practice for an employer not to bargain collectively "with the representatives of his employees." Such representatives are those who have been chosen by a majority of the employees of the appropriate unit, and they constitute ". . . the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . ." § 9 (a). The Board under § 9 (c) is authorized to direct a representation election and certify its results. The employer's duty to bargain with the representatives includes not merely the obligation to confer in good faith, but also ". . . the execution of a written contract incorporating any agreement reached if requested . . ." by the employees' representatives. § 8 (d). I think it hardly debatable that this language must be read to require the company, if so requested, to sign any agreement reached with the same representative with which it is required to bargain. By conditioning agreement upon a change in signatory from the certified exclusive bargaining representative, the company here in effect violated this duty.

I would affirm the judgment of the Court of Appeals in both cases and require the Board to modify its cease and desist order so as to allow the company to bargain over the "ballot" clause.

YATES *v.* UNITED STATES.

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

No. 841. Decided May 5, 1958.

Petitioner was tried and convicted for conspiracy to violate the Smith Act; but the conviction was reversed by this Court. 354 U. S. 298. For contempts and other subsidiary matters in the course of these proceedings, petitioner served over seven months' imprisonment on the basis of actions by the District Court, several of which were set aside on appeal. One contempt action resulted in petitioner's conviction for eleven contempts, and she was sentenced to eleven concurrent terms of one year's imprisonment. Finding that there was only one contempt, this Court remanded the case to the District Court for appropriate resentencing. 355 U. S. 66. The District Court resentenced petitioner to imprisonment for one year for the single contempt. *Held:* Certiorari granted; judgment vacated; and cause remanded to the District Court with directions to reduce the sentence to the time petitioner has already been confined in the course of these proceedings. Pp. 363–367.

252 F. 2d 568, judgment vacated and cause remanded to District Court with directions.

Ben Margolis and *Leo Branton, Jr.* for petitioner.

Solicitor General Rankin, Assistant Attorney General Tompkins and *Philip R. Monahan* for the United States.

PER CURIAM.

This case has a long history, the course of which must be summarized for understanding of the Court's disposition. On July 26, 1951, petitioner was arrested for conspiracy to violate the Smith Act, 18 U. S. C. §§ 371, 2385, and was released on furnishing $7,500 bail. On the following day bail was increased to $50,000 pending transfer of the proceedings to a different city and petitioner was recommitted. On August 2 petitioner was arraigned, and several days later bail was set at $25,000. Petitioner's

writ of habeas corpus seeking a reduction of bail was dismissed. The district judge who had fixed bail was disqualified, see *Connelly* v. *United States District Court,* 191 F. 2d 692, and the district judge whose sentence is now under review was assigned to the case. On motion of the Government, the court increased bail to $50,000 on August 30; petitioner's motion to reduce bail and her petition for a writ of habeas corpus were denied; on review of the denial of habeas corpus, the Court of Appeals affirmed, *Stack* v. *Boyle,* 192 F. 2d 56. This Court, however, found that bail had "not been fixed by proper methods" and remitted the case for the proper remedy of a motion to reduce bail, *Stack* v. *Boyle,* 342 U. S. 1, 7. The District Court denied such motion by petitioner, *United States* v. *Schneiderman,* 102 F. Supp. 52; on appeal, the Court of Appeals ordered bail set at $10,000. *Stack* v. *United States,* 193 F. 2d 875. Shortly thereafter, on December 10, 1951, petitioner, having been found to have been improperly confined since August 30 of that year, was released on bail.

The trial under the conspiracy indictment began on February 5, 1952. Testifying in her own defense, petitioner on cross-examination on June 26 refused to answer four questions about Communist membership of other persons; she was adjudged guilty of civil contempt and committed to jail until the contempt had been purged. On June 30 she refused to answer eleven questions about Communist membership of other persons; the court announced its intention to treat these refusals as criminal contempt. At the conclusion of the trial petitioner was found guilty of conspiracy to violate the Smith Act and was sentenced to serve five years' imprisonment and to pay a $10,000 fine. The District Court denied bail pending appeal of the conspiracy conviction; on application to the Court of Appeals to fix bail, the case was remanded to the District Court, which again denied bail. *United*

States v. *Schneiderman,* 106 F. Supp. 941. The Court of Appeals then fixed bail at $20,000, and on August 30 petitioner, upon furnishing that amount, was released from custody, having been in jail since June 26. The conspiracy conviction was later affirmed by the Court of Appeals, 225 F. 2d 146, but reversed by this Court, 354 U. S. 298. The indictment was eventually dismissed on motion of the Government.

Petitioner had in the meantime, on August 8, 1952, been adjudged guilty of eleven criminal contempts for her eleven refusals to answer on June 30, and she was sentenced by the District Court to eleven one-year terms of imprisonment, to run concurrently and to commence upon the completion of petitioner's imprisonment for the conspiracy. It is as to this sentence that review is sought here today.

On September 3, 1952, four days after petitioner's release from custody, the District Court ordered her recommitted on the civil contempt arising out of the four refusals to answer on June 26. 107 F. Supp. 408. The District Court denied her application for bail pending appeal, but the Court of Appeals granted it, and she was released two days after her commitment; the Court of Appeals subsequently reversed the recommitment order of the District Court on the ground that petitioner should not have been reconfined for civil contempt after the close of the main trial. 227 F. 2d 844. Two days after her release on bail, on September 8, petitioner was adjudged guilty of criminal contempt for the four June 26 refusals and sentenced to four three-year terms of imprisonment, to run concurrently. 107 F. Supp. 412. Petitioner was then reconfined; the District Court denied her bail pending appeal, but the Court of Appeals granted it, and she was released on bail three days after her recommitment. The Court of Appeals subsequently reversed this contempt judgment because of the District Court's failure

to give any notice that it intended to regard the June 26 refusals as criminal contempts, 227 F. 2d 848.

Petitioner appealed her conviction of criminal contempt for the eleven refusals to answer on June 30; the Court of Appeals affirmed. 227 F. 2d 851. This Court held that there was but one contempt, not eleven, and that a sentence for only one offense could be imposed. Accordingly, we vacated the one-year sentence for that one conviction and remanded the case to the District Court for determination of a new sentence appropriate in view of our setting aside of the punishment for eleven offenses when in fact only one was legally established. 355 U. S. 66. On remand, the District Court, after hearing, resentenced petitioner to one year's imprisonment. The court denied petitioner bail pending appeal; the Court of Appeals ordered her admitted to bail in the amount of $5,000, 252 F. 2d 568, and she was released after fifteen days' confinement. The Court of Appeals affirmed the judgment of the District Court, noting that the sentence was "severe." *Ibid.*

Reversing a judgment for contempt because of errors of substantive law may naturally call for a reduction of the sentence based on an extent of wrongdoing found unsustainable in law. Such reduction of the sentence, however, normally ought not be made by this Court. It should be left, on remand, to the sentencing court. And so, when this Court found that only a single offense was committed by petitioner, and not eleven offenses, it chose not to reduce the sentence but to leave this task, with gentle intimations of the necessity for such action, to the District Court. However, when in a situation like this the District Court appears not to have exercised its discretion in the light of the reversal of the judgment but, in effect, to have sought merely to justify the original sentence, this Court has no alternative except to exercise its supervisory power over the administration of justice in

the lower federal courts by setting aside the sentence of the District Court.

Although petitioner's conviction under the Smith Act, the substantive offense out of which this subsidiary matter arose, was reversed on appeal and the indictment itself dismissed on motion of the Government, she has in fact spent seven months in jail in the course of these proceedings. Not unmindful of petitioner's offense, this Court is of the view, exercising the judgment that we are now called upon to exercise, that the time that petitioner has already served in jail is an adequate punishment for her offense in refusing to answer questions and is to be deemed in satisfaction of the new sentence herein ordered formally to be imposed. Accordingly, the writ of certiorari is granted, and the judgment of the Court of Appeals is vacated and the cause remanded to the District Court with directions to reduce the sentence to the time petitioner has already been confined in the course of these proceedings.

It is so ordered.

THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE DOUGLAS concur in the result for reasons set out in their dissents in *Yates* v. *United States,* 355 U. S. 66, 76, and *Green* v. *United States,* 356 U. S. 165, 193, but under constraint of the Court's holdings in those cases they acquiesce in the opinion here.

MR. JUSTICE CLARK, with whom MR. JUSTICE BURTON and MR. JUSTICE WHITTAKER concur, dissenting.

It is for us to say whether the one-year sentence was improper rather than to pass on the adequacy of time already served on other judgments. Petitioner has served but 15 days on this sentence, and I therefore dissent from the judgment releasing her.

RATNER *v.* UNITED STATES ET AL.

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

No. 819. Decided May 5, 1958.

162 F. Supp. 518, affirmed.

David Axelrod and *James L. Givan* for appellant.

Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston and *Robert W. Ginnane* for the United States and the Interstate Commerce Commission, and *Walter Harwood* for the Hoover Motor Express Co., Inc., appellees.

PER CURIAM.

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

Syllabus.

SHERMAN *v.* UNITED STATES.

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

No. 87. Argued January 16, 1958.—Decided May 19, 1958.

At petitioner's trial in a Federal District Court for selling narcotics in violation of 21 U. S. C. § 174, he relied on the defense of entrapment. From the undisputed testimony of the Government's witnesses, it appeared that a government informer had met petitioner at a doctor's office where both were being treated to cure narcotics addiction, the informer asked petitioner to help him to obtain narcotics for his own use, petitioner seemed reluctant to do so, the informer persisted, and finally petitioner made several small purchases of narcotics and let the informer have half of each amount purchased at cost plus expenses. By prearrangement, other government agents then obtained evidence of three similar sales to the informer, for which petitioner was indicted. Except for a record of two convictions nine and five years previously, there was no evidence that petitioner himself was in the trade or that he showed a "ready complaisance" to the informer's request. The factual issue whether the informer had persuaded the otherwise unwilling petitioner to make the sale or whether petitioner was already predisposed to do so and exhibited only the natural hesitancy of one acquainted with the narcotics trade was submitted to the jury, which found petitioner guilty. *Held:* On the record in this case, entrapment was established as a matter of law, and petitioner's conviction is reversed. Pp. 370–378.

(a) Entrapment occurs only when the criminal conduct was "the product of the creative activity" of law-enforcement officials. P. 372.

(b) The undisputed testimony of the Government's witnesses established entrapment as a matter of law. P. 373.

(c) Although the informer was not being paid, the Government cannot disown him or disclaim responsibility for his actions, since he was an active government informer who was himself awaiting trial on narcotics charges, for which he was later given a suspended sentence. Pp. 373–374.

(d) It makes no difference that the sales for which petitioner was convicted occurred after a series of sales, since they were not independent acts subsequent to the inducement but were part of a course of conduct which was the product of the inducement. P. 374.

(e) The Government cannot make such use of an informer and then claim disassociation through ignorance of the way in which he operated. Pp. 374–375.

(f) The evidence was insufficient to overcome the defense of entrapment by showing that petitioner evinced a "ready complaisance" to accede to the informer's request. Pp. 375–376.

(g) This Court adheres to the doctrine of the Court's opinion in *Sorrells* v. *United States*, 287 U. S. 435, and declines to reassess the doctrine of entrapment according to the principles announced in the separate opinion of Mr. Justice Roberts in that case, such issues not having been raised by the parties either in this Court or in the lower courts. Pp. 376–378.

240 F. 2d 949, reversed and cause remanded.

Henry A. Lowenberg argued the cause and filed a brief for petitioner.

James W. Knapp argued the cause for the United States. On the brief were *Solicitor General Rankin, Warren Olney, III,* then Assistant Attorney General, *Beatrice Rosenberg* and *Robert G. Maysack.*

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

The issue before us is whether petitioner's conviction should be set aside on the ground that as a matter of law the defense of entrapment was established. Petitioner was convicted under an indictment charging three sales of narcotics in violation of 21 U. S. C. § 174. A previous conviction had been reversed on account of improper instructions as to the issue of entrapment. 200 F. 2d 880. In the second trial, as in the first, petitioner's defense was

a claim of entrapment: an agent of the Federal Government induced him to take part in illegal transactions when otherwise he would not have done so.

In late August 1951, Kalchinian, a government informer, first met petitioner at a doctor's office where apparently both were being treated to be cured of narcotics addiction. Several accidental meetings followed, either at the doctor's office or at the pharmacy where both filled their prescriptions from the doctor. From mere greetings, conversation progressed to a discussion of mutual experiences and problems, including their attempts to overcome addiction to narcotics. Finally Kalchinian asked petitioner if he knew of a good source of narcotics. He asked petitioner to supply him with a source because he was not responding to treatment. From the first, petitioner tried to avoid the issue. Not until after a number of repetitions of the request, predicated on Kalchinian's presumed suffering, did petitioner finally acquiesce. Several times thereafter he obtained a quantity of narcotics which he shared with Kalchinian. Each time petitioner told Kalchinian that the total cost of narcotics he obtained was twenty-five dollars and that Kalchinian owed him fifteen dollars. The informer thus bore the cost of his share of the narcotics plus the taxi and other expenses necessary to obtain the drug. After several such sales Kalchinian informed agents of the Bureau of Narcotics that he had another seller for them. On three occasions during November 1951, government agents observed petitioner give narcotics to Kalchinian in return for money supplied by the Government.

At the trial the factual issue was whether the informer had convinced an otherwise unwilling person to commit a criminal act or whether petitioner was already predisposed to commit the act and exhibited only the natural hesitancy of one acquainted with the narcotics trade.

The issue of entrapment went to the jury,[1] and a conviction resulted. Petitioner was sentenced to imprisonment for ten years. The Court of Appeals for the Second Circuit affirmed. 240 F. 2d 949. We granted certiorari. 353 U. S. 935.

In *Sorrells* v. *United States,* 287 U. S. 435, this Court firmly recognized the defense of entrapment in the federal courts. The intervening years have in no way detracted from the principles underlying that decision. The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, "A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." 287 U. S., at 442. Then stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search. Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations.

However, the fact that government agents "merely afford opportunities or facilities for the commission of the offense does not" constitute entrapment. Entrapment occurs only when the criminal conduct was "the product of the *creative* activity" of law-enforcement officials. (Emphasis supplied.) See 287 U. S., at 441, 451. To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal. The prin-

[1] The charge to the jury was not in issue here.

ciples by which the courts are to make this determination were outlined in *Sorrells*. On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an "appropriate and searching inquiry into his own conduct and predisposition" as bearing on his claim of innocence. See 287 U. S., at 451.

We conclude from the evidence that entrapment was established as a matter of law. In so holding, we are not choosing between conflicting witnesses, nor judging credibility. Aside from recalling Kalchinian, who was the Government's witness, the defense called no witnesses. We reach our conclusion from the undisputed testimony of the prosecution's witnesses.

It is patently clear that petitioner was induced by Kalchinian. The informer himself testified that, believing petitioner to be undergoing a cure for narcotics addiction, he nonetheless sought to persuade petitioner to obtain for him a source of narcotics. In Kalchinian's own words we are told of the accidental, yet recurring, meetings, the ensuing conversations concerning mutual experiences in regard to narcotics addiction, and then of Kalchinian's resort to sympathy. One request was not enough, for Kalchinian tells us that additional ones were necessary to overcome, first, petitioner's refusal, then his evasiveness, and then his hesitancy in order to achieve capitulation. Kalchinian not only procured a source of narcotics but apparently also induced petitioner to return to the habit. Finally, assured of a catch, Kalchinian informed the authorities so that they could close the net. The Government cannot disown Kalchinian and insist it is not responsible for his actions. Although he was not being paid, Kalchinian was an active government informer who had but recently been the instigator of at least

two other prosecutions.[2] Undoubtedly the impetus for such achievements was the fact that in 1951 Kalchinian was himself under criminal charges for illegally selling narcotics and had not yet been sentenced.[3] It makes no difference that the sales for which petitioner was convicted occurred after a series of sales. They were not independent acts subsequent to the inducement but part of a course of conduct which was the product of the inducement. In his testimony the federal agent in charge of the case admitted that he never bothered to question Kalchinian about the way he had made contact with

---

[2] "Q. And it was your [Kalchinian's] job, was it not, while you were working with these agents to go out and try and induce somebody to sell you narcotics, isn't that true?

. . . . . .

"A. No, it wasn't my job at all to do anything of the kind.

"Q. Do you remember this question [asked at the first trial]— . . . 'Q. And it was your job while working with these agents to go out and try and induce a person to sell narcotics to you, isn't that correct? A. I would say yes to that.' Do you remember that?

"A. If that is what I said, let it stand just that way.

. . . . . .

"Q. So when you testify now that it was not your job you are not telling the truth?

"A. I mean by job that nobody hired me for that. That is what I inferred, otherwise I meant the same thing in my answer to your question." R. 100.

[3] "Q. But you had made a promise, an agreement, though, to cooperate with the Federal Bureau of Narcotics before you received a suspended sentence from the court?

"A. [Kalchinian]. I had promised to cooperate in 1951.

"Q. And that was before your sentence?

"A. Yes, that was before my sentence." R. 99.

Kalchinian received a suspended sentence in 1952 after a statement by the United States Attorney to the Judge that he had been cooperative with the Government. R. 89, 98.

petitioner. The Government cannot make such use of an informer and then claim disassociation through ignorance.

The Government sought to overcome the defense of entrapment by claiming that petitioner evinced a "ready complaisance" to accede to Kalchinian's request. Aside from a record of past convictions, which we discuss in the following paragraph, the Government's case is unsupported. There is no evidence that petitioner himself was in the trade. When his apartment was searched after arrest, no narcotics were found. There is no significant evidence that petitioner even made a profit on any sale to Kalchinian.[4] The Government's characterization of petitioner's hesitancy to Kalchinian's request as the natural wariness of the criminal cannot fill the evidentiary void.[5]

The Government's additional evidence in the second trial to show that petitioner was ready and willing to sell narcotics should the opportunity present itself was petitioner's record of two past narcotics convictions. In 1942 petitioner was convicted of illegally selling narcotics; in 1946 he was convicted of illegally possessing them. However, a nine-year-old sales conviction and a five-year-old possession conviction are insufficient to prove petitioner had a readiness to sell narcotics at the time Kalchinian approached him, particularly when we must

---

[4] At one point Kalchinian did testify that he had previously received the same amount of narcotics at some unspecified lower price. He characterized this other price as "not quite" the price he paid petitioner. R. 80.

[5] It is of interest to note that on the first appeal in this case the Court of Appeals came to the same conclusion as we do as to the evidence discussed so far. See *United States* v. *Sherman*, 200 F. 2d 880, 883.

assume from the record he was trying to overcome the narcotics habit at the time.

The case at bar illustrates an evil which the defense of entrapment is designed to overcome. The government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use. Selecting the proper time, the informer then tells the government agent. The set-up is accepted by the agent without even a question as to the manner in which the informer encountered the seller. Thus the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted.[6] Law enforcement does not require methods such as this.

It has been suggested that in overturning this conviction we should reassess the doctrine of entrapment according to principles announced in the separate opinion of Mr. Justice Roberts in *Sorrells* v. *United States*, 287 U. S. 435, 453. To do so would be to decide the case on grounds rejected by the majority in *Sorrells* and, so far as the record shows, not raised here or below by the parties before us. We do not ordinarily decide issues not presented by the parties and there is good reason not to vary that practice in this case.

At least two important issues of law enforcement and trial procedure would have to be decided without the benefit of argument by the parties, one party being the Government. Mr. Justice Roberts asserted that although the defendant could claim that the Government had induced him to commit the crime, the Government could not reply by showing that the defendant's criminal conduct was due to his own readiness and not to the persuasion of govern-

---

[6] Cf. *e. g.*, *Lutfy* v. *United States*, 198 F. 2d 760; *Wall* v. *United States*, 65 F. 2d 993; *Butts* v. *United States*, 273 F. 35.

ment agents. The handicap thus placed on the prosecution is obvious.[7] Furthermore, it was the position of Mr. Justice Roberts that the factual issue of entrapment—now limited to the question of what the government agents did—should be decided by the judge, not the jury. Not only was this rejected by the Court in *Sorrells,* but where the issue has been presented to them, the Courts of Appeals have since *Sorrells* unanimously concluded that unless it can be decided as a matter of law, the issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused.[8]

To dispose of this case on the ground suggested would entail both overruling a leading decision of this Court and brushing aside the possibility that we would be

---

[7] In the first appeal of this case Judge Learned Hand stated: "Indeed, it would seem probable that, if there were no reply [to the claim of inducement], it would be impossible ever to secure convictions of any offences which consist of transactions that are carried on in secret." *United States* v. *Sherman,* 200 F. 2d 880, 882.

[8] For example, in the following cases the courts have, in affirming convictions, held that the issue of entrapment had been properly submitted to the jury. *United States* v. *Lindenfeld,* 142 F. 2d 829 (C. A. 2d Cir.); *United States* v. *Brandenburg,* 162 F. 2d 980 (C. A. 3d Cir.); *Demos* v. *United States,* 205 F. 2d 596 (C. A. 5th Cir.); *Nero* v. *United States,* 189 F. 2d 515 (C. A. 6th Cir.); *United States* v. *Cerone,* 150 F. 2d 382 (C. A. 7th Cir.); *Louie Hung* v. *United States,* 111 F. 2d 325 (C. A. 9th Cir.); *Ryles* v. *United States,* 183 F. 2d 944 (C. A. 10th Cir.); *Cratty* v. *United States,* 82 U. S. App. D. C. 236, 163 F. 2d 844. And in the following cases the courts have reversed convictions where the issue of entrapment was either not submitted to the jury or was submitted on improper instructions. *United States* v. *Sherman,* 200 F. 2d 880 (C. A. 2d Cir.); *United States* v. *Sawyer,* 210 F. 2d 169 (C. A. 3d Cir.); *Wall* v. *United States,* 65 F. 2d 993 (C. A. 5th Cir.); *Lutfy* v. *United States,* 198 F. 2d 760 (C. A. 9th Cir.); *Yep* v. *United States,* 83 F. 2d 41 (C. A. 10th Cir.).

458778 O—58——28

creating more problems than we would supposedly be solving.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court with instructions to dismiss the indictment.

Reversed and remanded.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE DOUGLAS, MR. JUSTICE HARLAN, and MR. JUSTICE BRENNAN join, concurring in the result.

Although agreeing with the Court that the undisputed facts show entrapment as a matter of law, I reach this result by a route different from the Court's.

The first case in which a federal court clearly recognized and sustained a claim of entrapment by government officers as a defense to an indictment was, apparently, *Woo Wai* v. *United States*, 223 F. 412. Yet the basis of this defense, affording guidance for its application in particular circumstances, is as much in doubt today as it was when the defense was first recognized over forty years ago, although entrapment has been the decisive issue in many prosecutions. The lower courts have continued gropingly to express the feeling of outrage at conduct of law enforcers that brought recognition of the defense in the first instance, but without the formulated basis in reason that it is the first duty of courts to construct for justifying and guiding emotion and instinct.

Today's opinion does not promote this judicial desideratum, and fails to give the doctrine of entrapment the solid foundation that the decisions of the lower courts and criticism of learned writers have clearly shown is needed.[1] Instead it accepts without re-examination the

[1] Excellent discussions of the problem can be found in Mikell, The Doctrine of Entrapment in the Federal Courts, 90 U. Pa. L. Rev. 245; Donnelly, Judicial Control of Informants, Spies, Stool Pigeons,

theory espoused in *Sorrells* v. *United States,* 287 U. S. 435, over strong protest by Mr. Justice Roberts, speaking for Brandeis and Stone, JJ., as well as himself. The fact that since the *Sorrells* case the lower courts have either ignored its theory and continued to rest decision on the narrow facts of each case, or have failed after penetrating effort to define a satisfactory generalization, see, *e. g., United States* v. *Becker,* 62 F. 2d 1007 (L. Hand, J.), is proof that the prevailing theory of the *Sorrells* case ought not to be deemed the last word. In a matter of this kind the Court should not rest on the first attempt at an explanation for what sound instinct counsels. It should not forego re-examination to achieve clarity of thought, because confused and inadequate analysis is too apt gradually to lead to a course of decisions that diverges from the true ends to be pursued.[2]

It is surely sheer fiction to suggest that a conviction cannot be had when a defendant has been entrapped by government officers or informers because "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations." In these cases raising claims of entrapment, the only legislative intention that can with any show of reason be extracted from the statute is the intention to make criminal precisely the conduct in which the defendant has engaged. That conduct includes all the elements necessary to constitute criminality. Without compulsion and "know-

---

and Agent Provocateurs, 60 Yale L. J. 1091, 1098–1115; Note, Entrapment by Government Officials, 28 Col. L. Rev. 1067.

[2] It is of course not a rigid rule of this Court to restrict consideration of a case merely to arguments advanced by counsel. Presumably certiorari was not granted in this case simply to review the evidence under an accepted rule of law. The solution, when an issue of real importance to the administration of criminal justice has not been argued by counsel, is not to perpetuate a bad rule but to set the case down for reargument with a view to re-examining that rule.

ingly," where that is requisite, the defendant has violated the statutory command. If he is to be relieved from the usual punitive consequences, it is on no account because he is innocent of the offense described. In these circumstances, conduct is not less criminal because the result of temptation, whether the tempter is a private person or a government agent or informer.

The courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced. As Mr. Justice Holmes said in *Olmstead* v. *United States,* 277 U. S. 438, 470 (dissenting), in another connection, "It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . [F]or my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part." Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them. They do this in the exercise of a recognized jurisdiction to formulate and apply "proper standards for the enforcement of the federal criminal law in the federal courts," *McNabb* v. *United States,* 318 U. S. 332, 341, an obligation that goes beyond the conviction of the particular defendant before the court. Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake.

The formulation of these standards does not in any way conflict with the statute the defendant has violated, or involve the initiation of a judicial policy disregarding or qualifying that framed by Congress. A false choice is put when it is said that either the defendant's conduct does not fall within the statute or he must be convicted. The statute is wholly directed to defining and prohibiting the substantive offense concerned and expresses no purpose, either permissive or prohibitory, regarding the police conduct that will be tolerated in the detection of crime. A statute prohibiting the sale of narcotics is as silent on the question of entrapment as it is on the admissibility of illegally obtained evidence. It is enacted, however, on the basis of certain presuppositions concerning the established legal order and the role of the courts within that system in formulating standards for the administration of criminal justice when Congress itself has not specifically legislated to that end. Specific statutes are to be fitted into an antecedent legal system.

It might be thought that it is largely an academic question whether the court's finding a bar to conviction derives from the statute or from a supervisory jurisdiction over the administration of criminal justice; under either theory substantially the same considerations will determine whether the defense of entrapment is sustained. But to look to a statute for guidance in the application of a policy not remotely within the contemplation of Congress at the time of its enactment is to distort analysis. It is to run the risk, furthermore, that the court will shirk the responsibility that is necessarily in its keeping, if Congress is truly silent, to accommodate the dangers of overzealous law enforcement and civilized methods adequate to counter the ingenuity of modern criminals. The reasons that actually underlie the defense of entrapment can too easily be lost sight of in the pursuit of a wholly fictitious congressional intent.

The crucial question, not easy of answer, to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power. For answer it is wholly irrelevant to ask if the "intention" to commit the crime originated with the defendant or government officers, or if the criminal conduct was the product of "the creative activity" of law-enforcement officials. Yet in the present case the Court repeats and purports to apply these unrevealing tests. Of course in every case of this kind the intention that the particular crime be committed originates with the police, and without their inducement the crime would not have occurred. But it is perfectly clear from such decisions as the decoy letter cases in this Court, *e. g.*, *Grimm* v. *United States,* 156 U. S. 604, where the police in effect simply furnished the opportunity for the commission of the crime, that this is not enough to enable the defendant to escape conviction.

The intention referred to, therefore, must be a general intention or predisposition to commit, whenever the opportunity should arise, crimes of the kind solicited, and in proof of such a predisposition evidence has often been admitted to show the defendant's reputation, criminal activities, and prior disposition. The danger of prejudice in such a situation, particularly if the issue of entrapment must be submitted to the jury and disposed of by a general verdict of guilty or innocent, is evident. The defendant must either forego the claim of entrapment or run the substantial risk that, in spite of instructions, the jury will allow a criminal record or bad reputation to weigh in its determination of guilt of the specific offense of which he stands charged. Furthermore, a test that looks to the character and predisposition of the defendant rather than the conduct of the police loses sight of the underlying reason for the defense of entrapment. No

matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society. And in the present case it is clear that the Court in fact reverses the conviction because of the conduct of the informer Kalchinian, and not because the Government has failed to draw a convincing picture of petitioner's past criminal conduct. Permissible police activity does not vary according to the particular defendant concerned; surely if two suspects have been solicited at the same time in the same manner, one should not go to jail simply because he has been convicted before and is said to have a criminal disposition. No more does it vary according to the suspicions, reasonable or unreasonable, of the police concerning the defendant's activities. Appeals to sympathy, friendship, the possibility of exorbitant gain, and so forth, can no more be tolerated when directed against a past offender than against an ordinary law-abiding citizen. A contrary view runs afoul of fundamental principles of equality under law, and would espouse the notion that when dealing with the criminal classes anything goes. The possibility that no matter what his past crimes and general disposition the defendant might not have committed the particular crime unless confronted with inordinate inducements, must not be ignored. Past crimes do not forever outlaw the criminal and open him to police practices, aimed at securing his repeated conviction, from which the ordinary citizen is protected. The whole ameliorative hopes of modern penology and prison administration strongly counsel against such a view.

This does not mean that the police may not act so as to detect those engaged in criminal conduct and ready and willing to commit further crimes should the occasion arise. Such indeed is their obligation. It does mean

that in holding out inducements they should act in such a manner as is likely to induce to the commission of crime only these persons and not others who would normally avoid crime and through self-struggle resist ordinary temptations. This test shifts attention from the record and predisposition of the particular defendant to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime. It is as objective a test as the subject matter permits, and will give guidance in regulating police conduct that is lacking when the reasonableness of police suspicions must be judged or the criminal disposition of the defendant retrospectively appraised. It draws directly on the fundamental intuition that led in the first instance to the outlawing of "entrapment" as a prosecutorial instrument. The power of government is abused and directed to an end for which it was not constituted when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law. Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime.

What police conduct is to be condemned, because likely to induce those not otherwise ready and willing to commit crime, must be picked out from case to case as new situations arise involving different crimes and new methods of detection. The *Sorrells* case involved persistent solicitation in the face of obvious reluctance, and appeals to sentiments aroused by reminiscences of experiences as companions in arms in the World War. Particularly reprehensible in the present case was the use of repeated requests to overcome petitioner's hesitancy, coupled with appeals to sympathy based on mutual experiences with narcotics addiction. Evidence of the setting in which the inducement took place is of course highly relevant in

judging its likely effect, and the court should also consider the nature of the crime involved, its secrecy and difficulty of detection, and the manner in which the particular criminal business is usually carried on.

As Mr. Justice Roberts convincingly urged in the *Sorrells* case, such a judgment, aimed at blocking off areas of impermissible police conduct, is appropriate for the court and not the jury. "The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention." 287 U. S., at 457 (separate opinion). Equally important is the consideration that a jury verdict, although it may settle the issue of entrapment in the particular case, cannot give significant guidance for official conduct for the future. Only the court, through the gradual evolution of explicit standards in accumulated precedents, can do this with the degree of certainty that the wise administration of criminal justice demands.

MASCIALE *v.* UNITED STATES.

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

No. 84. Argued January 16, 1958.—Decided May 19, 1958.

At the trial in a Federal District Court in which petitioner was convicted of the illegal sale of narcotics and conspiracy to make a sale, he did not deny the sale or his participation in it but claimed that he was entrapped by government agents. The testimony on the issue of entrapment was conflicting, and the judge submitted it to the jury under instructions to which no objection was made. *Held:* On the record in this case, the trial court properly submitted the case to the jury, and the conviction is sustained. Pp. 386–388.

236 F. 2d 601, affirmed.

Merrell E. Clark, Jr. argued the cause and filed a brief for petitioner.

James W. Knapp argued the cause for the United States. On the brief were *Solicitor General Rankin, Warren Olney, III,* then Assistant Attorney General, *Beatrice Rosenberg* and *Robert G. Maysack.*

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

This case presents the same issue as *Sherman* v. *United States, ante,* p. 369, decided this day: Should petitioner's conviction be set aside on the ground that as a matter of law the defense of entrapment was established? Cf. *Sorrells* v. *United States,* 287 U. S. 435. Petitioner was convicted on three counts, two of which charged him with the illegal sale of narcotics and one with conspiracy to make a sale.[1] The issue of entrapment went to the jury,[2]

[1] See 26 U. S. C. §§ 2553 (a), 2554 (a); 21 U. S. C. § 174, and 18 U. S. C. § 2.

[2] The charge to the jury was not in issue here.

and conviction followed. The Court of Appeals for the Second Circuit affirmed. 236 F. 2d 601. We granted certiorari. 352 U. S. 1000.

The evidence discloses the following events. On January 14, 1954, petitioner was introduced to government agent Marshall by a government informer, Kowel. Although petitioner had known Kowel for approximately four years, he was unaware of Kowel's undercover activities. Marshall was introduced as a big narcotics buyer. Both Marshall and petitioner testified concerning the ensuing conversation. Marshall testified that he immediately made it clear that he wanted to talk about buying large quantities of high-grade narcotics and that if petitioner were not interested, the conversation would end at once. Instead of leaving, petitioner questioned Marshall on his knowledge of the narcotics traffic and then boasted that while he was primarily a gambler, "he knew someone whom he considered high up in the narcotics traffic to whom he would introduce me [Marshall] and that I was able to get—and I can quote this—'88 per cent pure heroin' from this source." Marshall also stated that petitioner gave him a telephone number where he could be reached. In his testimony petitioner admitted that he was a gambler and had told Marshall that through his gambling contacts he knew about the narcotics traffic. He denied that he had then known any available source of narcotics or that he said he could obtain narcotics for Marshall at that time. Petitioner explained that he met Marshall only to help Kowel impress Marshall. Petitioner also said that it was Marshall who gave him the telephone number. It is noteworthy that nowhere in his testimony did petitioner state that during the conversation either Marshall or Kowel tried to persuade him to enter the narcotics traffic. In the six weeks following the conversation just related Marshall and petitioner met or spoke with each other at least ten times; petitioner kept

telling Marshall that he was trying to make his contact but was having trouble doing so. Finally, on March 1, 1954, petitioner introduced Marshall to Seifert, who sold some heroin to Marshall on the next day. Petitioner even loaned his sister's car to Seifert in order to get the narcotics. It was this sale for which petitioner was convicted.

In this case entrapment could have occurred in only one of two ways. Either Marshall induced petitioner, or Kowel did. As for Marshall, petitioner has conceded here that the jury could have found that when petitioner met Marshall he was ready and willing to search out a source of narcotics and to bring about a sale.[3] As for Kowel, petitioner testified that the informer engaged in a campaign to persuade him to sell narcotics by using the lure of easy income. Petitioner argues that this undisputed testimony[4] explained why he was willing to deal with Marshall and so established entrapment as a matter of law. However, his testimony alone could not have this effect. While petitioner presented enough evidence for the jury to consider, they were entitled to disbelieve him in regard to Kowel and so find for the Government on the issue of guilt. Therefore, the trial court properly submitted the case to the jury.[5]

The judgment of the Court of Appeals is

Affirmed.

---

[3] Well might petitioner concede this, for despite petitioner's version of the meeting and his explanation for being there, the jury could have believed Marshall and have inferred from his narration that petitioner needed no persuasion to seek a narcotics buyer.

[4] We conclude from the argument that neither party even attempted to subpoena Kowel.

[5] For the reasons stated in *Sherman* v. *United States, ante,* p. 369, we decline to consider the contention that this case should be reversed and remanded to the District Court for a determination of the issue

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE DOUGLAS, MR. JUSTICE HARLAN, and MR. JUSTICE BRENNAN join, dissenting.

The trial court in this case, according to the views expressed in my concurring opinion in *Sherman* v. *United States, ante,* p. 378, should itself have ruled on the issue of entrapment and not left it to determination by the jury. On a mere reading of the cold record the evidence for sustaining such a claim seems rather thin. But the judge who heard and saw the witnesses might give different weight to the evidence than the printed record reveals. Accordingly, I would remand the case to the District Court for determination of the issue of entrapment by the trial judge. If he should conclude, as the jury was allowed to conclude, that the claim of entrapment was not sustained, the conviction would stand. If he reached a different result, the indictment should be dismissed. This seems, on my view of the law, a better disposition than for this Court to decide that no harm was done in leaving the question to the jury because as a matter of law there was no entrapment.

---

of entrapment by the trial judge. This issue was never raised by the parties. The question of entrapment was submitted to the jury, and the charge to the jury was not put in issue by petitioner either here or in the Court of Appeals.

THOMAS *v.* ARIZONA.

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

No. 88. Argued March 4–5, 1958.—Decided May 19, 1958.

Contending that his state-court conviction of murder was obtained by use of a coerced confession in violation of his rights under the Due Process Clause of the Fourteenth Amendment, petitioner applied to a Federal District Court for a writ of habeas corpus. The writ was denied without a hearing after review of the entire record. Petitioner claimed that his confession was coerced by fear of lynching. At the time of his arrest, he was lassoed around the neck and thereafter around either the shoulder or neck by one and then another local rancher, neither of whom was officially connected with the Sheriff's posse. At the first roping, he was jerked a few steps in the direction of the Sheriff's car and the nearest trees, 200 yards away; the second roping occurred soon thereafter at the place where another Negro, whom petitioner had accused of the crime, was apprehended. This time he was pulled to his knees. On both occasions, the Sheriff immediately removed the rope and ordered the rancher to desist. The confession in issue was made 20 hours later, when petitioner was brought before a Justice of the Peace for arraignment. The latter read the complaint to petitioner and advised him of his rights, but petitioner declared that he was guilty, did not want a lawyer and had killed the woman. During this 20-hour interval, petitioner stoutly denied his guilt and attempted to implicate another suspect, who subsequently was found to have an unrefuted alibi. In that time no violence or threat of violence occurred, no promises were made, and no intimation of mob action existed. Petitioner was then 27 years of age, a veteran, of normal intelligence, and possessed of an extensive criminal record. Despite his determination that this confession was voluntary, the trial judge found that two later confessions by petitioner were procured by fear of lynching and held them inadmissible. The first confession was distinguished on the grounds (1) that it was made in the sanctuary of a court of law, and (2) that it was made in the presence of the Sheriff who protected petitioner at the roping affair. *Held:* The judgment is affirmed. Pp. 391–404.

(a) On all the undisputed facts here, petitioner's confession before the Justice of the Peace is not shown to be the product of fear, duress or coercion. Pp. 393–402.

(b) This Court's determination of the character of the first confession is neither controlled by the State's decision that later confessions were involuntary, nor limited to those factors by which the State differentiated the first from the later confessions. Pp. 400–401.

(c) Petitioner's reliance on certain disputed facts is misplaced, for this Court's inquiry is limited to the undisputed portions of the record when either the trial judge or the jury, with superior opportunity to gauge the truthfulness of witnesses' testimony, has found the confession to be voluntary. Pp. 402–403.

(d) The District Court did not abuse its discretion in denying the writ of habeas corpus without a hearing. P. 403.

(e) The District Court did not err in considering a transcript which was filed as an affidavit before that Court, despite the fact that it was not part of the trial record. Pp. 403–404.

235 F. 2d 775, affirmed.

W. Edward Morgan argued the cause and filed a brief for petitioner.

Wesley E. Polley, Special Assistant Attorney General of Arizona, and *John G. Pidgeon* argued the cause for respondent. With them on the brief were *Robert Morrison,* Attorney General, and *James H. Green, Jr.,* Chief Assistant Attorney General.

Mr. Justice Clark delivered the opinion of the Court.

Petitioner has been convicted of first degree murder and sentenced to death by an Arizona court for the killing of one Janie Miscovich. He asks this Court to reverse his conviction on the ground that a confession received in evidence at his trial was coerced by fear of lynching, in violation of his rights under the Due Process Clause of the Fourteenth Amendment.

The victim, proprietor of a grocery store in Kansas Settlement, Arizona, was killed while tending her store on the evening of March 16, 1953. No one witnessed the

crime, but strong circumstantial evidence indicated that it occurred between 10 p. m. and 11 p. m., and that petitioner was responsible. He was arrested the next day under circumstances which lend credence to his assertion of a "putative lynching." The confession at issue, however, was not made until the day following the arrest, when he was taken before a Justice of the Peace for preliminary examination.

After an initial determination of voluntariness, the trial judge in the Superior Court of Cochise County, Arizona, submitted the issue of coercion to the jury under instructions to ignore the confession as evidence unless it was found entirely voluntary. A general verdict of guilty was returned by the jury and accepted by the trial court. The Supreme Court of Arizona affirmed, 78 Ariz. 52, 275 P. 2d 408, and we denied certiorari.[1] 350 U. S. 950 (1956). Petitioner then made application for habeas corpus in the United States District Court for the District of Arizona. After reviewing the entire record, the District Court denied the writ without a hearing. The Court of Appeals

---

[1] The State contends preliminarily that petitioner failed to exhaust his state remedy before seeking habeas in the federal courts, because his application in this Court for certiorari to the state court was not timely. The normal rule that certiorari must be applied for here after a state conviction before habeas is sought in the District Court, *Darr* v. *Burford,* 339 U. S. 200 (1950), is not inflexible, however, and in special circumstances need not be complied with. *Darr* v. *Burford, supra,* at 210. "Whether such circumstances exist calls for a factual appraisal by the [District Court] in each special situation. Determination of this issue, like others, is largely left to the trial courts subject to appropriate review by the courts of appeals." *Frisbie* v. *Collins,* 342 U. S. 519, 521 (1952). Petitioner's failure to timely apply for certiorari was noted by the District Court in this case, but expressly was stated not to be the basis for its denial of habeas. Since that court and the Court of Appeals considered petitioner's application on the merits, we are not inclined at this late date to consider the procedural defect a fatal error.

affirmed, 235 F. 2d 775, and we granted certiorari because of the seriousness of petitioner's allegations under the Due Process Clause. 352 U. S. 1024. An exhaustive review of the record, however, impels us to conclude that petitioner's confession was "the expression of free choice," *Watts* v. *Indiana,* 338 U. S. 49, 53 (1949), and not the product of fear, duress, or coercion.

The prosecution's use of a coerced confession first led to this Court's reversal of a state conviction in *Brown* v. *Mississippi,* 297 U. S. 278 (1936). Our resolution of similar claims in subsequent cases makes clear that "the question whether there has been a violation of the due process clause of the Fourteenth Amendment by the introduction of an involuntary confession is one on which we must make an independent determination on the undisputed facts." *Malinski* v. *New York,* 324 U. S. 401, 404 (1945). No encroachment of the traditional jury function results, for the issue of coercion, unlike the basic facts on which coercion is ascertained, involves the application of constitutional standards of fundamental fairness under the Fourteenth Amendment. See *Brown* v. *Allen,* 344 U. S. 443, 507 (1953) (concurring opinion). In each instance our inquiry must weigh the "circumstances of pressure against the power of resistance of the person confessing." *Fikes* v. *Alabama,* 352 U. S. 191, 197 (1957), quoting *Stein* v. *New York,* 346 U. S. 156, 185 (1953).

We turn then to the undisputed portions of the record to ascertain the facts against which petitioner's claim of coercion must be measured.

I.

Petitioner is an itinerant Negro laborer who lived with his common-law wife and four other Negroes, including one Ross Lee Cooper, a 17-year-old boy, in an old barracks provided by his employer about a half mile from the victim's store. Petitioner is a Navy veteran, 27 years

458778 O—58——29

old at the time of the murder, with a partial high school education. He had a criminal record of three different convictions, the most serious being a five-year larceny sentence, as well as two terms in the Navy brig for twice being absent without leave from his service post.

The body of Janie Miscovich was found Tuesday morning, March 17. A supplier noticed smoke coming from the store and summoned the help of three men constructing a building nearby, one of whom was petitioner. Petitioner did nothing to assist in putting out the fire, and left the scene before the victim's body was discovered, declaring that he "never could stand the stench of burning flesh." Although the body was severely beaten and burned, death was attributed to knife wounds in the heart, inflicted with a large knife found later in the store.

Preliminary investigation by local police disclosed that petitioner and Cooper were at the store together Monday afternoon and evening. After they returned to the barracks at approximately 8:30 p. m., petitioner left again by himself, returning around midnight. A trail of blood and footprints was traced from the store to within 50 yards of the barracks, where a strip of freshly harrowed ground made further tracking impossible. Blood spots were found in the kitchen of the barracks, and two bloody gloves were found hidden near the barracks. Both gloves were for the right hand and one of them was slit across the middle, ring and little fingers. Matching gloves were found in the store, where nine pairs plus two gloves for the left hand remained out of 12 pairs of gloves stocked by Janie Miscovich on Monday. The only pair of shoes petitioner owned, found under his bed in the barracks, exactly matched the 13½-inch footprints trailed to the barracks. He had returned to the barracks after discovery of the fire and exchanged his shoes for a pair of old work boots he got "out of the trash pile."

II.

A posse of 12 to 15 men headed by the Sheriff of Cochise County apprehended petitioner Tuesday at 3 p. m. lying under a pasture brush pile over 200 yards from the road and about 1½ miles from Kansas Settlement. Three fingers of his right hand had been severely cut, matching the slits in the bloody glove found outside the barracks.

Petitioner was placed under arrest by the Sheriff and handcuffed by a state highway patrolman with the posse. When asked by the Sheriff "why he had killed the woman," petitioner asserted that he had not killed her, but that he could take the posse to the man who had done so, accusing Cooper of the murder. He also stated that he had cut his hand on a can. At this point a local rancher on horseback, who had no official connection with the Sheriff's posse, lassoed petitioner around the neck and jerked him a few steps in the general direction of both the Sheriff's car and the nearest trees, some 200 yards away. The Sheriff quickly intervened, removed the rope, and admonished, "Stop that. We will have none of that . . . ." There was no talk of lynching among the other members of the posse.

The Sheriff then put petitioner and two other men in his car and drove a few miles south where petitioner directed him in search of Cooper. They found Cooper working in a field about half a mile off the road. The Sheriff borrowed a horse from a member of the posse—which had followed the Sheriff's car—and rode alone across the field to arrest Cooper. As he was bringing Cooper back to the car, a second rancher on horseback roped Cooper around the waist and led him along. When they reached the car, the Sheriff removed the rope. Petitioner, who had a full view of Cooper's apprehension,

got out of the car and identified Cooper as the Miscovich killer.

Cooper was handcuffed and standing beside petitioner when the rancher responsible for Cooper's roping lassoed both men, catching them either by their shoulders or their necks and pulling them down to their knees. The Sheriff, looking "kind of mad," reacted "immediately," removing the rope and shouting, "Hey, stop that. We will have no more of that." Two or three other men joined the Sheriff in protesting the third roping incident. No trees at all could be seen from the location of these last two ropings, and no mention or threat of lynching was heard.

By 4:30 p. m. both prisoners had been placed in the Sheriff's car. They were taken directly to Willcox, the nearest town with a Justice Court, for preliminary examination in compliance with Arizona law.[2] However, the judge, who was also a school bus driver, already had departed on the evening run. Before leaving Willcox, the Sheriff stopped briefly at the local mortuary, where the body of the murder victim was shown to both suspects. The prisoners then were taken to Bisbee, site of the county jail and courthouse. Arriving there after closing time of the nearest Justice Court, the Sheriff took them to nearby Warren for questioning by the County Attorney.

It was 6 p. m. when the Sheriff and his prisoners reached the home of the County Attorney, whom a prior injury had confined to a full body cast and stretcher. Petitioner and Cooper were placed together in a back bedroom under guard of an armed deputy, but each was

---

[2] "An officer who has arrested a person without a warrant shall without unnecessary delay take the person arrested before the nearest or most accessible magistrate in the county in which the arrest occurs, and shall make before the magistrate a complaint, which shall set forth the facts showing the offense for which the person was arrested." Ariz. Rev. Stat. Ann., 1956, § 13–1418.

separately quizzed for an hour in a front room. Petitioner was questioned solely by the County Attorney, though six other men, some of whom were armed, were present.[3] Petitioner was barefoot; his shoes had been seized as evidence in the case, and there were no shoes at the jail large enough to fit him. He wore the same coveralls in which he was arrested. The County Attorney first identified each man in the room, assured petitioner that no threats and no promises would be made, "explained to him his rights," and told him to tell the truth. No force was used or threatened against either prisoner. While petitioner's statement was never tendered in evidence at the trial, it was filed with the United States District Court in the habeas proceeding as proof of his composure on the very day of his arrest. The statement included petitioner's stout denial of any responsibility for the murder, and a detailed story designed to incriminate Cooper, a young and backward boy called "Baby John."[4] Petitioner claimed to have returned to the store with Cooper a second time the night before, and to have waited outside while Cooper entered the store to buy beer. Upon hearing screams, petitioner said he rushed inside, found Cooper holding a knife over the woman, cut his hand trying to seize the knife from Cooper, and then ran back to the barracks, leaving Cooper with the woman. He illustrated the story in some detail by tracing his movements with crayons on a diagram of the Miscovich store.

At 9 p. m., the Cochise County Under-Sheriff took petitioner to a hospital where his hand was treated, and

---

[3] The Sheriff, the Under-Sheriff, a court reporter, a police photographer, and two County Attorney's deputies.

[4] A young mother living in the barracks who sat up all Monday night with her sick child completely discredited petitioner's story by her unshaken testimony that Cooper never left the barracks again after returning with petitioner about 8:30 p. m.

at 10 p. m. left him at the county jail. Later the Sheriff stopped by petitioner's cell, but nothing was said aside from the Sheriff's inquiry as to "how he was feeling."

At 11:30 a. m. the next morning, Wednesday, March 18, the Sheriff brought petitioner before the Lowell Justice Court for preliminary examination. Petitioner was barefoot, and remained so until the Sheriff bought him a pair of shoes. Prior to leaving the jail for court, the Sheriff gave petitioner a pack of cigarettes. Upon further inquiry as to how he was feeling, petitioner complained of his hand injury, and the Sheriff said he would see that it was dressed again.

When petitioner arrived at the court, three other men were conducting business with the Justice of the Peace, delaying petitioner's hearing for five minutes until they finished and departed. Then, in the presence of the Sheriff, a Deputy Sheriff, and a female secretary, Justice of the Peace Frazier read the complaint to petitioner, advised him of his rights to preliminary hearing and to counsel,[5] told him the hearing could be waived, and instructed him that he could plead guilty or not guilty as he chose, but that a guilty plea would automatically waive the preliminary. Petitioner immediately replied with the oral confession in issue here: "I am guilty. I don't need any lawyer. I killed the woman." Judge Frazier asked if the murder was committed with an axe. Petitioner said, "No. I killed her with a knife."

Immediately thereafter, the Sheriff again took petitioner to the home of the County Attorney, where a

---

[5] Out of the jury's presence during the initial inquiry of the trial court into the coercion issue, Judge Frazier testified that he told petitioner the Superior Court would appoint an attorney for him, but that he said nothing about appointing an attorney himself for the preliminary examination in the Justice Court. Subsequently, testifying before the jury, he stated that petitioner was told of a "right to counsel before his preliminary in Justice Court."

detailed confession was made in the presence of the County Attorney, his secretary, the Sheriff, and a Deputy Sheriff. Just as he had the night before, the County Attorney identified those present and told petitioner that no threats or promises would be made. He also warned petitioner that the secretary would record everything said, and concluded, "You don't have to talk to me if you don't want to, but you can, if you will, tell me in your own words, in your own free will, just what took place out at Kansas Settlement." Later in the afternoon, after his return to the jail, petitioner was taken downstairs to the County Attorney's courthouse office, where in the presence of five people [6] he read through and signed the typed transcript of his confession at the County Attorney's home.

Either the next day, Thursday, March 19, or else Friday, March 20 (the record being inconclusive), a newspaper reporter visited petitioner in jail. At the trial he testified petitioner seemed nervous and afraid. Petitioner indicated that he'd been "roughed up" and that the Sheriff had saved his life. At the reporter's request, he posed for a picture with the Sheriff. Petitioner asked the Sheriff on Thursday to be moved to a part of the jail where he could be by himself, and the Sheriff said he would try to arrange it. On the same day, the Sheriff took petitioner to a doctor for additional treatment of his hand.

The third and last confession was taken down on Friday, March 20, in the County Attorney's office in the presence of seven men, including a Deputy United States Marshal.[7] After the same preliminary precautions as

[6] The Sheriff, two Deputy Sheriffs, a County Attorney's deputy, and the County Attorney's secretary.

[7] Others present were the Under-Sheriff, a Deputy Sheriff, the County Attorney, two County Attorney's deputies, and a court reporter.

preceded petitioner's statements Tuesday night and Wednesday afternoon, the County Attorney obtained a detailed confession. Several days later, on April 1, the Marshal met alone with petitioner and had him read the transcript of this last confession, telling him to initial the bottom of each page if, and only if, the material thereon was true. After an hour's reading, petitioner initialed all the pages.

The written confessions, signed on the 18th and the 1st, were found "procured by threat of lynch" and declared involuntary by the trial judge after his preliminary inquiry. Although the oral confession before the Justice of the Peace was made between the time of the ropings and the written confessions, the trial judge made an initial determination that it was voluntary. He justified this seeming incongruity on the basis of the different circumstances under which the oral statement was made, namely, the judicial surroundings and the presence of the Sheriff with only one other deputy, the Sheriff being "the very man who had protected [petitioner]."

III.

Deplorable as these ropings are to the spirit of a civilized administration of justice, the undisputed facts before us do not show that petitioner's oral statement was a product of fear engendered by them. Arizona's determination that the written confessions were involuntary cannot control the separate constitutional inquiry posed by the character of the oral confession. And since ours is to be an independent resolution of the issue of coercion, the range of our inquiry is not limited to those factors which differentiate the oral from the written confessions. The inquiry to be made here, primary in both time and logic, is the voluntariness of the oral confession, which

was admitted into evidence. Consequently we do not consider the subsequent confessions.

Coercion here is posited solely upon the roping incidents. There is no claim and no evidence of physical beating, as in *Brown* v. *Mississippi,* 297 U. S. 278 (1936); of continuous relay questioning, as in *Watts* v. *Indiana,* 338 U. S. 49 (1949); of incommunicado detention, as in *Fikes* v. *Alabama,* 352 U. S. 191 (1957); or of psychiatric inducement, as in *Leyra* v. *Denno,* 347 U. S. 556 (1954). Petitioner is neither of tender age, as was the accused in *Haley* v. *Ohio,* 332 U. S. 596 (1948), nor of subnormal intelligence, as was the defendant in *Fikes* v. *Alabama, supra.* Nor, in view of his extensive criminal record, can he be thought an impressionable stranger to the processes of law.

The 20-hour interval between the time of the ropings and petitioner's oral confession was devoid of all coercive influences other than the sight of the victim's body.[8] No threats were made, no promises offered, no force used, and no intimation of mob action existent. Petitioner's own activity during the crucial 20 hours is eloquent rebuttal of the contention that he was a man dominated by fear. At the logical height of oppression, during the ropings themselves, petitioner stoutly denied the offense and attempted to put the police on the trail of Cooper. That very evening he reiterated

[8] Unlike many cases where this Court has found coercion, there apparently was no failure here to comply with the state statute requiring that a prisoner be taken before a magistrate without unnecessary delay after the arrest. Contrast, *e. g., Fikes* v. *Alabama,* 352 U. S. 191 (1957); *Watts* v. *Indiana,* 338 U. S. 49 (1949); *Malinski* v. *New York,* 324 U. S. 401 (1945); *Ward* v. *Texas,* 316 U. S. 547 (1942). The Arizona statute, see note 2, *supra,* was construed in *State* v. *Johnson,* 69 Ariz. 203, 211 P. 2d 469, where the accused apparently was not taken before a magistrate until the morning following his 5 p. m. arrest.

his position in a detailed story of Cooper's guilt and his own innocence, notwithstanding Cooper's presence with him in the same house. Even though petitioner appeared apprehensive and worried to a newspaperman two or three days after the oral statement, his demeanor both at the County Attorney's home the night of his arrest and before the Justice Court the next morning bespoke complete voluntariness to other witnesses, including Judge Frazier. Nothing in the undisputed record seriously substantiates the contention that a fear engendered by the ropings overbore petitioner's free will at the time he appeared in the Justice Court. His statement appears to be the spontaneous exclamation of a guilty conscience.

Petitioner relies heavily on the testimony of the state patrolman who was present at the first roping. He testified that when petitioner was first roped, the Sheriff said, "Will you tell the truth, or I will let them go ahead and do this." Petitioner argues that this testimony completely negates the Sheriff's role as petitioner's "protector," eliminating one of the two factors by which the trial judge distinguished the oral from the other confessions. The Sheriff, however, expressly denied making any such statement, and all other witnesses of the first roping agreed that no such threat ever was uttered. Whatever the merits of this dispute, our inquiry clearly is limited to a study of the *undisputed* portions of the record. "[T]here has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved [against petitioner] by the State's adjudication." *Watts* v. *Indiana,* 338 U. S. 49, 51–52 (1949).[9] Time and again we have refused

[9] The "[state] adjudication" upon which this rule turns is that of the trial judge in this case. While the general verdict of guilty is not instructive here as to the jury's view on the issue of coercion, the

to consider disputed facts when determining the issue of coercion. See *Gallegos* v. *Nebraska,* 342 U. S. 55, 60–61 (1951); *Haley* v. *Ohio,* 332 U. S. 596, 597–598 (1948); *Ward* v. *Texas,* 316 U. S. 547 (1942). The rationale behind such exclusion, of course, lies in the superior opportunity of trial court and jury to observe the witnesses and weigh the fleeting intangibles which may indicate truth or falsehood. We abide by the wisdom of that reasoning.

IV.

Petitioner has an alternative prayer that his case be remanded to the District Court for a plenary hearing on the issue of coercion. There is no merit, however, to his contention that the District Court erred in denying the writ on the basis of the record without a full hearing. The granting of a hearing is within the discretion of the District Court, *Brown* v. *Allen,* 344 U. S. 443, 463–465 (1953), and no abuse of that discretion appears here.

Petitioner also urges that the District Court erred in considering the transcript of his interrogation in the County Attorney's home after his arrest. As stated above, that transcript never was made part of the record in the case. The State, however, filed it as an affidavit before the District Court. Petitioner asserts error because, in the absence of any hearing, he had no opportunity to rebut the affidavit. It does not appear, however, that petitioner made any objection in the Dis-

---

judge made an initial determination of voluntariness before submitting the confession to the jury. That preliminary finding occurred prior to the highway patrolman's testimony, but a motion for mistrial by defense counsel immediately after the conflict arose was denied before the case went to the jury. Therefore, we need not decide whether the mere fact of conviction, absent a more specific adjudication of voluntariness, would suffice to invoke the rule foreclosing assessment of the disputed facts.

trict Court, nor did he file any counter-affidavit. Moreover, the substance of the transcript—petitioner's denial of guilt and attempt to implicate Cooper just three hours after the ropings—appears at other places in the record. We fail to see how prejudice could have resulted.

Affirmed.

THE CHIEF JUSTICE, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE BRENNAN dissent.

UNITED STATES *v.* CORES.

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

No. 455. Argued March 13, 1958.—Decided May 19, 1958.

An alien crewman who willfully remains in the United States in excess of the 29 days allowed by his conditional landing permit, in violation of § 252 (c) of the Immigration and Nationality Act, is guilty of a continuing offense which may be prosecuted in any district where he is found, even though it is not the district where he was present when his permit expired. Pp. 405–410.

Reversed and remanded.

John F. Davis argued the cause for the United States. On the brief were *Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *Carl H. Imlay.*

By invitation of the Court, 355 U. S. 887, *Clark M. Clifford* argued the cause, as *amicus curiae*, in support of the judgment below. With him on a brief he filed, as *amicus curiae,* was *Carson M. Glass.*

MR. JUSTICE CLARK delivered the opinion of the Court.

The sole issue in this appeal is whether an alien crewman who willfully remains in the United States in excess of the 29 days allowed by his conditional landing permit, in violation of § 252 (c) of the Immigration and Nationality Act,[1] is guilty of a continuing offense which may

[1] 66 Stat. 221, 8 U. S. C. § 1282 (c). Subsection (a) authorizes immigration officers to grant permits, on certain conditions, allowing alien crewmen to land for periods up to 29 days. Subsection (b) details procedures for revocation of permits. Subsection (c) sets out the criminal penalties involved in this case:

"Any alien crewman who willfully remains in the United States in excess of the number of days allowed in any conditional permit

be prosecuted in the district where he is found. Discovering that appellee's permit had expired before he entered the district where he was apprehended and where the prosecution was begun, the District Court dismissed the criminal information, holding that a violation of § 252 (c) was not a continuing crime. The Government brought direct appeal, 18 U. S. C. § 3731, and we noted probable jurisdiction. 355 U. S. 866 (1957). Since we conclude that the District Court was in error, the judgment is reversed and the case is remanded for further proceedings.

The information, filed in the United States District Court for the District of Connecticut, charged that appellee entered the United States at Philadelphia on April 27, 1955, and that 29 days later, at the expiration of his conditional landing permit, he "did wilfully and knowingly remain in the United States, to wit: Bethel, Connecticut," in violation of § 252 (c) of the Immigration and Nationality Act. A plea of guilty was entered, but a government attorney informed the court prior to sentencing that appellee was not in Connecticut at the expiration of his permit as charged in the information, but that in fact he came to Connecticut only after spending about a year in New York. The judge permitted withdrawal of the guilty plea and dismissed the case. He cited an earlier decision of the same court holding that § 252 (c) did not define a continuing crime, *United States* v. *Tavares*, No. 9407 Crim., May 6, 1957, and indicated that the information was brought in an improper district since appellee was not in Connecticut at the time his permit expired.[2]

---

issued under subsection (a) shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than $500 or shall be imprisoned for not more than six months, or both."

[2] Appellee suggests that the inconsistency in the date of the offense as alleged in the information and as represented by government

The Constitution makes it clear that determination of proper venue in a criminal case requires determination of where the crime was committed.[3] This principle is reflected in numerous statutory enactments, including Rule 18, Fed. Rules Crim. Proc., which provides that except as otherwise permitted, "the prosecution shall be had in a district in which the offense was committed . . . ." In ascertaining this locality we are mindful that questions of venue "raise deep issues of public policy in the light of which legislation must be construed." *United States* v. *Johnson,* 323 U. S. 273, 276 (1944). The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place. Provided its language permits, the Act in question should be given that construction which will respect such considerations.

Unlike some statutory offenses,[4] there is an absence here of any specific provision fixing venue, save the

---

counsel provides additional reason for upholding the dismissal. This phase of the case, however, is not before us, *United States* v. *Borden Co.,* 308 U. S. 188, 206–207 (1939), so we confine our opinion to the point of statutory construction which clearly prompted the dismissal. Any inconsistency may be asserted by appellee on remand. See Fed. Rules Crim. Proc., 7 (e).

[3] "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . . ." U. S. Const., Art. III, § 2, cl. 3.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U. S. Const., Amend. VI.

[4] See, *e. g.,* 18 U. S. C. § 659 (theft of goods in interstate commerce); 18 U. S. C. § 1073 (flight to avoid prosecution or giving testimony); 18 U. S. C. § 3236 (murder or manslaughter); 18 U. S. C. § 3239 (transmitting or mailing threatening communications); 32 Stat. 847, 34 Stat. 587, 49 U. S. C. § 41 (1) (certain violations of Interstate Commerce Act). See 4 Barron, Federal Practice and Procedure, § 2061.

general language of the Act providing for venue "at any place in the United States at which the violation may occur . . . ." [5] In such cases the Court must base its determination on "the nature of the crime alleged and the location of the act or acts constituting it," *United States* v. *Anderson,* 328 U. S. 699, 703 (1946), and if the Congress is found to have created a continuing offense, "the locality of [the] crime shall extend over the whole area through which force propelled by an offender operates." *United States* v. *Johnson, supra,* at 275.

Section 252 (c) punishes "[a]ny alien crewman who willfully remains in the United States in excess of the number of days allowed." The conduct proscribed is the affirmative act of willfully remaining, and the crucial word "remains" permits no connotation other than continuing presence. Nor does the section necessarily pertain to any particular locality, such as the place of entry, for the Act broadly extends to willfully remaining "in the United States." [6] Appellee urges, however, that the offense is completed the moment the permit expires,

---

[5] § 279, Immigration and Nationality Act, 66 Stat. 230, 8 U. S. C. § 1329.

[6] The offense here is unlike crimes of illegal entry set out in §§ 275 and 276 of the Act. 66 Stat. 229, 8 U. S. C. §§ 1325, 1326. Those offenses are not continuing ones, as "entry" is limited to a particular locality and hardly suggests continuity. Hence a specific venue provision in § 279 of the Act was required before illegal entry cases could be prosecuted at the place of apprehension. 66 Stat. 230, 8 U. S. C. § 1329. This reasoning underlay the request for specific legislation by the Immigration and Naturalization Service. See Analysis of S. 3455, 81st Cong., prepared by the General Counsel of the Service, p. 276–2. In contrast to illegal entry, the § 252 (c) offense of willfully remaining is continuing in nature. A specific venue provision would be mere surplusage, since prosecutions may be instituted in any district where the offense has been committed, not necessarily the district where the violation first occurred. The absence of such provision, therefore, is without significance.

and that even if the alien remains thereafter, he no longer commits the offense. It is true that remaining at the instant of expiration satisfies the definition of the crime, but it does not exhaust it. See *United States* v. *Kissel,* 218 U. S. 601, 607 (1910). It seems incongruous to say that while the alien "willfully remains" on the 29th day when his permit expires, he no longer does so on the 30th, though still physically present in the country. Given the element of willfulness, we believe an alien "remains," in the contemplation of the statute, until he physically leaves the United States. The crime achieves no finality until such time. Since an offense committed in more than one district "may be inquired of and prosecuted in any district in which such offense was . . . continued," 18 U. S. C. § 3237, venue for § 252 (c) lies in any district where the crewman willfully remains after the permit expires. Appellee entered Connecticut and was found there, so that district has venue for the prosecution.

The legislative history is not inconsistent with this interpretation of the statute. After a thorough investigation of our immigration laws completed some two years prior to the enactment of § 252 (c), the Senate Committee on the Judiciary reported, "The problems relating to seamen are largely created by those who desert their ships, remain here illegally beyond the time granted them to stay, and become lost in the general populace of the country." S. Rep. No. 1515, 81st Cong., 2d Sess. 550. The tracing of such persons is complicated by the obscuration worked both by their own movement and by the passage of time. In this atmosphere the Congress sought to establish sanctions for alien crewmen who "willfully remain," the Senate Committee having observed that traditional remedies for the problem were inadequate because many crewmen "do not have the necessary documents to permit deportation." *Ibid.* It is hardly likely that the Congress would create the new sanction only to

458778 O—58——30

strip it of much of its effectiveness by compelling trial in the district where the crewman was present when his permit expired—a place which months or years later might well be impossible of proof.

Moreover, we think it not amiss to point out that this result is entirely in keeping with the policy of relieving the accused, where possible, of the inconvenience incident to prosecution in a district far removed from his residence. See *Hyde* v. *Shine,* 199 U. S. 62, 78 (1905); *Johnston* v. *United States,* 351 U. S. 215, 224 (dissent) (1956). Forcing an alien crewman to trial in the district where he was present at the expiration of his permit could entail much hardship. By holding the crime here to be a continuing one we make a valuable tool of justice available to the crewman. Rule 21 (b) of the Federal Rules of Criminal Procedure provides for transfer of the proceeding to another district on motion of the defendant if it appears that the offense was committed in more than one district, and "if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged." The rule, with its inherent flexibility, would be inapplicable absent characterization of the offense as continuing in nature.

Reversed and remanded.

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

The decision seems to me to be out of harmony with the statutory scheme of venue which Congress designed for immigration cases. We are here concerned with a crime under § 252 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 220, 8 U. S. C. § 1282; *viz.* unlawfully remaining in the United States. Sections 275 and 276 describe crimes of unlawful entry. Section 279

gives the District Courts jurisdiction over the trial of both types of crimes; and as to venue it provides:

> "Notwithstanding any other law, such prosecutions or suits may be instituted at any place in the United States at which the violation may occur or at which the person charged with a violation under section 275 or 276 may be apprehended."

When Congress wanted to lay venue in the district where the accused was "apprehended," it said so. It would seem, therefore, that venue may be laid in the district where the alien was "apprehended" only in case of the crimes of unlawful entry. All other crimes are to be prosecuted in the district where the violation first occurred. It is no answer to say that this crime is different because it was "continuous." See *In re Snow,* 120 U. S. 274, 281. As District Judge Smith said, the distinction drawn by § 279 between venue at the place of violation and venue at the place of apprehension "would be meaningless if violations such as the one in issue were regarded as continuous." *United States* v. *Tavares, supra.**

Moreover, the crime is completed when the conditional permit expires. All elements of the crime occur then. Nothing more remains to be done. It is then and there, Congress says, that the crime is "committed" in the sense that that term is employed in Art. III, § 2, cl. 3 of the Constitution and in the Sixth Amendment.

I would affirm the judgment of the District Court.

---

*Congress has made its intent equally clear in analogous situations, see, *e. g.,* 18 U. S. C. § 659, where the possession of certain stolen goods, certainly a continuing illegal status similar to remaining, is made a crime. Section 659 provides in pertinent part: "The offense shall be deemed to have been committed . . . in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels."

COUNTY OF MARIN ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 415. Argued April 9, 1958.—Decided May 19, 1958.

Asserting exclusive and plenary authority under § 5 (2) (a) of the Interstate Commerce Act, the Interstate Commerce Commission approved a proposed transaction in which an interstate motor carrier would transfer its operations in the San Francisco Bay area (largely local commuter service) to a non-carrier subsidiary organized for that purpose, in exchange for the capital stock of the subsidiary. The admitted purpose of the transaction was to escape the rate-making practices and policies of the California Public Utilities Commission, which held that the carrier's applications for increases in rates in these local operations should be determined in the light of total revenues from all of its intrastate operations in California. Appellants sued to set aside the order of the Interstate Commerce Commission. *Held:* The proposed transaction is beyond the scope of the power of the Interstate Commerce Commission under § 5 (2) (a). Pp. 413–420.

(a) The congressional purpose in the sweeping revision of § 5 of the Act in 1940, enacting § 5 (2) (a) in its present form, was to facilitate *mergers* and *consolidations* in the national transportation system. Pp. 416–418.

(b) The proposed transaction does not involve the "acquisition" of any "carrier" within the meaning of § 5 (2) (a), because the subsidiary is not a "carrier." P. 418.

(c) Even if the plan were viewed at its consummation, when the subsidiary would become a "carrier," the proposal contemplates, in reality, a split-up—something beyond the purpose and language of § 5 (2) (a). P. 418.

(d) This holding does not create a vacuum in regulation, because the Interstate Commerce Commission would have jurisdiction over the transfer of *interstate* operating rights under § 212 (b), and the transfer of *intrastate* rights would be subject to the approval of the State Commission, the body most directly concerned with the local operations. P. 419.

(e) That it may have been the prior administrative practice of the Interstate Commerce Commission to exercise jurisdiction under § 5 (2) (a) in similar cases is insufficient to outweigh the apparent congressional purpose and the clear language of the statute—especially in this delicate area where the sustaining of federal jurisdiction leads, by statute, to the complete ouster of state authority. P. 420.

150 F. Supp. 619, reversed and cause remanded.

Spurgeon Avakian argued the cause for appellants. With him on the brief was *Leland H. Jordan.*

Robert W. Ginnane argued the cause for the United States and the Interstate Commerce Commission, appellees. With him on the brief were *Solicitor General Rankin* and *Assistant Attorney General Hansen.*

Allan P. Matthew argued the cause and filed a brief for the Golden Gate Transit Lines et al., appellees.

MR. JUSTICE CLARK delivered the opinion of the Court.

At issue here is the exclusive and plenary authority of the Interstate Commerce Commission to approve a transaction in which Pacific Greyhound Lines, a motor carrier subsidiary of the Greyhound Corporation,[1] would transfer its operations in the San Francisco Bay area to Golden Gate Transit Lines, a subsidiary of Pacific Greyhound organized by it for that purpose. Pacific Greyhound would receive all Golden Gate capital stock in exchange for the operating rights, certain equipment, and an amount in cash. Appellants, two counties in the area and their respective commuter associations, opposed the transaction and challenged the power of the Commis-

[1] A merger of Pacific Greyhound and Greyhound, pending when the instant proceedings were before the Commission, No. MC–F–573, has since been consummated.

sion to authorize it,[2] but the Commission asserted jurisdiction and, on certain terms and conditions, approved the plan on the merits. 65 M. C. C. 347. A three-judge District Court, in which appellants sought to set aside the order, held that the Commission had jurisdiction under § 5 (2)(a) of the Interstate Commerce Act.[3] 150 F. Supp. 619. In view of the importance of the jurisdictional question and its impact on federal-state relations, we noted probable jurisdiction. 355 U. S. 866 (1957). We conclude that the proposed transaction is beyond the scope of Commission power under § 5 (2)(a).[4]

At the time of the application, Pacific Greyhound was a motor common carrier of passengers in seven western and southwestern States under certificates issued by the

---

[2] Certain divisions of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, representing employees of Pacific Greyhound, also opposed the application, and joined appellants in seeking to set aside the Commission's order in the District Court. However, the complaint was later dismissed as to the union for reasons not material here.

[3] Section 5 (2)(a): "It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

"(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or 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 . . . ." 41 Stat. 481, as amended, 49 U. S. C. § 5 (2)(a).

[4] Our disposition makes unnecessary any consideration of appellants' alternative contention, namely, that the District Court abused its discretion in denying a motion by appellants to amend their complaint.

Interstate Commerce Commission. In combination with members of the Greyhound system and other lines, it provided joint through service to and from more distant areas of the country. In California, the extensive services of Pacific Greyhound included the operations in the San Francisco Bay area which are involved here. These routes are within 25 or 30 miles of the city, extending north into Marin County, east into Contra Costa County, and south on the Peninsula. Measured in terms of revenue, only 5.7% of the traffic is in interstate movement; 94.3% is intrastate, largely commuter.

The corporate transaction for which Commission approval was sought was conceived in an environment of financial difficulties plaguing the Bay area operations. The service consistently was operated at a loss, and Pacific Greyhound to some extent blamed the rate-making practices and policies of the California Public Utilities Commission. In proceedings for commutation rate increases over these routes, for example, the State Commission had held that Pacific Greyhound's applications should be determined in light of total revenues from all intrastate operations in California. *Pacific Greyhound Lines, Fares,* 50 Cal. P. U. C. 650. This the company deemed to be an unjustified subsidization of the local losses with profits from unrelated operations.[5]

The transfer in question admittedly was designed to escape, upon approval of the Interstate Commerce Commission, the practices and policies of the State Commission. Golden Gate was incorporated in 1953, but had

---

[5] In 1952 Pacific Greyhound unsuccessfully sought approval from the State Commission for the transfer of local operations between San Francisco and Marin County to an operator who offered to invest $200,000 in working capital. The State Commission, finding the proposed transfer "adverse to the public interest," denied the application. *Pacific Greyhound Lines, Certificate Transfer,* 52 Cal. P. U. C. 2, 7.

engaged in no business activity and was not a carrier. Under the agreement, arrived at early in 1954, Pacific Greyhound would transfer to Golden Gate substantially all interstate and intrastate operating rights in the Bay area, $150,000 in cash, and certain equipment.[6] Golden Gate would in turn issue all of its capital stock to Pacific Greyhound. The result is obvious: for rate-making purposes before the State Commission, the deficit-ridden local operation, after the split-up of operating rights into separate corporations, would be forced to stand on its own—or collapse.

Although it did not formally intervene, the State Commission filed its views regarding the transaction with the Interstate Commerce Commission. It was stated that the proposed transfer of "local" operations was wholly unnecessary, would create questionable expense, and would tend to inject confusion into intrastate rate fixing. Further, the State Commission feared that Golden Gate's resulting capital structure would be of "questionable soundness."

The Interstate Commerce Commission conditioned its approval of the proposal on an increase in the cash consideration to $250,000, after the hearing officer had recommended disapproval of the plan in its entirety.

The congressional purpose in the sweeping revision of § 5 of the Interstate Commerce Act in 1940, enacting § 5 (2)(a) in its present form, was to facilitate merger and consolidation in the national transportation system.[7]

---

[6] This included 52 buses recently purchased by Pacific Greyhound under conditional sales contracts, 138 other buses in use in the system, and 194 cash fare boxes. Golden Gate was to assume payment of $982,566 on the new buses, and in addition was to pay Pacific Greyhound $173,394 for its equity therein.

[7] See S. Rep. No. 433, 76th Cong., 1st Sess. 28–32; H. R. Rep. No. 1217, 76th Cong., 1st Sess. 6, 12, 17; H. R. Rep. No. 2016, 76th

In the Transportation Act of 1920 the Congress had directed the Commission itself to take the initiative in developing a plan "for the consolidation of the railway properties of the continental United States into a limited number of systems," 41 Stat. 481, but after 20 years of trial the approach appeared inadequate. The Transportation Act of 1940 extended § 5 to motor and water carriers, and relieved the Commission of its responsibility to initiate the unifications. "Instead, it authorized approval by the Commission of carrier-initiated, voluntary plans of *merger* or *consolidation* if, subject to such terms, conditions and modifications as the Commission might prescribe, the proposed transactions met with certain tests of public interest, justice and reasonableness . . . ." (Emphasis added.) *Schwabacher* v. *United States,* 334 U. S. 182, 193 (1948). In order to avoid the delays incident to approval by each State through which a company operated, the Congress provided for effectuation of Commission-approved plans "without invoking any approval under State authority." [8] In short, the result of the Act was a change in the *means,* while the *end* remained the same. The very language of the amended "unification section" [9] expresses clearly

---

Cong., 3d Sess. 61; H. R. Rep. No. 2832, 76th Cong., 3d Sess. 68–69. See the historical outline of the "consolidation" provisions in *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.,* 347 U. S. 298, 315 (1954) (appendix).

[8] Section 5 (11): "The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power . . . to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority . . . ." 54 Stat. 908, 49 U. S. C. § 5 (11).

[9] See S. Rep. No. 433, 76th Cong., 1st Sess. 28.

the desire of the Congress that the industry proceed toward an integrated national transportation system through substantial corporate simplification. Subject to approval and authorization of the Commission, § 5 (2)(a) makes lawful the consolidation or merger of two or more carriers; the purchase or lease of property, or acquisition of control, of one carrier by another; and the acquisition of control of a carrier by a noncarrier.[10]

In determining whether the Commission had jurisdiction in this case, we must examine the proposed transaction in light of the congressional purpose and statutory language. The Commission and the companies regard the transaction as an "acquisition" of Golden Gate by Pacific Greyhound, within the language of § 5 (2)(a) authorizing Commission approval ". . . for any carrier . . . to acquire control of another through ownership of its stock or otherwise." We think it is clear that this contemplates an acquisition, by one carrier, of another *carrier*. Golden Gate, a mere corporate shell without property or function, can by no stretch of the imagination be deemed a "carrier." Even if we look beyond Golden Gate's present status, however, and view the plan at its consummation, we find that the alleged "acquisition" amounts to little more than a paper transaction. In reality the carriers propose a split-up—something beyond the purpose and language of § 5 (2)(a). The operating rights which now are solely those of Pacific Greyhound would be divided with Golden Gate; where now there is one carrier, there would be two. Pacific Greyhound's control would be dissipated and its functions dismembered, in the hope of escaping certain practices of the State Commission.

There may or may not, in fact, be financial or operational justification for the proposed transaction; that

---

[10] See note 3, *supra*.

question is not before us. We consider only the applicability of § 5 (2)(a) as a ground for Commission jurisdiction, and in so doing the question narrows to "the nature of the change in relations between the companies." *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151, 169 (1957). For reasons we have stated, the nature of that change here eliminates this transaction from the "acquisition" language of § 5 (2)(a).

Our holding does not create a vacuum in regulation. In cases where the transaction is not within § 5, the Commission nevertheless may assert jurisdiction over the transfer of *interstate* operating rights under § 212 (b) of the Act.[11] Although the operations sought to be transferred here were predominantly suburban-commuter in nature, they involved at least some traffic in interstate movement, serviced under certificates issued by the Interstate Commerce Commission; the transfer of these certificates must be Commission-approved. See *Atwood's Transport Line—Lease—John A. Clarke*, 52 M. C. C. 97, 105–108, where the Commission discussed the distinction between § 5 and § 212 (b). The transfer of intrastate rights here will, of course, be subject to approval of the State Commission. Far from being a void in regulation, this will invoke the authority of the body most directly concerned with the local operations. This is not to say that the Interstate Commerce Commission could never have jurisdiction over the transfer of intrastate operating rights along with the interstate operations of a carrier. The test is whether the transaction comes within the terms of § 5 (2)(a), authorizing the exercise of exclusive and plenary jurisdiction.

---

[11] Section 212 (b): "Except as provided in section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe." 49 Stat. 555, as amended, 54 Stat. 924, 49 U. S. C. § 312 (b).

Finally, we are referred to certain cases in the Commission as evidence that prior administrative practice supports the sustaining of § 5 (2)(a) jurisdiction here. *Gehlhaus and Hollobinko—Control,* 60 M. C. C. 167; *Takin—Purchase—Takin Bros. Freight Line, Inc.,* 37 M. C. C. 626; *Consolidated Freightways, Inc.—Control—Consolidated Convoy Co.,* 36 M. C. C. 358; *Columbia Motor Service Co.—Purchase—Columbia Terminals Co.,* 35 M. C. C. 531. While the interpretation given a statute by those charged with its application and enforcement is entitled to considerable weight, it hardly is conclusive. *United States* v. *Missouri Pacific R. Co.,* 278 U. S. 269, 280 (1929). The Commission practice as evidenced by these cases is, in our opinion, insufficient to outweigh the apparent congressional purpose and the clear language of the statute—especially in this delicate area where the sustaining of federal jurisdiction leads, by statute, to the complete ouster of state authority.[12]

While the original application to the Commission for approval of the transaction is not a part of the record on appeal, it appears from the briefs that such application contained an alternative prayer for approval of the certificate transfers under § 212 (b). Therefore, the judgment is reversed and the case is remanded for proceedings in conformity with this opinion.

It is so ordered.

Mr. Justice Frankfurter, Mr. Justice Burton, Mr. Justice Harlan, and Mr. Justice Whittaker would affirm the judgment, substantially for the reasons given in the opinion of the District Court, 150 F. Supp. 619.

---

[12] See note 8, *supra.*

PUBLIC SERVICE COMMISSION OF UTAH ET AL. *v.* UNITED STATES ET AL.

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

No. 15. Argued December 9, 1957.—Decided May 19, 1958.

In a proceeding under § 13 (3) and (4) of the Interstate Commerce Act, the Interstate Commerce Commission considered the petition of railroads operating in Utah for an increase in freight rates on intrastate traffic in Utah, which had been denied by the Public Service Commission of Utah. After making findings patterned after those approved in *King* v. *United States*, 344 U. S. 254, the Interstate Commerce Commission concluded that the intrastate rates caused "undue, unreasonable, and unjust discrimination against interstate commerce," and it issued an order generally applying to intrastate traffic in Utah the 15% increase previously granted generally for interstate traffic. Appellants sued to set aside the order; but the District Court denied relief. *Held:* Certain findings of the Commission lack sufficient support in the evidence; the judgment is reversed; and the cause is remanded to the District Court with instructions to set aside the Commission's order and remand the cause to the Commission for further proceedings in conformity with this opinion. Pp. 422–429.

(a) The Commission's finding that prevailing intrastate rates were abnormally low and failed to contribute a fair share to over-all revenue was not adequately supported by the evidence, since there was no positive evidence to indicate that the relative cost of intrastate traffic was as great as that of interstate shipments. Pp. 426–427.

(b) To support its finding that intrastate conditions were not more favorable than those incident to interstate transportation, the railroad evidence was far from substantial. Pp. 427–428.

(c) The findings contain no indication that the Commission concerned itself with the revenues derived from, or the conditions incident to, intrastate passenger operations, which must be taken into consideration in arriving at a general intrastate freight level. *Chicago, M., St. P. & P. R. Co.* v. *Illinois*, 355 U. S. 300. Pp. 428–429.

146 F. Supp. 803, reversed and cause remanded.

Calvin L. Rampton and *Keith Sohm* argued the cause for appellants. With them on the brief were *E. R. Callister,* Attorney General of Utah, and *Raymond W. Gee,* Assistant Attorney General.

Charles H. Weston argued the cause for the United States and the Interstate Commerce Commission, appellees. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Hansen, Robert W. Ginnane* and *Charlie H. Johns.*

Elmer B. Collins argued the cause for the Denver & Rio Grande Western Railroad Co. et al., appellees. With him on the brief were *Bryan P. Leverich, Ernest P. Porter, Peter W. Billings, Wood R. Worsley* and *A. U. Miner.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This appeal presents another clash between state and federal authority in the regulation of intrastate commerce. The Public Service Commission of Utah and the Utah Citizens Rate Association, appellants, seek to set aside an order of the Interstate Commerce Commission entered in a proceeding under § 13 (3) and (4) of the Interstate Commerce Act [1] in which an increase in intra-

[1] SEC. 13. "(3) Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby 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, or initiated by the President during the period of Federal control, 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 part or part III 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

state freight rates to the general level of interstate rates was granted to railroads operating in Utah. 297 I. C. C. 87. The principal contention here is that the evidence before the Commission was insufficient to support its ultimate finding that existing intrastate rates caused "undue, unreasonable, and unjust discrimination against interstate commerce." 297 I. C. C., at 105. A three-judge District Court found against appellants on this and all subsidiary issues. 146 F. Supp. 803. Upon direct appeal, 28 U. S. C. § 1253, we noted probable jurisdiction. 352 U. S. 888 (1956). Having concluded that certain findings of the Commission lack sufficient support in the evidence, we reverse the judgment of the District Court.

The action of the Commission was limited to freight rates on intrastate traffic in Utah. In *Ex Parte No. 175*

---

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 part or part III.

"(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 hereby 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." 41 Stat. 484, as amended, 49 Stat. 543, 54 Stat. 911, 49 U. S. C. § 13 (3), (4).

the Commission had increased interstate freight rates on a national basis by an aggregate of 15%.[2] The appellee railroads applied to the Public Service Commission of Utah for a like increase in intrastate rates. After a full hearing, the Utah Commission dismissed the application on the ground that the railroads had not produced evidence concerning their intrastate operations as required by Utah law. No appeal was taken. Instead, pursuant to 49 U. S. C. § 13 (3) and (4), the railroads filed a petition with the Interstate Commerce Commission which led to the order under attack here. The Commission found the evidence insufficient to establish any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate commerce on the other. But in findings patterned after those approved in *King* v. *United States,* 344 U. S. 254 (1952), it concluded that the intrastate rates caused "undue, unreasonable, and unjust discrimination against interstate commerce." 297 I. C. C., at 105. It sought to remove this burden by generally applying to intrastate traffic the 15% interstate increase previously granted in *Ex Parte No. 175.*[3]

Appellants attack two findings of the Commission as not being supported by substantial evidence. The first is that existing intrastate rates were abnormally low and failed to contribute their fair share of the revenue needs of the railroads. Evidence was introduced to show that some of Utah's intrastate rates were lower than corresponding interstate rates for like distances. No showing was made, however, of the comparative costs of perform-

[2] The increase was accomplished in three separate orders. 280 I. C. C. 179; 281 I. C. C. 557; 284 I. C. C. 589.

[3] Appellants challenge the validity of the interstate increases permitted in *Ex Parte No. 175.* That record, however, was not introduced in this proceeding; moreover, our disposition requires no decision on this phase of the case.

ing such services. The second finding under attack is that the conditions incident to intrastate transportation were not more favorable than those incident to interstate movements. The evidence underlying this finding indicated only that goods moving intrastate were handled precisely as were those in interstate transportation, being intermingled on the same trains.

Intrastate transportation is primarily the concern of the State. Federal power exists in this area only when intrastate tariffs are so low that an undue or unreasonable advantage, preference, or prejudice is created as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other, or when those rates cast an undue burden on interstate commerce.[4] Proof of such must meet "a high standard of certainty," *Illinois Central R. Co.* v. *Public Utilities Comm'n*, 245 U. S. 493, 510 (1918); before a state rate can be nullified, the justification for the exercise of federal power must "clearly appear." *Florida* v. *United States*, 282 U. S. 194, 211–212 (1931). The Court pointed out in *North Carolina* v. *United States*, 325 U. S. 507, 511 (1945), that the findings supporting such an order of the Interstate Commerce Commission must encompass each of the elements essential to federal power. Thereafter, in *King* v. *United States, supra,* we stressed the necessity of substantial evidence to support the findings, although we held it unnecessary "to establish for each item in each freight rate a fully developed rate case." 344 U. S., at 275. In *King*, however, the insufficiency of the findings rather than of the evidence was urged upon the Court. Those findings, which we held adequate to support an order increasing intrastate rates, were, *inter alia*, (1) that existing intrastate rates were abnormally low and did not contribute a fair share of the railroads' revenue needs; (2) that condi-

[4] See note 1, *supra.*

tions as to the movement of intrastate traffic were not more favorable than those existing in interstate commerce; (3) that the rates cast an undue burden on interstate commerce; (4) that the increase ordered by the Commission would yield substantial revenues; and (5) that such increase would not result in intrastate rates being unreasonable and would remove the existing discrimination against interstate commerce. 344 U. S., at 267–268, footnote 13. We also held in *King* that the Commission might give weight to deficits in passenger revenue when prescribing intrastate freight rates so as to meet over-all revenue needs. In our most recent review of federal power in this intrastate area, *Chicago, M., St. P. & P. R. Co.* v. *Illinois,* 355 U. S. 300 (1958), we relied on the principles of the above cases in striking down an increase in intrastate passenger fares for a suburban commuter service because the Commission had failed to take into account "the carrier's other intrastate revenues from Illinois traffic, freight and passenger." 355 U. S., at 308.

We do not believe that the evidence here met the exacting standards required by our prior cases. As to the finding that prevailing intrastate rates were abnormally low and failed to contribute a fair share of over-all revenue, we discover no positive evidence to indicate that the relative cost of intrastate traffic was as great as that of interstate shipments. The absence of such evidence is important, for it is not enough to say that interstate rates were higher on similar shipments for like distances, *Florida* v. *United States, supra,* at 212, especially where, as here, there was some indication that intrastate traffic moved at lower cost than interstate. The annual reports of the four interstate railroads operating in Utah showed that their Utah operating ratios (freight service cost divided by freight service revenue) and the Utah density statistics (ton miles of traffic per mile of main track) were more favorable than comparable system-wide fig-

ures. The Commission discredited the density statistics because of the absence of branch-line inclusion in the totals. This was true, however, in the case of both Utah and system-wide computations, leaving no apparent foundation for the conclusion of unreliability.

Other evidence seemed to indicate that those railroads with the larger percentages of total operations within Utah enjoyed higher rates of over-all return for 1953, the year just prior to the hearings in this case. The Denver & Rio Grande, with almost half of its entire operations within Utah, showed a rate of return of 6.06%. The Southern Pacific and Union Pacific, with substantially smaller proportions of Utah operations, showed returns of 3.48% and 3.56%, respectively.

Statistics introduced by the railroads as to comparative economic conditions showed recent economic improvement to be greater percentagewise in the West and particularly in Utah than in other sections. The emphasis recently has switched from agriculture to industrial and mining activity, with its resulting increase in traffic—a factor tending to suggest more favorable railroad operating conditions.

As to the finding that intrastate conditions were *not* more favorable than those incident to interstate transportation,[5] the railroad evidence on this point was far from substantial. In essence, it merely showed that intrastate and interstate traffic was handled by the same crews and intermingled in the same movement. This evidence

---

[5] "Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues." *Illinois Commerce Comm'n* v. *United States,* 292 U. S. 474, 483–484 (1934); *King* v. *United States, supra,* at 273.

failed to establish that all material factors bearing on the reasonableness of rates were substantially the same. As we have previously noted, appellants offered convincing evidence not only of greater density on intrastate operations, permitting a wider spread of fixed costs, but also of lower operating ratios and higher returns as the percentage of intrastate traffic increased. In the face of this proof the evidence as to general similarity of conditions falls short of the "high standard of certainty" required.

It is suggested that the Commission, in granting general interstate increases, frequently proceeds on the assumption that intrastate rates will be raised to the same level. But this assumption is no through ticket permitting it to approach the question of intrastate rates with partiality for a uniform increase. Rate uniformity is not necessarily the goal of federal regulation, nor can the Commission's wishful thinking be substituted for substantial evidence. Section 13 is not cast in terms of "assumption" or "partiality." As applied to this case, it contemplates an inquiry into intrastate rates and conditions within Utah, and any conclusion that interstate operating conditions equally exist there must be ticketed on more than assumption.

Finally, we note an absence in the findings of any indication that the Commission concerned itself with the revenues derived from, or the conditions incident to, intrastate passenger operations. While a sweeping inquiry into those operations is not required, we believe that in light of our opinion in *Chicago, M., St. P. & P. R. Co.* v. *Illinois, supra,* the findings must reflect consideration of these factors in arriving at a general intrastate freight level. "A fair picture of the intrastate operation, and whether the intrastate traffic unduly discriminates against interstate traffic, is not shown . . . by limiting consideration to the particular . . . service in disregard of the revenue contributed by the other intrastate serv-

ices." 355 U. S., at 308. This issue was not argued by the parties, our opinion in that case having been announced after submission of the instant case. We mention it at this point, however, since further proceedings before the Commission no doubt will ensue.

The judgment of the District Court is reversed and the cause is remanded to that court with instructions to set aside the order of the Commission and remand the cause to the Commission for further proceedings in conformity with this opinion.

It is so ordered.

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

This case involves an order of the Interstate Commerce Commission raising rates on Utah intrastate freight traffic on the ground that such rates unduly discriminate against interstate commerce. The Court has found the evidence insufficient to support the Commission's findings bearing on discrimination, and, although petitioners do not call them in question, has also concluded that the findings themselves are inadequate. Our holding in the recent case of *Chicago, M., St. P. & P. R. Co.* v. *Illinois*, 355 U. S. 300, has been extended to require, even in such a case as this, comprehensive findings concerning all intrastate operations.

There comes a time in the development of law, especially when it concerns as complex and important a subject as that in the present case, when a comprehensive survey must be made and the cumulative effect of episodic instances appraised to determine whether or not they reveal a harmonious whole. Case-by-case adjudication, without scrutiny of underlying generalizations or presuppositions, must culminate in an effort to determine whither we are going, and whether the direction cut by

the specific instances should be further pursued or whether it represents a deviation from the path demanded by the purpose of the regulatory legislation. These considerations, and the fact that the sufficiency of the evidence can only be judged intelligently in the light of the findings, make it necessary to consider at some length the cases in which this Court has been concerned with intrastate rate discrimination against interstate commerce and the findings that have been required of the Commission to justify an order removing such discrimination.

Federal regulation of intrastate rates originated in cases involving discrimination as between particular persons or localities engaged in interstate commerce and particular persons or localities engaged in intrastate commerce. The discrimination in the *Shreveport* case, *Houston, E. & W. T. R. Co.* v. *United States,* 234 U. S. 342, arose from the fact that interstate shippers were required to pay more than intrastate shippers although the rate disparity was not justified by any difference in costs, transportation conditions, or other factors usually considered in setting rates. This discrimination was removed in order to protect the interstate commerce of the particular shippers or localities shown to have been prejudiced, the same reason for prohibiting under § 3 (1) of the Interstate Commerce Act, 24 Stat. 379, 380, as amended, 49 U. S. C. § 3 (1), any "undue or unreasonable preference or advantage to any particular person . . . locality . . . or any particular description of traffic . . ." where two forms of interstate commerce are involved. It has often been said that this form of discrimination arises simply from the relation of rates to each other, but this is true only if it is understood that the circumstances that enter into the setting of rates and justify differences between them are also taken into consideration. Even in a persons-localities case, discrimination is not made out merely from a disparity in rates, but, as the Court made clear in the

Shreveport case, the disparity must exist under " 'substantially similar conditions and circumstances . . . .' " 234 U. S., at 347.

The power to remove discrimination thus announced in the *Shreveport* case, as between persons and localities in interstate and intrastate commerce, was given express statutory basis by § 416 of the Transportation Act of 1920, 41 Stat. 456, 484, 49 U. S. C. § 13 (4), amending § 13 of the Interstate Commerce Act. The amendment added, however, as part of a much more comprehensive regulation of the Nation's transportation system, a broad prohibition against "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce . . . ." This provision, taken in conjunction with § 15a (2), 41 Stat. 456, 488, as amended, 49 U. S. C. § 15a (2), was construed in *Railroad Comm'n of Wisconsin* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563, to authorize the Commission to remove "revenue discrimination" resulting from unjustifiably low intrastate rates. The constitutionality of this power was upheld against claims of unwarranted intrusion into the area reserved to the States in their control over intrastate commerce. "Revenue discrimination" consists, not in prejudice to particular shippers or localities, but in the burden cast on interstate commerce because of the failure of intrastate commerce to contribute its fair share to meet the revenue needs of the carrier. Of course interstate shippers and localities will ultimately be prejudiced by having to make up revenues properly due from intrastate commerce or by the collapse of an adequate transportation system, but the immediate purpose of the exercise of the Commission's power under this head is to assure to the carrier needed revenues. The test of what revenues are needed is found in § 15a (2), 41 Stat. 456, 488, as amended, 49 U. S. C. § 15a (2), which instructs the Commission in prescribing rates to give due consid-

eration to the need "in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service." The National Transportation Policy of 1940, 54 Stat. 899, 49 U. S. C., at pp. 7107–7108, in turn expanded and supplemented the test of § 15 (a)(2). The "dovetail relation," as Mr. Chief Justice Taft termed it in the *Wisconsin* case, 257 U. S., at 586, between the second part of § 13 (4) and § 15a (2), thus gave a much broadened purpose to federal regulation. "Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service." *New England Divisions Case*, 261 U. S. 184, 189.

The order sustained in the *Wisconsin* case affected intrastate fares on a state-wide basis. The Court expressly rejected discrimination against persons or localities as justification for the order, on the ground that there was insufficient evidence to support a finding of state-wide discrimination of this kind. This conclusion may have been justified in the *Wisconsin* case itself. However, the limitation imposed by that case and later cases upon the effective scope of the persons-localities basis of discrimination, because of stringent evidentiary requirements, seems to have derived more from the origin of the prohibition in the particular kind of situation presented by the *Shreveport* case than from restrictions inherent in the regulatory scheme contemplated by the statute. Whether discrimination is directly against shippers or against the revenues of the carriers, practical considerations require that evidence typical of discriminatory conditions be sufficient to justify an order that goes

beyond the particular instances shown. In revenue cases evidence of some intrastate rates may be deemed typical and relied on to show that intrastate rates in general do not contribute their fair share to revenues. Likewise it might not have been unreasonable to rely on evidence of prejudice to certain interstate shippers as indicative of prejudice throughout the State to interstate shippers, and thus justify a state-wide order to remove discrimination against "interstate commerce" without resort to the question of revenues.

For a time it appeared that § 13 (4) would be construed to authorize the removal of discrimination against interstate commerce on such a basis. In *Georgia Pub. Serv. Comm'n* v. *United States,* 283 U. S. 765, for example, the Court sustained a state-wide order not confined in its effect to traffic directly shown to have been prejudiced, yet attention does not seem to have been directed to the revenue needs of the carriers. In its opinion the Court spoke particularly of "undue prejudice and discrimination to interstate shippers and localities . . . ," 283 U. S., at 773, and the brief for the Interstate Commerce Commission indicates that the case was not primarily conceived of as a revenue case. Pp. 38–40. (See also the significance of the Court's reliance, 283 U. S., at 774, on *Nashville, C. & St. L. R.* v. *Tennessee,* 262 U. S. 318.) In *Louisiana Pub. Serv. Comm'n* v. *Texas & N. O. R. Co.,* 284 U. S. 125, an order affecting rates throughout most of the State was sustained in spite of the fact, as appellants pointed out, 284 U. S., at 126–128, that there were no findings in regard to revenue. Finally, in *Ohio* v. *United States,* 292 U. S. 498, the Court sanctioned an unusually wide application of the persons-localities basis of discrimination in sustaining an order raising coal rates throughout the entire northeastern part of Ohio.

Nevertheless, the approach suggested by these cases was not in fact carried forward. The first *Florida* case,

Florida v. *United States*, 282 U. S. 194, 208, strongly reaffirmed the *Wisconsin* case in its rejection of the persons-localities basis for a state-wide order, and in the requirement that an order predicated on such a theory be restricted to "competitive territory." See *American Express Co.* v. *South Dakota ex rel. Caldwell*, 244 U. S. 617, 626. This was perhaps inevitable in view of the fact that the *Shreveport* doctrine had been evolved to remedy a specific situation—prejudice against particular shippers or localities shown by relatively direct evidence—so that the evil that gave rise to the legal theory in turn limited its growth. Furthermore, the broad power that the Court found in the relation between § 13 (4) and § 15a (2), to protect the carriers' revenues, made it appear unnecessary to expand the persons-localities theory in order effectively to protect interstate commerce. The result has been that, over the years, the cases that have come before this Court that have resulted in significant developments under § 13 (4) have been almost exclusively revenue cases.

Findings in revenue cases under section 13 (4).—In these cases we have been concerned to set forth, with such precision as the subject matter permits, the findings required to justify an ultimate conclusion that there is a revenue discrimination against interstate commerce. Such findings need not be, in any particular form of words, the automatic recitation of a talismanic formula, but must give ample assurance that the Commission has applied the standards and engaged in the process of judgment contemplated by the statute. Only through the findings can a court know what it is that the Commission has decided and is to be reviewed.

Since the purpose of the proceeding is to increase the contribution to revenues from intrastate traffic, there must be a finding that higher rates will in fact result in increased revenues. If business is unable to bear the

higher rates, and either production will be curtailed or traffic diverted to cheaper modes of transport, increased rates may actually decrease revenues. The Commission's finding on this matter must express an informed, expert judgment about probabilities. It may not rest simply on the mechanical application of proposed rates to the volume of past traffic, but, on the other hand, the fact that there is uncertainty about the actual revenue outcome will not make the finding insufficient. *United States* v. *Louisiana,* 290 U. S. 70, 80.

The finding principally required in a revenue case is that intrastate commerce is not contributing its "fair share" to the revenues needed to achieve the ends set forth in § 15a (2) and the National Transportation Policy. What share is a fair share? Intrastate traffic is not contributing a fair share if it pays lower rates than interstate traffic when, on balance, the circumstances that usually go to the setting of rates are not substantially more favorable for intrastate traffic than for interstate traffic. As already indicated, this same test is applicable in cases involving discrimination against persons or localities. A disparity in rates does not alone establish a forbidden discrimination, as the Court has frequently said, nor, it is equally clear, since conditions surrounding interstate transportation may be more favorable, does identity of rates alone give assurance that there is not such discrimination.

The most obvious of the circumstances thus made relevant are the costs that enter into the rendering of the transportation service. The circumstances that go to the setting of a rate, however, are not necessarily confined to such costs, but may include a wide range of other considerations such as the ability of traffic to bear the increase and the economic condition of an industry. Costs, furthermore, may be considered indirectly through the factors that generate costs, such as the quality of the service

rendered, the physical characteristics of the area through which the traffic moves, average loading, average length of haul, density of traffic, and so forth. In regard to the average length of haul, for example, if terminal costs are fixed, the longer the haul the more the carrier will realize per mile unless the rate is itself graduated to take this fact into account. Interstate hauls are probably on the whole longer than intrastate hauls. Where passenger service is concerned, wholly different factors may become important in deciding whether fare differentials are justified. For instance, coaches used in intrastate suburban or commuter service may require more cleaning and average fewer passenger miles per day than through coaches. See, *e. g., In re Intrastate Rates within Illinois,* 102 I. C. C. 479, 483. It is apparent that the factors that may reasonably be found to enter into costs are inexhaustible in number and too changing in significance to permit a definitive catalogue to be drawn up. Least of all should such a task be undertaken by courts that cannot be assumed to have familiarity with, let alone specialized knowledge of, the practicalities of the transportation industry, and whose contact with these matters is necessarily episodic. Understanding in such a complex area as rate regulation, and the feel for the subject essential to successful administration, come only from saturation in the elements of the problem by those constantly concerned. Even to the Commission, what one year has appeared an inconsiderable factor in appraising relative transportation conditions affecting costs has the next, in the light of new experience, been deemed highly relevant.

It is essential to bear in mind precisely what it is that the Commission compares when it compares the circumstances surrounding the movement of interstate and intrastate traffic that go to the setting of rates. In the case of interstate traffic, one rate set for an entire interstate move-

ment may take into account not only conditions within the State whose intrastate rates are in question, but also conditions in surrounding States. In comparing cost factors, therefore, it may be necessary to consider not only whether interstate and intrastate traffic as they move through the State move under the same conditions, but also the conditions under which interstate traffic moves beyond the borders of the State. The interstate area relevant to this inquiry may embrace several States, such as the Western District in the present case, or half the country; it is the area chosen in setting the interstate rates.

What findings the Commission is required to make concerning the circumstances surrounding interstate and intrastate transportation to justify an ultimate finding that intrastate traffic is not contributing its fair share to revenues have necessarily been dictated more by the practicalities of administration than the demands of abstract logic. The Commission has not been required to make findings as to revenues and costs attributable to intrastate traffic or even to make findings specifically negativing the existence of any factors that might affect costs. Although such findings would give increased assurance that intrastate commerce was not being made to bear more than its fair share, an unwillingness to render nugatory the provisions of § 13 (4) by imposing upon the Commission obligations impossible of fulfillment has precluded the Court from such a requirement.

In *Illinois Commerce Comm'n* v. *United States,* 292 U. S. 474, a case involving rates in the Chicago Switching District, the Court clearly laid down what had been implicit in earlier cases sustaining Commission orders. In reply to a contention that there had been no finding separating interstate and intrastate property, revenues, and expenses, the Court stated: "Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all

factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues." 292 U. S., at 483–484. This statement was quoted with approval and applied in *King* v. *United States,* 344 U. S. 254, 273. The order in the *King* case was sustained, although the only finding respecting the similarity of conditions surrounding interstate and intrastate transportation was the general finding that, "the transportation conditions incident to the intrastate transportation of freight in Florida are not more favorable and such conditions in the Florida peninsula are somewhat less favorable than those (1) within southern territory and (2) between Florida and interstate points." 278 I. C. C. 41, 72. See also the second *Florida* case, *Florida* v. *United States,* 292 U. S. 1, 11.

More elaborate findings have not been required because of the practical impossibility, at least where the traffic is mingled and carried on as one operation, of accurately segregating costs between interstate and intrastate commerce. Moreover, a general finding of similarity of conditions was held sufficient because it would have been the height of imprudence for this Court to require the Commission specifically to negative the existence of all factors that might touch on costs when, because of the changing nature of the transportation industry and the endless variety of situations giving rise to discrimination, such factors are not precise, fixed, or equal in importance. The holding in the *King* case was a practical solution hammered out to meet the almost intractable difficulty of regulating as two systems what is in fact one integrated transportation system of interstate and intrastate commerce, where regulation, if there is to be regulation at all, must be by approximation and compromise.

Evidence in section 13 (4) cases.—In the present case the Commission found that, "The conditions incident to the intrastate transportation of freight in Utah are not more favorable than those incident to the interstate transportation between Utah and adjoining States." Petitioners attack this finding as not supported by substantial evidence. The findings necessary to support an order under § 13 (4) have been considered at length because only in the light of them, and the reasons that led the Court to require these, and not more elaborate, findings, can the sufficiency of the evidence be appraised. Thus it would be paradoxical, after deciding that the Commission need not make findings segregating costs because of the practical impossibility of accurate allocation, to require that evidence to the same effect be in the record. Likewise, if individual findings on particular factors that may bear on costs need not be made because an authoritative catalogue of such factors cannot be compiled, it would be inconsistent, and would disregard the criteria governing the findings, to require that the record contain evidence as to all such factors or as to any particular factor.

Since, as cannot too often be pointed out, the Commission's administration of § 13 (4) must from the nature of the case proceed by approximation and estimate, and for this reason the possible must have a large share in determining the permissible, it is highly relevant to examine at least some of the § 13 (4) cases that have come before this Court to determine what evidence has actually been in the record in support of findings of similarity of conditions. In determining whether the record in the present case satisfied the requirement of substantial evidence, we do not deal with a new problem.

In the *Wisconsin* case itself, *Railroad Comm'n of Wisconsin* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563, a stipulation that operating and transportation conditions were

substantially the same made it unnecessary to examine the evidence underlying the Commission's finding on this point, and the record on which the Commission founded its order was not in fact before this Court. In *New York* v. *United States,* 257 U. S. 591, however, a case also involving intrastate passenger fares, this Court affirmed the District Court's dismissal of a bill brought to annul the Commission's order when the substantiality of the evidence was squarely in issue. The record contained testimony that physical characteristics of interstate and intrastate service, type of equipment, running time, and accommodations were similar, and in addition there was testimony of the most general sort that transportation conditions within the State did not justify lower rates. There was some indication that traffic density in New England was greater than in New York.

Alabama v. *United States,* 283 U. S. 776, involved intrastate rates on fertilizer and fertilizer materials. The issue of the substantiality of the evidence to support the Commission's findings was squarely presented. The record contained no evidence of the cost of the intrastate service. Instead there was general testimony that the conditions surrounding intrastate and interstate transportation in Alabama were substantially similar, and that the witnesses knew of no conditions in Alabama that would justify different intrastate rates. There was some evidence that the tonnage of fertilizer moving intrastate was much greater than that moving interstate, and that ton-miles per loaded car of fertilizer were greater in Alabama than in the Southern District as a whole. Evidence was introduced of competition from wagons on short, intrastate hauls. Yet in spite of this specific evidence tending to show, as against the more general testimony, that conditions affecting intrastate traffic were not the same as those affecting interstate traffic, this Court sustained the Commission's order, finding that the ques-

tion of similarity of transportation conditions had been "thoroughly canvassed," and that the findings were supported by evidence. 283 U. S., at 779 and n. 4.

In *Louisiana Pub. Serv. Comm'n* v. *Texas & N. O. R. Co.*, 284 U. S. 125, involving both interstate and intrastate rates on sand, gravel, and similar materials in western Louisiana, this Court found that the facts stated in the opinion were adequately supported by the evidence and were sufficient to warrant the order prescribing higher rates. The record contained evidence as to general freight costs per mile in different States in the territory embracing Louisiana, but no comparison was made of the costs of interstate and intrastate transportation within the State, and there was no evidence of the cost of transportation in the particular part of Louisiana concerned or of the particular commodities on which higher rates were sought. Evidence was introduced to show general freight density in the States in the territory considered, interstate and intrastate combined, and, according to the Commission, 155 I. C. C. 247, 253, about ninety per cent of the movements of the particular commodities involved was intrastate. There was also considerable evidence that bore indirectly on traffic density in these commodities: tonnage moved in each of the States; producers throughout the territory, in Louisiana, and in western Louisiana; total production in western Louisiana; shipments to particular consumers; estimates, based on the Louisiana highway program and population statistics, of probable future consumption. In addition there was the usual general testimony on similarity of conditions, and references to Commission findings in earlier proceedings on the same question. Although the record is, as to the issue we are here concerned with, one of the most extensive in any § 13 (4) case that has been before the Court, there is little or no evidence specifically directed to transportation conditions in the southern part

458778 O—58—32

of western Louisiana, the area to which the Louisiana Commission had specifically refused to apply the interstate level of rates.

Another case in which this Court found that there was substantial evidence was *Florida* v. *United States,* 292 U. S. 1, involving intrastate rates on logs. The record contained evidence bearing on the cost of transporting logs in Florida, and indicating that existing intrastate rates did not cover the cost of the service. As to freight in general, there was evidence that costs per gross ton-mile were higher on the carrier's lines in Florida than for the rest of its system, and that density on its lines in Florida, intrastate and interstate combined, was less than for its system as a whole or its system excluding Florida. These comparisons involved the question whether evidence of general freight conditions could be used to justify raising rates on a particular commodity. The case furnished the best evidence on the probability that increased rates would increase revenues because the proposed intrastate rates had actually been in effect for a period before the Court set aside an earlier order of the Commission.

In *Illinois Commerce Comm'n* v. *United States,* 292 U. S. 474, already referred to in connection with the rule that there need not be findings segregating interstate and intrastate expenses, the Court also found that there was substantial evidence. The Commission relied primarily on an extensive cost study of the movement of all commodities in the Chicago Switching District, a study that did not, however, make any separation between interstate and intrastate costs. There was evidence of the physical characteristics of the service: that interstate and intrastate traffic were handled in the same manner and carried on the same trains. On the other hand, it was shown that average intrastate hauls were shorter than average interstate hauls, yet the Commission had set a single rate no

matter what the length of haul. In spite of this evidence indicating that at least one factor underlying costs favored intrastate traffic, the Court upheld the Commission's order.

Mississippi ex rel. Rice v. *United States,* 307 U. S. 610, concerned intrastate rates on sand, gravel, fertilizer, and fertilizer materials. This Court affirmed the District Court *per curiam,* citing cases to the effect that the Commission's orders would be sustained when supported by substantial evidence. The record contained no evidence segregating costs between intrastate and interstate traffic, although one witness testified generally that costs were less in Mississippi than in neighboring States. There was no evidence on traffic density as such, but considerable from which conclusions as to density might be inferred. Thus there was evidence of the tonnage of the commodities involved that had been moved by the carriers, intrastate, interstate, and total, during selected annual periods, and evidence of points of production in Mississippi. The carriers relied on testimony that the same service was rendered interstate and intrastate traffic and the usual general evidence of similarity of conditions. Against this was testimony that the bulk of intrastate movements were single-line, and that, because of extra switching and inspection of cars at switching points, and because of the necessity of keeping interchange records, joint-line movements were more expensive than single-line. Dispute centered principally on whether increased rates would increase revenues. Evidence was introduced to show intensive truck competition, facilitated by the fact that short hauls from wayside gravel pits to all points in the State were possible. Other evidence minimized the seriousness of such competition. The record contained little evidence of conditions surrounding the production and transportation of the commodities in other parts of

the South, but the Commission relied to some extent on its investigation into general conditions in earlier proceedings concerned with interstate rates.

New York v. *United States,* 342 U. S. 882, affirming 98 F. Supp. 855, another *per curiam* affirmance, raised intrastate commuter fares to the level of interstate commuter fares. A study had been made of the cost of the intrastate commuter service, costs being apportioned between that service and other service on the trains studied principally on the basis of passenger-mile ratios. The results of the study were used by the Commission, however, to show that intrastate fares did not cover the cost of service, rather than to contrast intrastate with comparable interstate costs. Intrastate commuter service was of much heavier volume than interstate, both in number of passengers and passenger miles, but the Commission pointed out that increased costs from such density went far to offset its advantages. Wear and tear on equipment was increased, and since traffic was concentrated at rush hours, additional crews and equipment needed to handle it were idle during the rest of the day. There was evidence that intrastate trains made more stops than interstate trains and used coaches that were older, more crowded, and not air-conditioned. Yet these differences were found not to justify a lower fare.

In *King* v. *United States,* 344 U. S. 254, the parties raised no question as to the sufficiency of the evidence. The Court observed, however, that evidence supporting the findings appeared in the record and that much of the material that had been before the Commission in its investigations into the interstate rates had also been before it in the § 13 proceedings. 344 U. S., at 272. The record did contain evidence of operating expenses allocated to Florida traffic, interstate and intrastate, but it was admitted that the allocation was simply on the basis of the percentage of revenue derived from such traffic,

and that it was impossible accurately to ascertain actual expenses. However, for one carrier, because of special bookkeeping, it was possible to show that actual freight expenses were higher in Florida than for the rest of its system. Statistics were introduced to show that the percentage increase in net railway operating income for Florida and the carriers operating in Florida had been greater than for the Southern District as a whole.

As to density, there was evidence that the density of freight traffic in Florida, at least for some carriers, was lower than that for their whole systems or their systems excluding Florida. Against this the State Commission introduced evidence showing that there had been a greater relative increase in tonnage originated in Florida than on the entire systems of the three principal carriers serving Florida. There was evidence that intrastate movements were mostly by local trains on branch lines, and the percentage of branch lines in Florida was greater than for the rest of the carriers' systems. Because of overtime wages, shorter hauls, more switching, the necessity of frequently making and breaking up trains, such local trains were shown to be more expensive to operate than through trains. The Court left it to the Commission to weigh the competing claims of all this evidence on the question of similarity of conditions.

In recent years the Court has, by *per curiam* affirmance, disposed of a number of cases involving challenges to § 13 (4) orders. In *Tennessee* v. *United States,* 346 U. S. 891, affirming 113 F. Supp. 634, a case involving intrastate rates on coal and wood, the District Court had found that there was substantial evidence. The Commission's report, *Tennessee Intrastate Rates and Charges,* 286 I. C. C. 41, stated the principal evidence relevant to the finding that intrastate conditions were not more favorable than interstate conditions. The results of a traffic study, separately listing interstate and intrastate

terminations of the commodities involved, bore indirectly on density. A greater proportion of intrastate than interstate traffic was handled in costly local trains. A cost study based on waybills showing average load, haul, and rates charged was introduced to show that intrastate rates provided a greater return above cost than rates on interstate movements; the Commission rejected this evidence on the ground that the information in the waybills was unreliable.

In *Louisiana Pub. Serv. Comm'n* v. *United States,* 348 U. S. 885, affirming 125 F. Supp. 180, the District Court had also found that there was substantial evidence. The Commission in its report, *Louisiana Intrastate Freight Rates and Charges,* 291 I. C. C. 279, relied on evidence that generally intrastate traffic was carried in the same trains with the same crews as interstate traffic and under no more favorable operating conditions, and that in fact considerable intrastate traffic moved in expensive local trains. There was also evidence separately stating, as between intrastate and interstate commerce, the tonnage of the various commodities terminated during a test period.

In *Illinois Central R. Co.* v. *Mississippi Pub. Serv. Comm'n,* 349 U. S. 908, affirming *Mississippi Pub. Serv. Comm'n* v. *United States,* 124 F. Supp. 809, the principal question before the District Court had been the sufficiency of the evidence. Among the considerations that that court relied on in setting aside the Commission's order was the fact that the passenger deficit in Mississippi was lower than for the entire systems of the Mississippi carriers, for the rest of the South, or for the country as a whole. It found the evidence too unsubstantial, furthermore, to support the Commission's judgment that, in spite of competition from other forms of transportation, increased rates would increase revenue.

From this review of the cases in this Court, and from a consideration of others in the District Courts and before the Commission, certain conclusions emerge that should be decisive in disposing of the case now before us. In the first place, there has been in many cases only the slightest direct evidence of the cost of moving intrastate traffic, and in other cases the record is wholly devoid of such evidence. As is clear from *Illinois Commerce Comm'n* v. *United States,* 292 U. S. 474, and *King* v. *United States,* 344 U. S. 254, such evidence is not required when intrastate and interstate traffic are intimately bound together. The records in many cases contained evidence of factors affecting costs, but, according to the traffic involved and the character of the investigation, what has been deemed an important factor in one case has been passed over in silence in another. Reliance on general testimony concerning similarity of conditions has been almost universal and, in some of the cases considered, such evidence appears to have provided the principal, if not exclusive, support for the Commission's finding.

The evidence introduced before the Commission to support a finding of similarity of conditions varies with the purpose and scope of the proceeding. Thus, an investigation under § 13 (4) may involve intrastate rates on a single commodity or on all freight traffic; it may involve the rate of a single carrier or all the carriers in the State; it may be confined to rates in a certain part of the State or extend to rates and fares throughout the State. Obviously a single, comprehensive, easily applied formula for testing the evidence required in all these cases cannot be devised without closing one's eyes to the rich and shifting variety of situations presented by the Nation's transportation system, and without unduly confining the Commission in its responsibility to deal with the intermingled interstate and intrastate transportation of a single system.

Finally, it is of importance to distinguish § 13 proceedings, such as those in the present case, that accompany or follow regulation of interstate rates on comparable traffic. In these cases, in determining the level at which interstate rates should be set in order to assure a given revenue, the Commission often proceeds on the assumption that intrastate rates will be raised to the same level or proportionately increased. Of course uniformity of rates is not the goal of federal regulation, and the Commission's conclusions in the interstate proceedings do not justify foregoing the inquiry into intrastate rates and conditions required by § 13. But the manner in which the Commission customarily proceeds is strong evidence of what is practically possible in performing the difficult regulatory task imposed by the statute. It should be respected by this Court in prescribing standards for the Commission's guidance. When a § 13 proceeding follows regulation of rates on comparable interstate traffic, furthermore, evidence introduced in the interstate proceedings, whether they are general revenue proceedings or directed to specific rates, will, to a greater or less extent, also bear on conditions surrounding the movement of intrastate traffic, and it may not be unreasonable for the Commission to assume, in the absence of persuasive evidence to the contrary, that the conclusions it has drawn from such evidence about general conditions are equally applicable to a particular State. As was stated in *King* v. *United States,* 344 U. S. 254, 272, "In the absence of any showing that it is not applicable to Florida, the evidence which forms the basis of the Commission's nationwide order becomes the natural basis for its Florida order."

The evidence in the present case.—The present case concerns, with exceptions not now relevant, all Utah intrastate freight rates. It follows a general revenue proceeding raising interstate rates, and seeks to apply the same increase there granted to intrastate traffic.

The validity of the Commission's state-wide order was not impaired because as to particular traffic or carriers in the State a rate increase might not be justified. It may be that an increase in rates on certain traffic will decrease revenues, or the operations of one carrier may already be exceptionally profitable. Factors affecting costs may vary throughout the State. In *New York* v. *United States,* 257 U. S. 591, the fact that evidence indicated that one carrier had a more favorable route with greater density than others did not preclude an order raising passenger fares on a state-wide basis. If general orders are to be possible at all, and § 13 (4) necessarily implies them, the Commission must be able to proceed on evidence typical of general conditions, see *Georgia Pub. Serv. Comm'n* v. *United States,* 283 U. S. 765, 774, making provision as it did in the present case for the re-examination of specific rates claimed not to fall within the findings. See *Railroad Comm'n of Wisconsin* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563, 591; *New England Divisions Case,* 261 U. S. 184, 196–199.

The evidence in the present case said to bear on the conditions surrounding the movement of interstate and intrastate traffic included evidence of the following: economic conditions in Utah, the rate of return on the carriers' net property investment, net railway operating income, revenue per ton-mile, freight service ratio, density, operating efficiency, the character of the service rendered interstate and intrastate traffic, and general similarity of operating conditions.

There was general testimony from a number of qualified witnesses that interstate and intrastate traffic in Utah moved under substantially similar conditions, were carried on the same trains, handled by the same crews, and accounted for in the same manner, and that generally no better service was given interstate than intrastate traffic. There was evidence that so-called "piggyback"

service was used exclusively for interstate traffic, and that traffic in Utah was more heavily weighted in favor of mine products moving in cheap gondola cars than in neighboring States, but there was no indication that these considerations, insofar as they affected costs, were not in fact taken into account in setting rates on the particular commodities involved.

The average rate of return on net property investment for the five Class I carriers serving Utah, and their net railway operating income, were shown to have declined steadily since 1950. Since these figures were not broken down between interstate and intrastate operations within Utah, however, nor between operations in Utah and other States, but instead embraced the carriers' entire systems, the showing of a decline is of no probative value on similarity of conditions surrounding the movement of interstate and intrastate traffic. The decline may be attributable as much to one traffic as to the other. It goes instead to establish the carriers' need for additional revenue from one source or another. The same may be said of the evidence of particular costs entering into the rendering of freight service. There was evidence that wages on the entire systems of the five Utah Class I carriers had risen 45.89% from 1948 to 1953, that they were generally higher in the Western District than in the States further east, and that average unit prices for materials and supplies in that District had risen 24.7% from 1949 to 1954. In none of these statistics were costs attributable to interstate and intrastate traffic segregated and compared.

As in most § 13 (4) cases, the record here contained numerous statistics showing revenue per ton-mile. Revenue per ton-mile on all freight traffic in Utah, interstate and intrastate, had increased less between 1939 and 1952 than revenue per ton-mile for the Western District and for the country as a whole. On the other hand, the re-

sults of a waybill study introduced by the Utah Commission showed that in 1952 the revenue per ton-mile from Utah intrastate shipments was greater than that from interstate shipments that had originated in Utah. But, as the Interstate Commerce Commission pointed out in its report, revenue per ton-mile tends to be less on interstate traffic because average hauls are longer. In any event, since differences in revenue per ton-mile are often simply a reflection of the fact that there are differences between interstate and intrastate rates, they are not probative of the relative cost factors affecting interstate and intrastate traffic.

I turn now to the evidence that the Court finds, contrary to the Commission, establishes that on the whole conditions surrounding intrastate traffic are substantially more favorable than those surrounding interstate traffic, and require overruling the District Court and setting aside the Commission's order. This evidence, according to the Court, so preponderates over the general testimony on similarity of conditions, referred to above, that the Commission was bound to accept it as decisive.

There was evidence such as increase in population, automobile registrations, and income payments to individuals that justified a conclusion that economic conditions in Utah had improved relatively more than in the Western District and the United States as a whole. Although this evidence may be relevant to the density of traffic in Utah as compared with other States, or the density of intrastate and interstate traffic within Utah, it is so remote that it cannot reasonably be argued that it compels a conclusion one way or another.

The Court suggests that Utah intrastate transportation conditions must be more favorable because the rate of return on the Denver and Rio Grande Western, with almost half of its operations in Utah, is greater than the rate of return for the Southern Pacific and Union Pacific.

For this Court to draw such an inference presupposes a natural law of railroading within the Court's knowledge or to which it can gain ready access. There is nothing in the record to indicate that the higher rate of return for the D&RGW is due to the fact that a substantial part of its traffic is Utah intrastate traffic. It may be due to any one of a number of factors: the railroad as a whole may be more efficiently operated than the UP or the SP; its routes may be more favorably situated or the operations on other parts of its system particularly profitable; the lower rate for the UP and the SP may be due to circumstances present anywhere in their far-flung empires.

The Court finds that there was no justification for the Commission's conclusion that density figures introduced by petitioners were unreliable. Such a judgment by the Court on the basis of these statistics is indeed puzzling.

Exhibit 64 compares, for four Class I carriers in Utah, freight density (ton-miles per mile of main-line track) for "intrastate" operations with this density for each carrier's system as a whole. In each case the "intrastate" density is greater than the system density. It is important to understand just what is being compared in this exhibit. As was admitted by petitioners, the "intrastate" density in the exhibit is not limited to traffic that, under § 1 (2)(a) of the Act, 24 Stat. 379, as amended, 49 U. S. C. § 1 (2)(a), moves "wholly within one State." Yet it is the cost of moving only such intrastate traffic, traffic wholly within the State, that must be ascertained and compared with the cost of moving interstate traffic, because only this kind of intrastate traffic is subject in the first instance to regulation by the State. Instead, "intrastate" density in the exhibit includes also that portion of interstate movements that lies within Utah, whether such movements originate or terminate there or bridge the State.

The comparison in this exhibit, therefore, is by no means probatively the best when the purpose is to show that the cost of moving one ton one mile on an intrastate journey is less than it would be on an interstate journey. The most persuasive comparison would be between the average density of interstate traffic in the region taken for the purposes of setting the interstate rates and the average density of intrastate traffic that moves wholly within the State. The interstate density properly taken into consideration, because it is the density that affects the interstate rates, is the average density for the entire interstate journey including that part that lies in other States, but not including the intrastate density in those States. There is some, although less, probative value in a comparison between the density of interstate traffic confined to interstate traffic within the State and the density of intrastate traffic. For this comparison to be reliable, density of interstate traffic for the entire region for which the interstate rates have been set must be assumed to be substantially the same as the density of interstate traffic within the State.

The comparison in Exhibit 64, between interstate and intrastate density on the carriers' entire systems and interstate and intrastate density in Utah, is of considerably less probative value than these two comparisons. It does not show whether Utah intrastate density is in fact greater or less than interstate density either in Utah or on the carriers' entire systems. It has some evidentiary value, of course, since, if over-all system density is less than over-all density within the State, there are probably factors in the State generating traffic that do not exist in neighboring States. That these factors generate more intrastate than interstate traffic, however, is a matter of speculation, and average regional interstate density may still be higher than intrastate density within

Utah. A comparison somewhat similar to that in Exhibit 64, and in fact relied on in the second *Florida* case, *Georgia Pub. Serv. Comm'n* v. *Atlantic C. L. R. Co.*, 186 I. C. C. 157, 164, is a comparison between combined interstate and intrastate density within one State and combined interstate and intrastate density on the balance of the carrier's system in surrounding States. It is impossible to tell from such a comparison whether or not region-wide interstate density is less than intrastate density in the particular State involved, although that it is may be a permissible judgment for the Commission to make but hardly for this Court to impose upon it.

These distinctions are necessary because the bearing of density on the cost of interstate and intrastate traffic is unlike that of many other factors. Thus road conditions, wages, and cost of fuel in a State are likely to fall with equal effect on intrastate traffic and interstate traffic as it passes through the State. As to these conditions, a comparison between those prevailing in one State and surrounding States is highly relevant. Since interstate rates take into account average conditions throughout the region, if conditions are more favorable in one State, intrastate traffic moving only under those more favorable conditions should not have to pay the same rate as interstate traffic.

The Commission itself discounts the importance of the density figures because comparison is made of density on main-line track only and that on branch lines is excluded. However, the Court finds that, since branch-line density is excluded both from Utah and system figures, the omission does not render the evidence unreliable. This is right if, and only if, the proportion of branch line to main line in Utah is the same as for the carriers' systems as a whole. If there is proportionately more low-density branch-line track in Utah, Utah density will be relatively lower. The possibility that such is in fact the case was

mentioned at the hearings (R. 294), and petitioners introduced no evidence to supply the deficiency in their exhibit.

Thus it is clear that there were good reasons for rejecting the evidence in Exhibit 64,[1] but even if the comparison offered were the best, the Commission surely would not be compelled to accept the density evidence as conclusive. Density is only one of a multitude of factors affecting costs, and what is gained by high density may

---

[1] The record also contains evidence that in 1952 and 1953 density for the Denver and Rio Grande Western was higher on its lines in Utah than on its lines in Colorado or for its system as a whole. Such a comparison, as already pointed out, does not show that Utah intrastate density for the D&RGW is in fact higher than interstate density over the carrier's entire system. Furthermore, the system of the D&RGW is confined almost completely to Utah and Colorado, and there was no showing that the density figures could not be explained on the basis of special conditions in Colorado, rather than by more favorable conditions in Utah compared with the Western District as a whole. The same criticism can be made of the evidence that operating efficiency on the D&RGW—tons per freight car loaded, tons per train, tons per locomotive, etc.—is more favorable in Utah than Colorado.

There was also considerable evidence, taken from actual freight bills, of tonnage terminated in Utah during a four-month test period in 1953–1954, in some instances segregated between interstate and intrastate movements. However, since all interstate movements during the period were admittedly not included, the evidence provides no basis for reliable conclusions about density.

Evidence of the relative volume of interstate and intrastate movements of particular commodities, such as coal, ores, and concentrates, are no necessary indication of over-all freight density, and therefore of little assistance on this question in a proceeding to raise all freight rates. When the § 13 (4) proceeding is concerned with rates on certain commodities only, it is for the Commission to decide what density comparisons are significant, whether of over-all freight traffic, movements of the particular commodities, or movements restricted to a particular region. See, *e. g., Indianapolis Chamber of Commerce* v. *Cleveland, C., C. & St. L. R. Co.*, 60 I. C. C. 67, 74.

be lost because of some other factor. High density itself, as was shown in *New York* v. *United States*, 342 U. S. 882 (see 279 I. C. C. 151, 161), is not always an unmitigated blessing, and low interstate density may be the result of rate discrimination rather than a justification for it.

The Court also relies on evidence that the freight service operating ratio of four Class I carriers operating in Utah for 1950–1953 was more favorable for operations described in the exhibit as "intrastate" than for the carriers' entire systems. The "intrastate" traffic included in this comparison was the same as that used in the density statistics. Moreover, the Commission itself rejected the evidence because of an even more fundamental criticism of the method used to segregate expenses attributable to intrastate traffic. Since it was impossible in many instances to ascertain actual expenses, allocation had been to a large extent simply on the basis of the number of train miles in the State. The carriers had long attacked this method of allocation as artificial and not reflecting the actual cost of service, and there is no justification for overriding the Commission's judgment on the matter.

The upshot is that petitioners produced no evidence of dissimilar conditions that was not open to serious criticism and that the Commission was not justified in rejecting or severely restricting in effect. There remained to support the Commission's finding the general testimony that interstate and intrastate traffic in Utah did in fact move under substantially similar conditions, and also the evidence in the earlier general revenue proceeding to adjust interstate rates that, as we recognized in *King* v. *United States*, 344 U. S. 254, 272, becomes the natural basis for the intrastate order in the absence of any showing that it is not applicable. This Court has never before overturned an order of the Commission under § 13 (4)

on the ground that the evidence was insufficient to sustain a finding of revenue discrimination, although that question has been squarely presented on a number of occasions. The evidence in the present case was as substantial as that in many of these other cases, and, under an interpretation of the Act that respects the practical difficulties facing the Commission, should be enough.

The Court objects that there was "no positive evidence" to support the Commission's finding, but it does not say what evidence on what factors affecting costs, beyond that in the record, was required. Should there have been evidence on length of haul, average loading, cars per train, grade conditions, volume of intrastate traffic handled by local trains, size of crews? This Court cannot say in each case what factors would be significant enough to necessitate evidence, and to require that the record contain evidence negativing all possible factors would be as paralyzing as to require findings to that effect. Once there is evidence of the general nature here introduced, it is for those who contend that intrastate conditions are dissimilar to come forward with convincing evidence showing what specific factors affecting costs are more favorable. Statements in earlier opinions of the Court indicate that such is in fact present law.[2] It is the only workable solution. As Mr. Justice Brandeis said in the *New England Divisions Case,* 261 U. S. 184, 197, "Obviously, Congress intended that a method should be

[2] *King* v. *United States,* 344 U. S. 254, 264–265: "In the instant case, however, there is no showing that the character of operating conditions in Florida intrastate passenger traffic differs substantially from that of interstate passenger operations in the southern territory generally." *United States* v. *Louisiana,* 290 U. S. 70, 79: "It sufficed that the Commission found that Louisiana showed nothing in the circumstances of its agriculture and industry or its traffic conditions so different from the rest of the country as to lead to the conclusion that the intrastate rates, raised to the reasonable general interstate level, would not themselves be reasonable . . . ."

458778 O—58——33

pursued by which the task, which it imposed upon the Commission, could be performed."

Intrastate passenger operations.—This consideration of the findings the Court has required in § 13 (4) cases, and the evidence necessary to support them, bears on the far-reaching consequences, not adverted to in the Court's opinion, of holding that our decision in *Chicago, Milwaukee, St. P. & P. R. Co.* v. *Illinois,* 355 U. S. 300, in some manner applies to the present case. It is not clear from the Court's opinion whether on the remand the Commission will be required to make findings on the profitableness of intrastate passenger operations, such as were required in the *Milwaukee* case for all intrastate operations, or only on the similarity of conditions surrounding intrastate and interstate passenger traffic.

It was settled in *King* v. *United States,* 344 U. S. 254, that interstate freight traffic could be made to support interstate passenger traffic, and intrastate freight traffic to support intrastate passenger traffic. Left open, because there was no indication in the record that the deficits arising from the two kinds of passenger traffic significantly differed, was the question whether intrastate freight traffic could be made to support an interstate passenger deficit. Such support would be the practical effect if interstate freight rates are set to compensate for an interstate passenger deficit, and intrastate freight rates are raised to the same level although intrastate passenger operations are profitable or result in a smaller loss than interstate passenger operations. The question was presented in *Mississippi Pub. Serv. Comm'n* v. *United States,* 124 F. Supp. 809, where the failure of the Commission to take into account a lower passenger deficit in Mississippi was one ground for the District Court's setting aside the order. Since there were other issues in the case, however, our *per curiam* affirmance did not necessarily indicate a view on the question. *Illinois Central R. Co.* v. *Mississippi*

Pub. Serv. Comm'n, 349 U. S. 908. The precise problem, furthermore, was not clearly settled by the general holding in the *Milwaukee* case that there should be findings "which reflect the commuter service deficit in the totality of intrastate revenues . . . ," 355 U. S. 300, 308, nor, strictly speaking, must the question be answered at this point in the present case though doubtless it will arise under the Court's disposition on the remand.

There is no apparent reason why a lower passenger deficit, like any other favorable circumstance surrounding intrastate transportation, would not justify a lower rate on intrastate freight traffic. If intrastate traffic taken as a whole contributes its fair share to needed revenues and does not, from a revenue standpoint, discriminate against interstate commerce, what justification can there be for a finding of discrimination that is possible only because a segment of intrastate traffic is considered in isolation? Raising rates in this situation may have the effect of compelling intrastate commerce to contribute more than its fair share.

It does not necessarily follow that the Commission should be required to make findings, supported by evidence in the record, that the intrastate passenger deficit is not lower than the interstate, or about the profitableness of, or circumstances surrounding, any segment of intrastate operations with which it is not immediately concerned. Indeed, the consequences that follow in the train of such a requirement demonstrate that it exalts formal consistency over sound policy. In the first place, if the Commission must determine the profitableness of intrastate passenger operations, it will of course be compelled to segregate revenues and costs attributable to intrastate and interstate traffic. Yet it is precisely this that in *Illinois Commerce Comm'n* v. *United States,* 292 U. S. 474, and the *King* case we said, urged on by the

difficulty of accurate allocation, was not required when interstate and intrastate traffic were mingled together.

Another consequence of the Court's decision appears to be that every case involving an intrastate rate claimed to result in a revenue discrimination must be broadened into a general inquiry into all intrastate rates and the profitableness of, or circumstances surrounding, all intrastate traffic. The result would be a radical, and in all likelihood unworkable, change in the way the Commission has administered the provisions of § 13 (4) for over 35 years. The Commission's Reports are full of cases in which intrastate rates on one commodity or group of commodities, or on traffic in only one part of a State. have been tested for discrimination without reference to the entire intrastate picture. The *Wisconsin* case itself raised passenger fares without consideration of other intrastate operations, and the *Chicago Switching* case, *Illinois Commerce Comm'n* v. *United States,* 292 U. S. 474, concerned only segments of Illinois and Indiana intrastate traffic. The possible disruptive effect of requiring the Commission to proceed by giant, state-wide strides, rather than by steps designed to relieve discrimination from a particular segment of intrastate commerce, is alone sufficient to cast doubt on the wisdom of the Court's decision and to require a close scrutiny of the *Milwaukee* case to determine if the rule there set forth is not in fact confined to the special situation that gave rise to it.[3]

---

[3] A recent report on the "Problems of the Railroads" of the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce, issued after extensive hearings on the depressed conditions in the industry, expresses deep concern over the implications of the *Milwaukee* decision, and specifically proposes legislation to forestall what appear to be the consequences of the present decision:

"From the testimony, it is clear that this opinion of the Supreme Court [in the *Milwaukee* case] not only places an intolerable burden

The *Milwaukee* case involved intrastate fares on commuter service that was for all practical purposes totally separate from the interstate operations of the carrier. There had been no previous proceedings to set the fares on comparable interstate traffic because in fact there was no significant comparable interstate traffic with which the intrastate traffic was mingled. Intrastate fares were not raised to a level of interstate fares that had previously been determined to be reasonable; instead, they were raised to a level that the Commission decided, after considering the intrastate traffic alone, would contribute a fair share to revenues. In such a context a determination of discrimination too easily becomes simply an inquiry into reasonableness, an inquiry the Commission is not empowered to make in respect to intrastate fares.

---

under present accounting practices, but in addition presents an almost impossible obstacle because of the problem of segregating intrastate and interstate expenses of rail operation. Further the subcommittee thinks that each service should stand on its own feet, supported by rates that are compensatory.

"Fear has been expressed that this case might be construed as requiring that the finding of 'undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce' stipulated by the act be made only in the light of the overall, statewide totality of a carrier's operating results deriving from the entire body of that carrier's rates applicable within the State, thus precluding such a finding on a showing of only the effect of the particular rate or rates in issue. To protect against such an interpretation of the Milwaukee case it is proposed to provide that the Commission, in determining whether any intrastate rate causes discrimination against, or burden on, interstate commerce, need not consider in totality the overall statewide results of the carrier's operations but need consider only the effect of the particular rate or rates in issue." Report of the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce, Committee Print, 85th Cong., 2d Sess. 15 (April 30, 1958).

The legislative proposals of the Subcommittee have been embodied in a bill introduced in the Senate on May 8, 1958. S. 3778, 85th Cong., 2d Sess.

By being compelled to make findings reflecting a broader view of the profitableness of intrastate operations, the Commission is made to give assurance that intrastate commerce has in fact been compared with interstate commerce and discrimination found. A broad comparison between interstate and intrastate operations is necessary because, in this special situation, a narrow comparison is not possible.[4]

It is a very different matter when there is comparable interstate traffic and intrastate rates are raised to the level of rates on that traffic already determined to be reasonable. This was the case in *New York* v. *United States*, 342 U. S. 882, affirming 98 F. Supp. 855, also involving intrastate suburban fares, and there was no suggestion that the Commission was bound to look to the totality of intrastate operations. The fact that a comparison of rates on similar traffic is possible gives a greater degree of assurance than was possible in the *Milwaukee* case that intrastate traffic is not being compelled to contribute more than its fair share to needed revenues, and that it is discrimination rather than simply unreasonableness that the Commission seeks to remedy. In this situation the Commission is justified in considering whether a particular segment of intrastate commerce is contributing its fair share to revenues.

Of course, those who contend that intrastate traffic as a whole is not discriminating against interstate traffic may come forward and show, as they may in respect to any claimed dissimilarity of conditions surrounding interstate and intrastate traffic, some favorable aspect of intrastate operations that the Commission should take into account. In the absence of such a showing, however, the

---

[4] Are we to assume that the *Milwaukee* case has, *sub silentio*, overruled *Illinois* v. *United States*, 342 U. S. 930, affirming 101 F. Supp. 36, where the intrastate suburban service was almost wholly distinct from the carrier's other operations?

Commission should be able to assume that discrimination shown to exist as to the particular segments of intrastate and interstate traffic with which the § 13 (4) proceeding is concerned is not offset by other conditions that this Court speculates may affect wholly different segments of intrastate commerce. The record in the present case is devoid of the remotest suggestion that the Utah intrastate passenger deficit is any less than the interstate passenger deficit, and the Commission should not be required to seek out such evidence itself and make findings beyond those it has already made.

This is a solution that accommodates imponderables and does not demand precision where the nature of the subject can yield only approximations. It is a solution responsive to the difficult regulatory problems posed by § 13 (4). Embedded in it are some of the advantages in simplicity of administration that would follow if this Court had expanded, as it might well have done, the doctrine of discrimination against persons or localities to permit state-wide orders protecting all interstate shippers against discrimination without reference to revenues. At the same time, there remains an opportunity for intrastate shippers or a state commission to show to the Interstate Commerce Commission's satisfaction the existence of specific factors favoring intrastate traffic in general that should not wisely be ignored. It is the solution that seems best designed to achieve the purposes of the Act without interposing insurmountable obstacles to the effective regulation of the national transportation system, the responsibility for which rests, after all, predominantly with the Interstate Commerce Commission.

HOAG *v.* NEW JERSEY.

CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

No. 40. Argued November 19, 1957.—Decided May 19, 1958.

In a New Jersey State Court, petitioner was tried and acquitted on three separate indictments (joined for trial) for statutory robbery of three persons on the same occasion. Subsequently, he was indicted, tried and convicted for robbing a fourth person during the same occurrence. *Held:* His conviction did not violate the Due Process Clause of the Fourteenth Amendment. Pp. 465–473.

(a) He was not put twice in jeopardy for the same crime. New Jersey construes the statute under which he was indicted as making each of the four robberies, though taking place on the same occasion, a separate offense; and nothing in the Due Process Clause prevented the State from making that construction. Pp. 466–467.

(b) In the circumstances of this case, he was not deprived of due process by consecutive trials, even though the multiple offenses arose out of the same occurrence. Pp. 467–470.

(c) Whether States must apply collateral estoppel in criminal trials need not be decided; because the state courts held that petitioner's acquittal did not give rise to such an estoppel, and this Court would not be justified in substituting its view as to the basis of the jury's verdict. Pp. 470–472.

(d) In the circumstances of this case, he was not denied a speedy trial. P. 472.

(e) The sufficiency of the evidence to support the identification of petitioner as one of the robbers is a matter solely within the province of the state courts. Pp. 472–473.

21 N. J. 496, 122 A. 2d 628, affirmed.

Robert E. Knowlton, acting under appointment by the Court, 352 U. S. 958, argued the cause and filed a brief for petitioner.

David D. Furman, Deputy Attorney General of New Jersey, argued the cause for respondent. With him on the brief was *Grover C. Richman, Jr.,* Attorney General.

MR. JUSTICE HARLAN delivered the opinion of the Court.

In this case we are asked to set aside, under the Due Process Clause of the Fourteenth Amendment, a state conviction secured under somewhat unusual circumstances.

On June 26, 1951, a Bergen County, New Jersey, grand jury returned three indictments against the petitioner charging that on September 20, 1950, in concert with two others, he robbed three individuals, Cascio, Capezzuto and Galiardo, at Gay's Tavern in Fairview, New Jersey. These indictments were joined for trial. The State called five witnesses: the three victims named in the indictment, and two other persons, Dottino and Yager. Dottino and Yager were also victims of the robbery, but they were not named in the indictment. All the witnesses, after stating that they were in Gay's Tavern on September 20, testified to the elements of a robbery as defined in the New Jersey statute: [1] that they were put in fear and that property was taken from their persons. The petitioner, who claimed that he was not at the tavern on the fateful day and testified to an alibi, was the sole witness for the defense. Although Galiardo and Dottino had both identified petitioner from a photograph during the police investigation, only one of the witnesses, Yager, identified him at the trial as one of the robbers. On May 27, 1952, the jury acquitted the petitioner on all three indictments.

---

[1] Section 2:166–1 of the Revised Statutes of New Jersey, under which petitioner was indicted, provided:

"Any person who shall forcibly take from the person of another, money or personal goods and chattels, of any value whatever, by violence or putting him in fear . . . shall be guilty . . . ."

This section was subsequently repealed and substantially re-enacted. N. J. Stat. Ann., 1953, § 2A:141–1.

Subsequently, on July 17, 1952, another Bergen County grand jury returned a fourth indictment against petitioner, which was the same as the first three in all respects except that it named Yager as the victim of the robbery at Gay's Tavern. At the trial upon this indictment the State called only Yager as a witness, and he repeated his earlier testimony identifying petitioner. The defense called Cascio, Capezzuto, Galiardo and Dottino, and they each once again testified either that petitioner was not one of the robbers or that a positive identification was not possible. Petitioner repeated his alibi. This time the jury returned a verdict of guilty. The conviction was sustained on appeal in both the Superior Court of New Jersey, 35 N. J. Super. 555, 114 A. 2d 573, and the Supreme Court of New Jersey, 21 N. J. 496, 122 A. 2d 628. We granted certiorari to consider petitioner's claim, timely raised below, that he was deprived of due process. 352 U. S. 907.

Petitioner contends that the second prosecution growing out of the Gay's Tavern robberies infringed safeguards of the Double Jeopardy Clause of the Fifth Amendment which are "implicit in the concept of ordered liberty" and that these safeguards as such are carried over under the Fourteenth Amendment as restrictions on the States. *Palko* v. *Connecticut,* 302 U. S. 319, 325. More particularly, it is said that petitioner's trial for the robbery of Yager, following his previous acquittal on charges of robbing Cascio, Capezzuto, and Galiardo, amounted to trying him again on the same charges. However, in the circumstances shown by this record, we cannot say that petitioner's later prosecution and conviction violated due process.

At the outset it should be made clear that petitioner has not been twice put in jeopardy for the same crime. The New Jersey courts, in rejecting his claim that conviction for robbing Yager violated the Double Jeopardy

Clause of the State Constitution,[2] have construed the New Jersey statute as making each of the four robberies, though taking place on the same occasion, a separate offense. This construction was consistent with the usual New Jersey rule that double jeopardy does not apply unless the same evidence necessary to sustain a second indictment would have been sufficient to secure a conviction on the first. See *State* v. *Di Giosia,* 3 N. J. 413, 419, 70 A. 2d 756, 759; *State* v. *Labato,* 7 N. J. 137, 144, 80 A. 2d 617, 620. Certainly nothing in the Due Process Clause prevented the State from making that construction.

But even if it was constitutionally permissible for New Jersey to *punish* petitioner for each of the four robberies as separate offenses, it does not necessarily follow that the State was free to *prosecute* him for each robbery at a different trial. The question is whether this case involved an attempt "to wear the accused out by a multitude of cases with accumulated trials." *Palko* v. *Connecticut, supra,* at 328.[3]

We do not think that the Fourteenth Amendment always forbids States to prosecute different offenses at consecutive trials even though they arise out of the same occurrence. The question in any given case is whether such a course has led to fundamental unfairness. Of course, it may very well be preferable practice for a State

---

[2] Article I, par. 11, of the New Jersey Constitution provides in part that "No person shall, after acquittal, be tried for the same offense."

[3] Indeed, the New Jersey Superior Court recognized this problem under the double jeopardy clause of the State Constitution when it said in the present case: "Assuredly our prosecutors are aware that the concept of double jeopardy is designed to prevent the government from unduly harassing an accused, and we are confident that they will not resort unfairly to multiple indictments and successive trials in order to accomplish indirectly that which the constitutional interdiction precludes." 35 N. J. Super., at 561–562, 114 A. 2d, at 577.

in circumstances such as these normally to try the several offenses in a single prosecution, and recent studies of the American Law Institute have led to such a proposal. See Model Penal Code § 1.08 (2) (Tent. Draft. No. 5, 1956).[4] But it would be an entirely different matter for us to hold that the Fourteenth Amendment always prevents a State from allowing different offenses arising out of the same act or transaction to be prosecuted separately, as New Jersey has done.[5] For it has long been recognized as the very essence of our federalism that the States should have the widest latitude in the administration of their own systems of criminal justice. See *Hurtado* v. *California,* 110 U. S. 516; *Maxwell* v. *Dow,* 176 U. S. 581; *West* v. *Louisiana,* 194 U. S. 258; *Twining* v. *New Jersey,* 211 U. S. 78. In the last analysis, a determination whether an impermissible use of multiple trials has taken place cannot be based on any over-all formula. Here, as elsewhere, "The pattern of due process is picked out in the facts and circumstances of each case." *Brock* v. *North Carolina,* 344 U. S. 424, 427–428. And thus, without speculating as to

---

[4] See also Horack, The Multiple Consequences of a Single Criminal Act, 21 Minn. L. Rev. 805; Kirchheimer, The Act, The Offense and Double Jeopardy, 58 Yale L. J. 513; Gershenson, Res Judicata in Successive Criminal Prosecutions, 24 Brooklyn L. Rev. 12.

[5] The New Jersey Rules in force during 1952 provided:

"Rule 2:4–15 Joinder of Offenses [now Revised Rule 3:4–7]:

"Two or more offenses may be charged in the same indictment or accusation in a separate count for each offense if the offenses charged, whether high misdemeanors or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

"Rule 2:5–4 Trial of Indictments or Accusations Together [now Revised Rule 3:5–6]:

"The court may order two or more indictments or accusations to be tried together if the offenses and the defendants, if there is more than one, could have been joined in a single indictment or accusation."

hypothetical situations in which the Fourteenth Amendment might prohibit consecutive prosecutions of multiple offenses, we reach the conclusion that the petitioner in this case was not deprived of due process.

In *Brock* v. *North Carolina, supra,* this Court upheld a state conviction against a somewhat similar claim of denial of due process. In *Brock* two of the State's key witnesses had previously been tried and convicted of crimes arising out of the same transaction which formed the basis of the charge against the petitioner. Before judgments were entered on their convictions they were called by the State to testify at petitioner's trial. Because of their intention to appeal their convictions and the likelihood of a new trial in the event of reversal, the two witnesses declined to testify at petitioner's trial on the ground that their answers might be self-incriminatory. At this point the State was granted a mistrial upon its representation that the evidence of the two witnesses was necessary to its case and that it intended to procure their testimony at a new trial of the petitioner. This Court held that a second trial of the petitioner did not violate due process.

Remembering that the Yager robbery constituted a separate offense from the robberies of the other victims, we find no basis for a constitutional distinction between the circumstances which led to the retrial in *Brock* and those surrounding the subsequent indictment and trial in the present case. It is a fair inference from the record before us that the indictment and trial on the charge of robbing Yager resulted from the unexpected failure of four of the State's witnesses at the earlier trial to identify petitioner, after two of these witnesses had previously identified him in the course of the police investigation. Indeed, after the second of the two witnesses failed to identify petitioner, the State pleaded surprise and attempted to impeach his testimony. We cannot say

that, after such an unexpected turn of events, the State's decision to try petitioner for the Yager robbery was so arbitrary or lacking in justification that it amounted to a denial of those concepts constituting "the very essence of a scheme of ordered justice, which is due process." *Brock* v. *North Carolina, supra,* at 428. Thus, whatever limits may confine the right of a State to institute separate trials for concededly different criminal offenses, it is plain to us that these limits have not been transgressed in this case.

Petitioner further contends that his conviction was constitutionally barred by "collateral estoppel." His position is that because the sole disputed issue in the earlier trial related to his identification as a participant in the Gay's Tavern robberies, the verdict of acquittal there must necessarily be taken as having resolved that issue in his favor. The doctrine of collateral estoppel, so the argument runs, is grounded in considerations of basic fairness to litigants, and thus for a State to decline to apply the rule in favor of a criminal defendant deprives him of due process. Accordingly, it is claimed that New Jersey could not relitigate the issue of petitioner's "identity," and is thus precluded from convicting him of robbing Yager.

A common statement of the rule of collateral estoppel is that "where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action." Restatement, Judgments, § 68 (1). As an aspect of the broader doctrine of *res judicata,* collateral estoppel is designed to eliminate the expense, vexation, waste, and possible inconsistent results of duplicatory litigation. See Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818, 820. Although the rule was originally developed in connection with civil litigation, it has been widely employed in criminal cases in both

state and federal courts. See, *e. g., Harris* v. *State,* 193 Ga. 109, 17 S. E. 2d 573; *Commonwealth* v. *Evans,* 101 Mass. 25; *United States* v. *Oppenheimer,* 242 U. S. 85; *Sealfon* v. *United States,* 332 U. S. 575; cf. *Yates* v. *United States,* 354 U. S. 298, 335.

Despite its wide employment, we entertain grave doubts whether collateral estoppel can be regarded as a constitutional requirement. Certainly this Court has never so held. However, we need not decide that question, for in this case New Jersey both recognized the rule of collateral estoppel and considered its applicability to the facts of this case. The state court simply ruled that petitioner's previous acquittal did not give rise to such an estoppel because "the trial of the first three indictments involved several questions, not just [petitioner's] identity, and there is no way of knowing upon which question the jury's verdict turned." 21 N. J., at 505, 122 A. 2d, at 632. Possessing no such corrective power over state courts as we do over the federal courts, see *Watts* v. *Indiana,* 338 U. S. 49, 50, note 1, we would not be justified in substituting a different view as to the basis of the jury's verdict.

It is of course true that when necessary to a proper determination of a claimed denial of constitutional rights this Court will examine the record in a state criminal trial and is not foreclosed by the conclusion of the state court. *Niemotko* v. *Maryland,* 340 U. S. 268, 271; *Feiner* v. *New York,* 340 U. S. 315, 316. But this practice has never been thought to permit us to overrule state courts on controverted or fairly debatable factual issues. "On review here of State convictions, all those matters which are usually termed issues of fact are for conclusive determination by the State courts and are not open for reconsideration by this Court. Observance of this restriction in our review of State courts calls for the utmost scruple." *Watts* v. *Indiana, supra,* at 50–51.

In this case we are being asked to go even further than to overrule a state court's findings on disputed factual issues. For we would have to embark on sheer speculation in order to decide that the jury's verdict at the earlier trial necessarily embraced a determination favorable to the petitioner on the issue of "identity." In numerous criminal cases both state and federal courts have declined to apply collateral estoppel because it was not possible to determine with certainty which issues were decided by the former general verdict of acquittal. See, *e. g., People* v. *Rogers,* 102 Misc. 437, 170 N. Y. Supp. 86; *State* v. *Erwin,* 101 Utah 365, 422–424, 120 P. 2d 285, 312–313; *United States* v. *Halbrook,* 36 F. Supp. 345. Keeping in mind the fact that jury verdicts are sometimes inconsistent or irrational, see, *e. g., Dunn* v. *United States,* 284 U. S. 390; *United States* v. *Dotterweich,* 320 U. S. 277, 279; *Green* v. *United States,* 355 U. S. 184, we cannot say that the New Jersey Supreme Court exceeded constitutionally permissible bounds in concluding that the jury might have acquitted petitioner at the earlier trial because it did not believe that the victims of the robbery had been put in fear, or that property had been taken from them, or for other reasons unrelated to the issue of "identity." For us to try to outguess the state court on this score would be wholly out of keeping with the proper discharge of our difficult and delicate responsibilities under the Fourteenth Amendment in determining whether a State has violated the Federal Constitution.

Finally, in the circumstances shown by this record, we cannot hold that petitioner was denied a "speedy trial" on the Yager indictment, whatever may be the reach of the Sixth Amendment under the provisions of the Fourteenth.[6] And we need hardly add that the sufficiency

[6] The robbery at Gay's Tavern occurred on September 20, 1950. On September 23 or 24, 1950, petitioner absconded from parole in New York. He was arrested on November 20, 1950, and returned to

of the evidence to support the identification of the petitioner as one of the Gay's Tavern robbers is a matter solely within the province of the state courts.

Affirmed.

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

MR. CHIEF JUSTICE WARREN, dissenting.

I think the undisputed facts disclosed by this record plainly show that the conviction of this petitioner has been obtained by use of a procedure inconsistent with the due process requirements of the Fourteenth Amendment. These are the facts: On Sept. 20, 1950, three armed men entered a tavern in Fairview, New Jersey, lined up five persons against a wall and robbed each of them. Petitioner alone was charged in three indictments with robbery of three of these five victims. The three indictments were joined for trial. At his trial, petitioner put only one fact in issue—whether or not he was one of the men who had committed the robbery. All five

---

prison in New York, where he remained until January 12, 1952, when he was transferred to the Bergen County jail in New Jersey. In the meantime, on June 26, 1951, the Bergen County grand jury returned indictments charging petitioner with the robberies of Cascio, Capezzuto and Galiardo. These were tried together, at petitioner's first trial, on May 26 and 27, 1952. Following his acquittal petitioner was returned to New York to complete his sentence, and he was in a New York prison on July 17, 1952, when the Bergen County grand jury returned the indictment charging him with the robbery of Yager. New Jersey reacquired petitioner by extradition on May 11, 1954. The second trial was held on October 18, 1954, at the next term of the Bergen County Court, which was not in session for criminal trials during the summer months. It thus appears that a substantial portion of the time elapsing prior to petitioner's trial on the Yager indictment can be accounted for by his incarceration in New York.

458778 O—58——34

victims testified for the State on this issue. Three said petitioner was not the man; one said he could not swear that petitioner was the man; one made a positive identification of petitioner. Petitioner's sole defense was an alibi. He sought to establish his presence elsewhere at the time of the robbery. The jury heard all the evidence, duly deliberated, and found petitioner not guilty. Thereafter, petitioner was indicted and tried for the robbery of victim number four. This time, only the victim who had identified petitioner as one of the robbers at the first trial was called by the State as a witness. The other four victims testified for the defense. All five testified substantially as at the first trial. Again, the only contested issue was whether petitioner was one of the three robbers. Again, petitioner testified that he was in New York City at the time of the robbery. This time the jury found petitioner guilty.

The issue is whether or not this determination of guilt, based as it is on the successive litigation of a single issue that had previously been resolved by a jury in petitioner's favor, is contrary to the requirements of fair procedure guaranteed by the Due Process Clause of the Fourteenth Amendment. The issue is not whether petitioner has technically committed five offenses, nor whether he could receive a total of five punishments had he been convicted in a single trial of robbing five victims.

Few would dispute that after the first jury had acquitted petitioner of robbing the first three victims, New Jersey could not have retried petitioner on the identical charge of robbing these same three persons. After a jury of 12 had heard the conflicting testimony of the five victims on the issue of the robber's identity and concluded that at least a reasonable doubt existed as to whether petitioner was one of the robbers, the same evidence could not be presented to 12 new jurors in the hope that they would come to a different conclusion. I fail to

see how the unconstitutionality of that procedure is altered one whit by the fact that the new indictment, brought in this case after petitioner's acquittal, relates to a different victim of the same robbery. The name of the particular victim specified in the indictment has absolutely no bearing on the issue of the robber's identity. The vice of this procedure lies in relitigating the same issue on the same evidence before two different juries with a man's innocence or guilt at stake. This taints the second trial, whether the new indictment charges robbery of the same or different victims.

The Court finds it unnecessary to come to grips with this problem, because it elects to defer to the appraisal of the record made by a 4–3 majority of the New Jersey Supreme Court. That court concluded that the first trial raised issues other than identity of the robber, thus making it impossible to say that the jury's verdict of acquittal resolved the issue of identity favorably to petitioner. This Court now concludes that the state court's appraisal of the record was a resolution of the sort of "factual issue" that is normally not open for reconsideration by this Court. But " 'issue of fact' is a coat of many colors." *Watts* v. *Indiana,* 338 U. S. 49, 51. In my view the issue posed here is not a "fact issue" at all. The facts are clear and undisputed. The problem is to judge their legal significance. And since the claim of a denial of due process depends on an evaluation of the significance of these undisputed facts, the task of making that evaluation is inescapably the function of this Court. *Niemotko* v. *Maryland,* 340 U. S. 268, 271; *Watts* v. *Indiana, supra; Fay* v. *New York,* 332 U. S. 261, 272.

Assessing the significance of a jury verdict in some criminal cases may involve, as the Court terms it, "sheer speculation." But the records of other trials are such as to indicate plainly, when "viewed with an eye to all the circumstances of the proceedings," *Sealfon* v. *United*

States, 332 U. S. 575, 579, that a jury verdict of acquittal is determinative of a particular issue that was contested at that trial. This Court unanimously found the record in *Sealfon* v. *United States, supra,* sufficient to justify such a conclusion. Cf. *Emich Motors Corp.* v. *General Motors Corp.,* 340 U. S. 558. Other courts have similarly evaluated trial records and come to the same conclusion in situations where, precisely as in the instant case, the sole contested issue was the identity of the criminal. *United States* v. *De Angelo,* 138 F. 2d 466; *Harris* v. *State,* 193 Ga. 109, 17 S. E. 2d 573; *People* v. *Grzesczak,* 77 Misc. 202, 137 N. Y. Supp. 538. Of course, such a review of the record cannot tell us in fact what was in the mind of each juror. This we would not know even if the issue of the robber's identity in this case had been submitted to the jury as a special interrogatory, for an answer in petitioner's favor might reflect a wide assortment of "facts" believed by each juror. But because a court cannot say with certainty what was in the mind of each juror is no reason for declining to examine a record to determine the manifest legal significance of a jury's verdict.

Evaluating the record in this case requires no speculation. The only *contested* issue was whether petitioner was one of the robbers. The proof of the elements of the crime of robbery was overwhelming and was not challenged. The suggestion that the jury might have acquitted because of a failure of proof that property was taken from the victims is simply unrealistic. The guarantee of a constitutional right should not be denied by such an artificial approach. The first jury's verdict of acquittal is merely an illusion of justice if its legal significance is not a determination that there was at least a reasonable doubt whether petitioner was present at the scene of the robbery.

The Court's effort to enlist *Brock* v. *North Carolina,* 344 U. S. 424, in aid of the conclusions reached is, in my view, entirely unwarranted. In that case a trial was halted before completion when two state witnesses unexpectedly invoked their privilege against self-incrimination and declined to testify. Upon a motion by the prosecutor, a mistrial was declared. On retrial, the defendant was convicted, and this Court affirmed. Whatever view one might take of the correctness of that decision, its holding should not be expanded to cover the situation here. The obvious difference between that case and this is that *Brock* does not involve determination of the same issue by two different juries. At the first *Brock* trial, the case never went to the jury. Here, however, the prosecution did not ask for a mistrial when its own witnesses failed to give expected testimony. Instead, the State proceeded to the conclusion of the trial, and the issue of guilt, which turned solely on the issue of identity, went to the jury. The verdict was in petitioner's favor. The trial was free of error. To convict petitioner by litigating this issue again before 12 different jurors is to employ a procedure that fails to meet the standard required by the Fourteenth Amendment.

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

We recently stated in *Green* v. *United States,* 355 U. S. 184, 190, that by virtue of the constitutional protection against double jeopardy an accused can be forced to "run the gantlet" but once on a charge. That case, involving a federal prosecution, provides for me the standard for every state prosecution as well, and by that standard this judgment of conviction should be reversed.[1]

---

[1] See *Brock* v. *North Carolina,* 344 U. S. 424, 440 (dissenting opinion).

Hoag is made to run the gantlet twice. The facts are simple. Five men—Cascio, Capezzuto, Galiardo, Dottino, and Yager—were together at Gay's Tavern when three armed men entered and robbed them. Petitioner was indicted and tried for the offenses of robbing three of the five.

One indispensable element of the crime was the taking of property "by violence or putting him in fear," as provided by the New Jersey statute defining robbery. N. J. Stat. Ann., 1939, 2:166–1.[2] The critical evidence was petitioner's alibi: He claimed to be at another place at the time. One witness, however, identified him as one of the robbers. The jury acquitted. Then petitioner was indicted for robbing one of the remaining five named individuals. The criminal transaction, unlike that in *Burton* v. *United States,* 202 U. S. 344, 378, was indivisible. The time and place were the same.[3] The central issue was the same, for, as stated by Justice Heher, dissenting, below, ". . . here the assaults were simultaneous, the putting in fear was but a single act or offense operating

[2] This section has been repealed and re-enacted in substantially the same form. N. J. Stat. Ann., 1953, 2A:141–1.

[3] *Gavieres* v. *United States,* 220 U. S. 338, arose in the Philippines under an Act of Congress which applied to the Islands the protection of double jeopardy. Petitioner was first convicted of being drunk and indecent in a public place, an offense under an ordinance of Manila. Then he was convicted a second time for insulting a public official, a crime under the penal code of the Islands. The acts and words charged in the second prosecution were the same as those charged in the first. The Court sustained the second conviction, Mr. Justice Harlan dissenting, on the grounds that while "the conduct of the accused was one and the same, two offenses resulted, each of which had an element not embraced in the other." *Id.,* at 345. This case appears contrary to the position I take here. But it, like other cases arising under the laws of the Philippine Islands prior to their independence, has not been deemed an authoritative construction of the constitutional provision. See *Green* v. *United States, supra,* at 194–198.

alike upon all the victims of the felonious endeavor at the same time." 21 N. J., at 510, 122 A. 2d, at 635. The basic facts canvassed were the same. Petitioner's alibi was tendered once more. The testimony of the selfsame witness identifying petitioner as one of the robbers was introduced. This time petitioner was convicted.

The resolution of this crucial alibi issue in favor of the prosecution was as essential to conviction in the second trial as its resolution in favor of the accused was essential to his acquittal in the first trial. Since petitioner was placed in jeopardy once and found not to have been present or a participant, he should be protected from further prosecution for a crime growing out of the identical facts and occurring at the same time.[4]

---

[4] In 1912, a New York court, under almost identical circumstances, stated:

"The only litigated question of fact on both these indictments is the presence of the accused when these crimes were committed. That question having once been decided, it cannot again be tried. Should the jury in this case find the defendant guilty under the defense herein interposed, that of an alibi, we would be confronted with two incompatible verdicts, which would amount to a finding on the one hand that the defendant was not present, and on the other hand that he was present." *People* v. *Grzesczak,* 77 Misc. 202, 206, 137 N. Y. Supp. 538, 541.

Or, as Chitty said:

"It is not, in all cases, necessary that the two charges should be precisely the same in point of degree, for it is sufficient if an acquittal of the one will show that the defendant could not have been guilty of the other." 1 Chitty, Criminal Law (5th Am. ed. 1847), 455.

To like effect is *State* v. *Shepard,* 7 Conn. 54, 55–56,

"He has been convicted of an *assault, with an attempt to commit a rape;* for this he has been punished. Of these facts he has been found guilty; and they must be alleged, and proved, to convict him of a rape. But for these facts he cannot be tried again; otherwise, he might be twice punished for the same fact."

And see *State* v. *Cooper,* 13 N. J. L. 361; *State* v. *Labato,* 7 N. J. 137, 80 A. 2d 617; *Commonwealth* v. *Roby,* 12 Pick. (Mass.) 496, 504–505.

Hoag was once made to "run the gantlet" on whether he was present when the violence and putting in fear occurred. Having once run that gantlet successfully, he may not be compelled to run it again.[5]

[5] The result I reach does not square with *Palko* v. *Connecticut*, 302 U. S. 319. Palko was indicted for the crime of murder in the first degree and was found guilty by a jury of murder in the second degree. He was sentenced to confinement for life. Pursuant to a state statute, the prosecution appealed and obtained a reversal and a new trial. This time Palko was convicted of murder in the first degree and sentenced to death. That is a decision under the Double Jeopardy Clause with which I do not agree since Palko was forced to face the risk of the death penalty twice on the same evidence and the same charge.

FEDERAL MARITIME BOARD *v.* ISBRANDTSEN COMPANY, INC., ET AL.

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

No. 73. Argued December 11, 1957.—Decided May 19, 1958.*

The Federal Maritime Board issued an order approving a rate system proposed by a shipping conference of 17 common carriers by water serving the inbound trade from Japan, Korea, and Okinawa to ports on the Atlantic and Gulf Coasts of the United States. Under the proposed system, a shipper who signed an exclusive-patronage contract with the conference would pay less than the regular freight rates charged to all others. The Court of Appeals set aside the Board's order, on the ground that this system of dual rates was unlawful under § 14 of the Shipping Act of 1916. *Held:* The judgment is affirmed. Pp. 482–500.

(a) In § 14 Congress flatly prohibits certain specific conference practices having the purpose and effect of stifling the competition of independent carriers. In addition to these specific abuses, § 14 also forbids "resort to other discriminating or unfair methods," and this, in the context of § 14, must be construed as constituting a catchall clause by which Congress meant to prohibit other practices not specifically enumerated but similar in purpose and effect to those which were enumerated. Pp. 491–493.

(b) Since the Board found that the proposed rate system was required to meet the competition of a certain independent carrier in order to obtain for Conference members a greater participation in the cargo moving in this trade, it follows that the system was a "resort to other discriminating or unfair methods" to stifle outside competition in violation of § 14. P. 493.

(c) Previous decisions in *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, and *Far East Conference* v. *United States*, 342 U. S. 570, cannot be read as having passed on the construction of § 14 Third. Pp. 496–499.

99 U. S. App. D. C. 312, 239 F. 2d 933, affirmed.

---

*Together with No. 74, *Japan-Atlantic and Gulf Freight Conference et al.* v. *United States et al.*, also on certiorari to the same Court.

Warner W. Gardner argued the causes for the Federal Maritime Board, petitioner in No. 73 and respondent in No. 74. With him on the brief were *E. Robert Seaver, Robert E. Mitchell, Edward Aptaker* and *Edward Schmeltzer.*

Elkan Turk argued the cause for petitioners in No. 74. With him on the brief were *James M. Landis, Wallace M. Cohen, Seymour J. Rubin, Carl A. Auerbach, Herman Goldman, Benjamin Wiener* and *Elkan Turk, Jr.*

Philip Elman argued the causes for the United States and the Secretary of Agriculture, respondents in both cases. On the brief were *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman, Robert L. Farrington, Neil Brooks* and *Donald A. Campbell.*

John J. O'Connor argued the causes for the Isbrandtsen Co., Inc., respondent in both cases. With him on the brief were *John J. O'Connor, Jr.* and *Robert J. Crotty.*

John R. Mahoney, Elmer C. Maddy, Alan B. Aldwell, Walter Carroll, Allen E. Charles and *David Orlin* filed a brief in both cases for the Steamship Conferences et al., as *amici curiae,* urging reversal.

Mr. Justice Brennan delivered the opinion of the Court.

The Isbrandtsen Co., Inc., filed a petition in the United States Court of Appeals for the District of Columbia Circuit to review, under 5 U. S. C. § 1034, an order of the Federal Maritime Board [1] approving a rate system proposed by the Japan-Atlantic and Gulf Freight Confer-

[1] 4 F. M. B. 706. The Federal Maritime Board and its predecessors are hereinafter referred to as "the Board." Its predecessors were the United States Shipping Board (1916 to 1933); the United States Shipping Board Bureau in the Department of Commerce (1933 to 1936); and the United States Maritime Commission (1936 to 1950).

ence (the Conference).[2] Under the proposed system a shipper would pay less than regular freight rates for the same service if he signs an exclusive-patronage contract with the Conference. Contract rates would be set at levels 9½ percent below noncontract rates. The Court of Appeals[3] set aside the Board's order on the ground that this system of dual rates was illegal *per se* under § 14 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U. S. C. § 812 Third.[4] We granted certiorari. 353 U. S. 908.

---

[2] The Federal Maritime Board was named a respondent in Isbrandtsen's petition. The United States was also named as statutory respondent pursuant to 5 U. S. C. § 1034 but, appearing by the Department of Justice, joined Isbrandtsen in attacking the Board order. The Secretary of Agriculture intervened and joined in the Justice Department's brief. The Conference intervened by leave of the court. The same parties are before this Court.

[3] 99 U. S. App. D. C. 312, 239 F. 2d 933.

[4] Section 14 provides:

"No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

"First. Pay or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow a deferred rebate to any shipper. The term 'deferred rebate' in this chapter means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

"Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term 'fighting ship' in this chapter means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

"Third. Retaliate against any shipper by refusing, or threatening

The Conference is a voluntary association of 17 common carriers by water serving the inbound trade from Japan, Korea, and Okinawa to ports on the United States Atlantic and Gulf Coasts. Five of the carriers are American lines, eight are Japanese, and four are of other nationalities. The Conference presently operates under a Board-approved Conference Agreement made in 1934. Prior to World War II, the Conference had no direct liner competition and little tramp competition.

After the war, Isbrandtsen entered the trade as the sole non-Conference line maintaining a regular berth service in the Japan-Atlantic trade. From 1947 to early 1949, Isbrandtsen operated from Japan to Atlantic Coast ports via the Suez Canal. Since 1949 Isbrandtsen has operated an approximately fortnightly service from Japan to United States Atlantic Coast ports via the Panama Canal as part of its Eastbound, Round-the-World Service.[5]

Although Conference membership is open to any common carrier regularly operating in the trade, Isbrandtsen has refused to join. Isbrandtsen's practice, between 1947

---

to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

"Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

"Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense."

[5] Isbrandtsen's vessels are not equipped with refrigerated space or silkrooms, as are many of the Conference vessels, and do not compete for cargoes requiring these facilities.

and March 12, 1953, was to maintain rates at approximately 10 percent below the corresponding Conference rates. The general understanding of shippers and carriers in the trade was that Isbrandtsen underquoted Conference rates by 10 percent. This practice of undercutting Conference rates during the years 1950, 1951, and 1952, captured for Isbrandtsen 30 percent of the total cargo in the trade although Isbrandtsen provided only 11 percent of the sailings.[6]

Since outbound tonnage from the United States exceeds the inbound tonnage, the Japan-Atlantic and Gulf trade is presently overtonnaged, and both Isbrandtsen and Conference vessels have had substantial unused cargo space after loading cargoes in Japan. Total sailings in the trade rose from 109 in 1949 to more than 300 in 1953. (Cf. note 6.) The re-entry of the Japanese lines in the trade after World War II, four in 1951 and four in 1952, greatly contributed to the excess of tonnage. For the years 1951, 1952, and the first 6 months of 1953, the Japanese lines carried approximately 15 percent, 49 percent, and 66 percent, respectively, of the trade's total liner cargo. For the years 1950, 1951, 1952, and the first 6 months of 1953, American flag lines, including

[6] The comparative sailings and carryings are indicated in the following table:

Calendar year	Number of sailings			Cargo carried (revenue tons)			Average carryings per sailing		Percentage of total liner cargo	
	Isbrandtsen	Conf.	Total	Isbrandtsen	Conf.	Total	Isbrandtsen	Conf.	Isbrandtsen	Conf.
1949	6	103	109	18,099	135,635	153,734	3,016	1,317	12	88
1950	21	137	158	120,381	229,829	350,210	5,780	1,678	34	66
1951	21	174	195	93,450	219,343	312,793	4,450	1,261	30	70
1952	24	221	245	98,834	281,308	380,142	4,118	1,273	26	74
1953 — 6 months	12	153	165	37,308	189,503	226,811	3,109	1,239	16	84

Isbrandtsen but excluding two others, carried 53 percent, 46 percent, 34 percent, and 21 percent respectively.

When, in late 1952, Isbrandtsen announced a plan to increase sailings from two to three or four sailings a month, the Conference foresaw a further increase in Isbrandtsen's participation which, because of the nationalistic preference of Japanese shippers, would probably be at the expense of the non-Japanese Conference lines. To meet this outside competition the Conference first attempted, in November of 1952, a 10-percent reduction in rates, but Isbrandtsen answered with a reduction of its rates 10 percent under the Conference rates.

On December 24, 1952, the Conference proposed the dual-rate system and filed its plan with the Board as required by the Board's General Order 76, 46 CFR § 236.3, which permitted proposed rate changes to become effective after 30 days unless postponed by the Board on its own motion or on the protest of interested persons. Protests were filed by Isbrandtsen and the Department of Justice. The Secretary of Agriculture intervened as an interested commercial shipper opposed to the proposal. On January 21, 1953, the Board ordered a hearing on the protests but refused, pending the Board's determination, to suspend operations of the dual-rate system. Isbrandtsen, therefore, filed a petition in the United States Court of Appeals for the District of Columbia Circuit for a stay of the Board's order insofar as it authorized the Conference to institute the dual-rate system. The court announced on February 3, 1953, that the Board's order would be stayed and the stay was entered on March 23, 1953.[7]

---

[7] On January 21, 1954, the Court of Appeals handed down its final decision holding that § 15 of the Shipping Act required the Board to hold a hearing on the proposed dual-rate system before approval. 93 U. S. App. D. C. 293, 211 F. 2d 51.

The Conference response to the stay was to open rates to allow each line to fix its own rates. At a meeting on March 12, 1953, the Conference voted to open Conference rates on 10 of the major commodities moving in the trade. The action was primarily directed at Isbrandtsen's competition; the Board found that "it was hoped that the rate war would lead to Isbrandtsen's joining the Conference or to the institution of the dual rate system or other system." On succeeding dates in the spring of that year, the Conference opened rates on most of the major items in the trade. In the resulting rate war, the level of rates dropped to about 80 percent and later to about 30 percent to 40 percent of the pre-March 12 rates. In some instances, rates fell below handling costs. Isbrandtsen attempted to keep on a competitive basis in the rate war but, when pegging of minimum rates in May did not improve its position, in July it set its rates at 50 percent of the pre-March 12 Conference rates. Since that date, Isbrandtsen has carried little cargo in the trade. Meanwhile the Board proceeded with the hearing and issued its report on December 14, 1955, followed on December 21, 1955, and January 11, 1956, by orders approving the proposed dual-rate system.[8] The question for our decision is whether the Court of Appeals correctly set aside the Board's orders.

It has long been almost universal practice for American and foreign steamship lines engaging in ocean commerce to operate under conference arrangements and agreements. At least by 1913 it was recognized that such agreements might run counter to the policy of the antitrust laws; several cases were pending against foreign and domestic water carriers for alleged violations of the

[8] The Board did modify the exclusive-patronage contracts to delete from their coverage refrigerated cargoes for which Isbrandtsen did not compete.

Sherman Act. The House Committee on Merchant Marine and Fisheries of the 62d Congress, of which committee Representative J. W. Alexander was Chairman, undertook an exhaustive inquiry into the practices of shipping conferences. The work of this Committee is set forth in two volumes of hearings,[9] a volume of diplomatic and consular reports, and a fourth volume containing the Committee's report, known as the Alexander Report.[10] Contemporaneously a British inquiry was conducted by the Royal Commission on Shipping Rings. The Royal Commission's report was available to the House Committee and was considered by it in formulating recommended legislation. See Hearings, at 369.

Both inquiries brought to light a number of predatory practices by shipping conferences designed to give the conferences monopolies upon particular trades by forestalling outside competition and driving out all outsiders attempting to compete. The crudest form of predatory practice was the fighting ship. The conference would select a suitable steamer from among its lines to sail on the same days and between the same ports as the nonmember vessel, reducing the regular rates low enough to capture the trade from the outsider. The expenses and losses from the lower rates were shared by the members of the conference. The competitor by this means was caused to exhaust its resources and withdraw from competition.

More sophisticated practices depended upon a tie between the conference and the shipper. The most widely used tie, because the most effective, was the system of deferred rebates. Under this system a shipper

---

[9] Proceedings of the House Committee on the Merchant Marine and Fisheries in the Investigation of Shipping Combinations under House Resolution 587, Hearings, 62d Cong. (Hereinafter "Hearings.")

[10] H. R. Doc. No. 805, 63d Cong., 2d Sess. (Hereinafter "Report.")

signed a contract with the conference exclusively to patronize its steamers, and if he did so during the contract term, and for a designated period thereafter, a rebate of a certain percentage of his freight payments was made to him at the end of the latter period. In this way, the shipper was under constant obligation to give his patronage exclusively to the conference lines or suffer the loss of the rebate, which often amounted to a considerable sum.

But the Alexander Committee also found evidence of other predatory practices. Shippers who patronized outside competitors were denied accommodations for future shipments even at full rates of freight, or were discriminated against in the matter of lighterage and other services. Outside competition was also met by dual-rate contracts, by contracts with large shippers at lower rates for volume shipments, and by contracts with American railroads giving conference vessels preference in the handling of cargoes at the docks, and delivering through shipments of freight to conference vessels. Report, at 287–293.

The Alexander Committee recommended against a flat prohibition of shipping combinations because it found that the restoration of unrestricted competition among carriers would operate against the public interest by depriving American shippers of desirable advantages of conference arrangements honestly and fairly conducted. The Committee mentioned advantages such as "greater regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination." *Id.*, at 416. The Committee believed that these advantages could be preserved "only by permitting the

458778 O—58—35

several lines in any given trade to cooperate through some form of rate and pooling arrangement under Government supervision and control," *ibid.*, and further "that the disadvantages and abuses connected with steamship agreements and conferences as now conducted are inherent, and can only be eliminated by effective government control; and it is such control that the Committee recommends as the means of preserving to American exporters and importers the advantages enumerated, and of preventing the abuses complained of." *Id.*, at 418.

In passing the Shipping Act of 1916, 39 Stat. 728, 733, as amended, 46 U. S. C. § 812 Third, Congress followed the basic recommendations of the Alexander Committee.[11] The Act does not forbid shipping conferences in foreign commerce but requires all conference agreements covering the subjects mentioned in § 15 to be submitted for Board approval.[12] No power to fix rates is granted to

---

[11] H. R. Rep. No. 659, 64th Cong., 1st Sess. 27; see S. Rep. No. 689, 64th Cong., 1st Sess. 7. The Alexander Report was submitted in 1914 to the 63d Congress and a bill to carry out its recommendations was introduced but not passed. H. R. 17328, 63d Cong., 2d Sess. In the following Congress substantially the same bill was reintroduced, H. R. 15455, 64th Cong., 1st Sess., and became the Shipping Act of 1916.

[12] Section 15 provides:

"Every common carrier by water, or other person subject to this chapter, shall file immediately with the Federal Maritime Board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an

the Board. Subject to familiar limitations, the power vested in the Board is to approve agreements not found to be unjustly or unfairly discriminatory in violation of §§ 16 and 17 or otherwise in violation of the Act. Approved agreements are exempted from the antitrust laws.

But it must be emphasized that the freedom allowed conference members to agree upon terms of competition subject to Board approval is limited to the freedom to agree upon terms regulating competition among themselves. The Congress in § 14 has flatly prohibited practices of conferences which have the purpose and effect of stifling the competition of independent carriers. Thus the deferred-rebate system (§ 14 First) and the fighting ship (§ 14 Second) are specifically outlawed. Similarly, § 14 Third prohibits another practice, common in 1913: to "[r]etaliate against any shipper by refusing . . . space accommodations when such are available . . ."; that prohibition, moreover, is enlarged to condemn retaliation not only when taken "because such shipper has patronized any other carrier" but also when taken because the shipper "has filed a complaint charging unfair treatment, *or for any other reason.*" (Emphasis added.)

---

exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

"The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

. . . . . .

"Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of [the Antitrust Acts] . . . ." 39 Stat. 733, as amended, 46 U. S. C. § 814.

But in addition to these specifically proscribed abuses, Congress, as previously noted, was aware that other devices—some known but not so widely used, and others that might be contrived—might be employed to achieve the same results. Therefore, coordinate with these three clauses aimed at specific practices, a fourth category, couched in general language, was added: "resort to other discriminating or unfair methods . . . ." In the context of § 14 this clause must be construed as constituting a catchall clause by which Congress meant to prohibit other devices not specifically enumerated but similar in purpose and effect to those barred by § 14 First, Second, and the "retaliate" clause of § 14 Third.

The reason the "resort to" clause was added to the statute as an independent prohibition of practices designed to stifle outside competition is revealed in the Alexander Report. From information contained in the Report of the British Royal Commission and a communication from a major New York carrier organization, the Alexander Committee was aware that the outlawing of the deferred-rebate system would lead conferences to adopt a contract system to accomplish the same result. The British Royal Commission believed that ties to shippers were justified and that the abuses of the deferred-rebate system should be tolerated in the interest of achieving a strong conference system. Hearings, 369–381. However, the Alexander Committee, and the Congress in adopting the Committee's proposals, reached a different conclusion. Congress was unwilling to tolerate methods involving ties between conferences and shippers designed to stifle independent carrier competition. Thus Congress struck the balance by allowing conference arrangements passing muster under §§ 15, 16, and 17 limiting competition among the conference members while flatly outlawing conference practices designed to

destroy the competition of independent carriers.[13] Ties to shippers not designed to have the effect of stifling outside competition are not made unlawful. Whether a particular tie is designed to have the effect of stifling outside competition is a question for the Board in the first instance to determine.

Since the Board found that the dual-rate contract of the Conference was "a necessary competitive measure to offset the effect of non-conference competition" required "to meet the competition of Isbrandtsen in order to obtain for its members a greater participation in the cargo moving in this trade," [14] it follows that the contract was a "resort to other discriminating or unfair methods" to stifle outside competition in violation of § 14 Third.

The Board argues, however, that Congress, although aware of the use of such contracts, did not specifically outlaw them and therefore implicitly approved them. But the contracts called to the attention of Congress bear little resemblance to the contracts here in question. Those joint contracts were described by the Alexander Committee as follows:

> "Such contracts are made for the account of all the lines in the agreement, each carrying its proportion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers at

---

[13] Both the section which became § 14 Third and the section which became § 15, as originally proposed, used the language "discriminating or unfair." H. R. 17328, 63d Cong., 2d Sess. The bill which became the Shipping Act, H. R. 15455, 64th Cong., 1st Sess., substituted "unjustly discriminatory or unfair" in § 15 but left untouched "discriminating or unfair" in § 14 Third.

[14] The Board estimated that Isbrandtsen would lose approximately two-thirds of its 1952 volume. ". . . [I]t [is] probable that Isbrandtsen will retain 10 percent or more of the cargo moving in the trade as against the 26 percent carried by it in 1952 . . . ." 4 F. M. B. 706, 737, 1956 Am. Mar. Cas. 414, 451.

> regular intervals and the shipper agrees to confine all shipments to conference steamers, and to announce the quantity of cargo to be shipped in ample time to allow for the proper supply of tonnage. The rates on such contracts are less than those specified in the regular tariff, but the lines generally pursue a policy of giving the small shipper the same contract rates as the large shippers, i. e. are willing at all times to contract with all shippers on the same terms." Report, at 290.

These contracts were very similar to ordinary requirements contracts. They obligated all members of the Conference to furnish steamers at regular intervals and at rates effective for a reasonably long period, sometimes a year. The shipper was thus assured of the stability of service and rates which were of paramount importance to him. Moreover, a breach of the contract subjected the shipper to ordinary damages.

By contrast, the dual-rate contracts here require the carriers to carry the shipper's cargo only "so far as their regular services are available"; rates are "subject to reasonable increase" within two calendar months plus the unexpired portion of the month after notice of increase is given; "[e]ach Member of the Conference is responsible for its own part only in this Agreement"; the agreement is terminable by either party on three months' notice; and for a breach, "the Shipper shall pay as liquidated damages to the Carriers fifty percentum (50%) of the amount of freight which the Shipper would have paid had such shipment been made in a vessel of the Carriers at the Contract rate currently in effect." Until payment of the liquidated damages the shipper is denied the reduced rate, and if he violates the agreement more than once in 12 months, he suffers cancellation of the agreement and the denial of another until all liquidated damages have

been paid in full. Thus under this agreement not only is there no guarantee of services and rates for a reasonably long period, but the liquidated-damages provision bears a strong resemblance to the feature which Congress particularly objected to in the outlawed deferred-rebate system. Certainly the coercive force of having to pay so large a sum of liquidated damages ties the shipper to the Conference almost as firmly as the prospect of losing the rebate. It would be anomalous for Congress to strike down deferred rebates and at the same time fail to strike down dual-rate contracts having the same objectionable purpose and effect. Events have proved the accuracy of the prediction that the outlawing of the deferred-rebate system would lead conferences to adopt a contract system, as here, specially designed to accomplish the same result.

It is urged that our construction "produces a flat and unqualified prohibition of *any* discrimination by a carrier for *any* reason" and converts the rest of the statute into surplusage. But that argument overlooks the revealed congressional purpose in § 14 Third. That purpose, as we have said, was to outlaw practices in addition to those specifically prohibited elsewhere in the section when such practices are used to stifle the competition of independent carriers. The characterizations "unjustly discriminatory" and "unjustly prejudicial" found in other sections (§§ 15, 16 and 17) imply a congressional intent to allow some latitude in practices dealt with by those sections, but the practices outlawed by the "resort to" clause of § 14 Third take their gloss from the abuses specifically proscribed by the section; that is, they are confined to practices designed to stifle outside competition.[15]

[15] The Court of Appeals made a partial application of the rule of *ejusdem generis* and related the "resort to" clause to retaliation, holding the dual-rate contract or suit was retaliatory and within the ban of the section. The Board urges that the Court of Appeals

Petitioners argue that our construction of § 14 Third is foreclosed by this Court's decisions in *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, and *Far East Conference* v. *United States*, 342 U. S. 570. A reading of those opinions immediately refutes any suggestion either that this issue was expressly decided in those cases or that our holding here is not fully consistent with the disposition of those cases. In *Cunard* the petitioner had filed a complaint in the District Court alleging that respondents had conspired to maintain "a general tariff rate and a lower contract rate, the latter to be made available only to shippers who agree to confine their shipments to the lines of respondents." 284 U. S., at 479. The differentials were alleged to be unrelated to volume or regularity of shipments, but to be wholly arbitrary and unreasonable and designed "for the purpose of coercing shippers to deal exclusively with respondents and refrain from shipping by the vessels of petitioner, and thus exclude it entirely from the carrying trade between the United States and Great Britain." *Id.*, at 480. An injunction was sought under the Sherman and Clayton Acts. The Court held that the questions raised by this complaint were within the primary jurisdiction of the Shipping Board and therefore the courts could not entertain the suit until the Board had considered the matter. In *Far East Conference* the Court similarly held that the Board's primary jurisdiction precluded the United States

---

did not carry the rule of *ejusdem generis* far enough, that by carrying the rule "a hand's breadth farther" and also relating—and limiting—the "resort to" clause to the refusal of space accommodations and *similar services* to shippers, the dual-rate contract falls without the prohibition because the contract is concerned only with *charges for services* and not with *denial of services*. We do not believe that these constructions can be reconciled with the language of the statute or the scope of the congressional plan.

from bringing antitrust proceedings against a shipping conference maintaining dual rates.

The Board and the Conference argue that, if the Court in these earlier cases had thought that § 14 Third in any way makes dual rates *per se* illegal and thus not within the power of the Board to authorize, it would not have found it necessary to require that the Board first pass upon the claims. But in the *Cunard* case the Court said:

> "Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal." 284 U. S., at 485.

Similarly, in the *Far East Conference* case:

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

> ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." 342 U. S., at 574–575. (Emphasis added.)

It is, therefore, very clear that these cases, while holding that the Board had primary jurisdiction to hear the case in the first instance, did not signify that the statute left the Board free to approve or disapprove the agreements under attack. Rather, those cases recognized that in certain kinds of litigation practical considerations dictate a division of functions between court and agency under which the latter makes a preliminary, comprehensive investigation of all the facts, analyzes them, and applies to them the statutory scheme as it is construed. Compare *Denver Union Stock Yard Co.* v. *Producers Livestock Marketing Assn., ante,* p. 282. It is recognized that the courts, while retaining the final authority to expound the statute, should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern. Cases are not decided, nor the law appropriately understood, apart from an informed and particularized insight into the factual circumstances of the controversy under litigation.

Thus the Court's action in *Cunard* and *Far East Conference* is to be taken as a deferral of what might come to be the ultimate question—the construction of § 14 Third—rather than an implicit holding that the Board could properly approve the practices there involved. The holding that the Board had primary jurisdiction, in short, was a device to prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court of the scope and

meaning of the statute as applied to those particular circumstances. To have held otherwise would, necessarily, involve the Court in comparatively abstract exposition.

This consideration, moreover, is particularly compelling in light of our present holding. Since, as we hold, § 14 Third strikes down dual-rate systems only where they are employed as predatory devices, then precise findings by the Board as to a particular system's intent and effect would become essential to a judicial determination of the system's validity under the statute. In neither *Cunard* nor *Far East Conference* did the Court have the assistance of such findings on which to base a determination of validity. We conclude, therefore, that the present holding is not foreclosed by these two cases.[16]

Finally, petitioners argue that this Court should not construe the Shipping Act in such a way as to overturn the Board's consistent interpretation. "[T]he rulings, interpretations and opinions of the [particular agency] . . . , while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power

---

[16] Certainly it must be assumed that the Court would refrain from settling *sub silentio* an issue of such obvious importance and difficulty plainly requiring a clearly expressed disposition.

Petitioners' reliance on *Swayne & Hoyt, Ltd.*, v. *United States*, 300 U. S. 297, is similarly misplaced. In that case the Court upheld the administrative determination that a dual-rate system gave an "undue or unreasonable preference or advantage" under § 16 of the Shipping Act. Because the Court sustained the finding as supported by substantial evidence it did not need to reach the more contentious problem of whether that particular contract was illegal under § 14 Third.

to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140. But we are here confronted with a statute whose administration has been shifted several times from one agency to another, and it is by no means clear that the Board and its predecessors have taken uniform and consistent positions in regard to the validity of dual-rate systems under § 14 Third.[17] See *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883, 889–891. In view of the fact that in the present case the dual-rate system was instituted for the purpose of curtailing Isbrandtsen's competition, thus becoming a device made illegal by Congress in § 14 Third, we need not give controlling weight to the various treatments of dual rates by the Board under different circumstances.

Affirmed.

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

The Court today holds that any dual system of international steamship rates tied to exclusive patronage contracts that is designed to meet outside competition—howsoever justified it may be as a reasonable means of counteracting cutthroat competition—violates § 14 of the Shipping Act of 1916 [1] and cannot be approved by the Federal Maritime Board pursuant to § 15 of that Act. The Court thus outlaws a practice that has prevailed among international steamship conferences for half a century,[2] that is presently employed by at least half of

[17] Compare, *e. g.*, *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41, and *Contract Routing Restrictions*, 2 U. S. M. C. 220, 226–227, with *W. T. Rawleigh Co.* v. *Stoomvart*, 1 U. S. S. B. 285, 290.

[1] 39 Stat. 728, 733, as amended, 46 U. S. C. § 812.

[2] See, *e. g.*, agreements set forth at pp. 262–263 of Hearings before the House Committee on the Merchant Marine and Fisheries in the Investigation of Shipping Combinations, 62d Cong.

the hundred-odd conferences subject to Board jurisdiction,[3] and that has been found by the Board in this case to decrease the probability of ruinous rate wars in the shipping industry.[4] In doing so, the Court does more than set aside a weighty decision of the Federal Maritime Board. It could do so only by rendering meaningless two prior decisions in which this Court respected the power given by Congress to the Board, within the usual limits of administrative discretion, to approve or disapprove such agreements.

The agreement involved in this case is typical of the contracts used by the loose associations of steamship lines known as "conferences" to effectuate their dual-rate systems. See Marx, International Shipping Cartels, 207–210. The contracting shipper agrees to forward all of his shipments moving in the "trade" or route of the conference by bottoms of conference members (§ 1). In return, the conference members, "so far as their regular services are available," agree to carry the shipper's goods at rates below those charged to noncontracting shippers; rates are subject to reasonable increase upon specified notice (§ 2). The conference members agree to maintain service adequate to the reasonable requirements of the trade, and if they fail to provide the shipper (who may ordinarily select which of the conference members' vessels will carry his goods) with needed space, he may obtain space from nonconference carriers (§ 4). If the shipper makes any shipments in violation of the agree-

---

[3] Respondent Isbrandtsen, in its petition to the Court of Appeals to review the order of the Federal Maritime Board, stated (at par. 10b) that "[o]f the about one hundred seventeen steamship freight conferences organized pursuant to Section 15 of the Shipping Act, and subject to the jurisdiction of the Board, about sixty-two conferences presently employ that system . . . ." See also Marx, International Shipping Cartels, 207.

[4] 4 F. M. B. 706, 737, 739–740, 1956 Am. Mar. Cas. 414, 451, 454.

ment, he must pay as liquidated damages 50 percent of the amount of freight he would have paid if he had made the shipment under the contract, and he is not entitled to contract rates until he pays these damages (§ 5). If the shipper violates the agreement more than once in a twelve-month period, the agreement is canceled, and no new agreement will be entered into until all damages are paid (*ibid.*). Either party may cancel the agreement on three months' notice (§ 9), and any dispute arising out of the agreement is to be submitted to arbitration (§ 10).

Such differences as exist among the dual-rate systems that have for long been in wide use in international ocean transportation are irrelevant if each such system is to be judged by the new test laid down by the Court: is it aimed at meeting outside competition? Of course these exclusive patronage contracts and the dual-rate systems of which they are an integral part are designed to meet nonconference competition. And there should be no doubt that today's decision outlaws such systems. This result cannot be clouded by the Court's reliance upon "findings" of the Board that it

> "consider[s] the inauguration of a dual-rate system to be a necessary competitive measure to offset the effect of non-conference competition in this trade." 4 F. M. B. 706, 736, 1956 Am. Mar. Cas. 414, 450.

and that

> "a reduction in the amount of conference sailings or other solution to the overtonnaging problem would not mitigate the conference's need to meet the competition of Isbrandtsen in order to obtain for its members a greater participation in the cargo moving in the trade." 4 F. M. B., at 737, 1956 Am. Mar. Cas., at 451.

These statements in the Board's opinion are nothing more than a recognition of the dual-rate system as a device for

meeting outside competition; they provide a basis neither for distinguishing the situation before us from any other familiar use of a dual-rate system nor for concluding that the conference members in this case instituted the system in order to "stifle" outside competition.

While limits have been imposed upon enterprise in meeting competition, which is itself the governing principle of our economic system, these limits, embodied in the antitrust laws, were found to be inapplicable to, because destructive of our national interest in, the international ocean transportation industry. The United States obviously could not completely regulate the foreign carriers with whom American carriers compete (not to mention the carriers that serve foreign shippers with whom American shippers compete). In view of the prevailing characteristics of the industry, it early became apparent that it would, on the whole, be in the national interest to tolerate some practices of steamship lines that in other industries would be deemed inadmissible. For the alternative, so it was concluded, would be to put it within the power of unregulated foreign carriers seriously to injure American firms—both carriers and shippers—if not, indeed, to put them out of business. And so, in the development of a scheme for regulating this international industry, self-protective measures by way of collective action were not left to the condemnation of the Sherman and Clayton Acts. In order to appreciate the Shipping Act of 1916 as an attempt to balance the need for some regulation with the economic and political objections to sweeping the shipping industry under the antitrust concept, the circumstances that begot the Act must be recalled.

The second half of the Nineteenth Century saw a tremendous rise in the development of ocean transportation by steamship. Unfortunately, the supply of available cargo space increased during this period much more

rapidly than the demand for it. The inevitable result was cutthroat competition among steamship owners. This in turn was followed by mergers of ownership and by concerted efforts among individual owners to limit competition. The practices by which this end was pursued led to abuses and demands for their correction, to which a number of governments at the turn of the century began to direct their attention. A series of investigations of rates and practices in various parts of the British Empire was followed by the appointment in 1906 of the Royal Commission on Shipping Rings, which rendered its report in 1909. See, generally, Marx, *supra,* at 45–50; see also Johnson and Huebner, Principles of Ocean Transportation, 263–302. In the United States, the Department of Justice in 1911 brought two proceedings against three steamship conferences to enjoin competitive practices in alleged violation of the Sherman Act, *United States* v. *Prince Line, Ltd.,* 220 F. 230; *United States* v. *Hamburg-American S. S. Line,* 216 F. 971.[5]

The terms of the resolutions that gave rise to the historic investigation of shipping combinations by the House Committee on the Merchant Marine and Fisheries in 1912–1913, H. Res. 425 and H. Res. 587, 62d Cong., 2d Sess., 48 Cong. Rec. 2835–2836, 9159–9160, manifest the concern of Congress over these steamship conferences and their practices. The investigation was thorough and detailed. The Committee, under the chairmanship of Representative Joshua W. Alexander of Missouri, elicited great quantities of relevant data from shippers, carriers, trade organizations and the Departments of State and Justice, including copies of many kinds

[5] On appeal, the very limited decrees obtained by the Government against some members of two of the conferences were reversed, 239 U. S. 466, 242 U. S. 537, and the suits directed to be dismissed on the score of mootness because of World War I.

of agreements among carriers and between carriers and shippers, and it held extensive hearings in January–March, 1913. Fully considered were exclusive patronage agreements between shippers and conferences providing for a dual rate, see, *e. g.*, Hearings before the House Committee on the Merchant Marine and Fisheries in the Investigation of Shipping Combinations, 62d Cong., 248, 254, 262–263; see also *id.*, at 246, 263.

In 1914 the Committee submitted its comprehensive report. In summarizing the competitive methods used by steamship conferences in the American foreign trade, the report discussed, under the heading *"Meeting the competition of lines outside of the conference,"* deferred rebate systems, the use of fighting ships, agreements with American railroads, and such types of contracts with shippers as individual requirements contracts, contracts giving preferential rates to large shippers, and the following:

> "(*a*) *Joint contracts made by the conference as a whole.*—Such contracts are made for the account of all the lines in the agreement, each carrying its proportion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers at regular intervals and the shipper agrees to confine all shipments to conference steamers, and to announce the quantity of cargo to be shipped in ample time to allow for the proper supply of tonnage. The rates on such contracts are less than those specified in the regular tariff, but the lines generally pursue a policy of giving the small shipper the same contract rates as the large shippers, i. e. are willing at all times to contract with all shippers on the same terms." Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade, H. R. Doc. No. 805, 63d Cong., 2d Sess. 290.

458778 O—58——36

There can be no doubt that the Committee was amply alive to the primary purpose of the dual-rate system. But it did not, in subsequently discussing (*id.*, at 304–307) the "Disadvantages of Shipping Conferences and Agreements, as Now Conducted," make any reference to the system as such, although it dealt extensively and disapprovingly, on the basis of evidence put before it, with such practices as deferred rebates, fighting ships, and retaliation against shippers for airing grievances. Nor were there any strictures against dual-rate systems in the survey of recommendations of witnesses at the hearings for corrective legislation (*id.*, at 307–314), although it was there noted that recommendations were made in favor of prohibitions against deferred rebates and retaliation by refusal of accommodations to a shipper because "he may have shipped by an independent line, or may have filed a complaint charging unfair treatment, or for other unjust reasons." *Id.*, at 313.

In making its own recommendations (*id.*, at 415–421), the Committee recognized that steamship lines almost universally form conferences and enter into agreements for the purpose (among others) of "meeting the competition of non-conference lines." *Id.*, at 415. The Committee recognized that it had to choose between prohibition of these conferences or subjection of them to government supervision.

> "It is the view of the Committee that open competition can not be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines." *Id.*, at 416.

To prohibit existing arrangements, said the Committee, would be to invite rate wars leading to monopoly or to the exposure of American shippers and lines to disastrous competition with foreign shippers and lines. Among the complaints relating to existing conditions was "the unfairness of certain methods—such as fighting ships, deferred rebates, and threats to refuse shipping accommodations—used by some conference lines to meet the competition of nonconference lines." *Id.*, at 417. The Committee concluded that the system of conferences and agreements was not to be uprooted. Its disadvantages and abuses must be curbed by effective government control.

Among the specific recommendations of the Committee were that carriers be required to file for approval with the regulatory agency (the Committee recommended use of the Interstate Commerce Commission) any agreements among themselves or with shippers, with the agency being empowered to cancel agreements it found to be "discriminating or unfair in character, or detrimental to the commercial interests of the United States" (*id.*, at 420); that the agency be empowered to investigate and institute proceedings concerning rates that are "unreasonably high, or discriminating in character as between shippers" (*ibid.*), and

> ". . . That the use of 'fighting ships' and deferred rebates be prohibited in both the export and import trade of the United States. Moreover, all carriers should be prohibited from retaliating against any shipper by refusing space accommodations when such are available, or by resorting to other unfair methods of discrimination, because such shipper has patronized an independent line, or has filed a complaint charging unfair treatment, or for any other reason." *Id.*, at 421.

The cautious generality of the latter portion of this last recommendation (and, surely, of the legislative provision based on it) doubtless reflects a feeling on the part of the Committee that many shippers refrained from describing the various forms of and reasons for retaliation against them by carriers, for fear that they would subsequently be retaliated against for making the disclosures. See, *e. g., id.,* at 5.

The report of the Committee was filed in February 1914, and four months later Representative Alexander introduced a bill, H. R. 17328, 63d Cong., 2d Sess., incorporating its recommendations. The bill provided, among other things, that carriers be required to file for approval with the Interstate Commerce Commission any of a wide variety of agreements, that the Commission be empowered to cancel or modify agreements that it found "discriminating or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or that it may find to operate to the detriment of the commerce of the United States, or that may be in violation of this Act," and that agreements when approved should be exempt from the antitrust laws (§ 3). Where the Commission was of the opinion that rates, charges, classifications, regulations or practices were "unjust or unreasonable," it was empowered to determine and enforce what would be just and reasonable under the circumstances (§ 7). And the bill (§ 2) provided that it should be a misdemeanor (punishable by fine of up to $25,000) for any carrier to allow deferred rebates, use a fighting ship, or:

> "Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or

> unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment or for any other reason."

As no action was taken on H. R. 17328 in 1914, it was reintroduced by Mr. Alexander in the 64th Congress late in 1915 as H. R. 450. Shortly thereafter he introduced H. R. 10500, a bill "To establish a United States Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its territories and possessions, and with foreign countries, and for other purposes." That bill authorized the Board to purchase or charter commercial vessels to be leased to private concerns in peacetime and used as a naval auxiliary in wartime; the bill also (§§ 9, 10) provided for very general regulation by the Board of the ocean transportation industry.

Approximately two months later, in April 1916, Mr. Alexander introduced H. R. 14337, which adapted his earlier regulatory bill (H. R. 450) to the administrative framework of the Shipping Board bill (H. R. 10500). The bill was considered in committee with a view to substituting its provisions for the general regulatory language of §§ 9 and 10 of the Shipping Board bill. See Hearings before the House Committee on the Merchant Marine and Fisheries on H. R. 14337, 64th Cong., 1st Sess. 5. In these hearings, there was no discussion of the "retaliation" provision of the bill; attention was concentrated on its more controversial aspects, such as the power of the Board to regulate rates.

At the close of these hearings, in early May 1916, a new Shipping Board bill, H. R. 15455, in which the substitution of the more detailed regulatory provisions had been made, was introduced by Mr. Alexander. The bill added a "Fourth" to the prohibitions against deferred

rebates, fighting ships and retaliation: unfair or unjustly discriminatory contracts with or treatment of shippers under specified circumstances; the standard ("discriminating and unfair") in the provision empowering the Board to cancel or modify agreements became "unjustly discriminatory and unfair." The bill was promptly reported out of the Merchant Marine and Fisheries Committee with a report that set forth *in extenso* the recommendations in the 1914 report of the investigation of the shipping industry. H. R. Rep. No. 659, 64th Cong., 1st Sess. 27–31. The debate in the House centered on the ship purchase and lease provisions of the bill, and the bill passed the House with no detailed consideration of the regulatory provisions. In the Senate, the hearings before the Committee on Commerce were also concerned primarily with the ship purchase and lease provisions, as were the floor debates. Once again, the Committee report set forth the recommendations arising out of the 1914 investigation. S. Rep. No. 689, 64th Cong., 1st Sess. 7–11. With no relevant amendment to the regulatory portions of the bill, H. R. 15455 passed the Senate and became law in September of 1916. 39 Stat. 728.

As enacted, then, the statute provided for the following scheme of regulation. Carriers subject to the Act must file with the Board copies of agreements establishing (*inter alia*) preferential or cooperative arrangements. Such of these as the Board finds "to be unjustly discriminatory or unfair . . . or to operate to the detriment of the commerce of the United States, or to be in violation of this Act," it may disapprove, cancel or modify; all others it must approve, and those approved are exempt from the antitrust laws (§ 15). As to any "rate, fare, charge, classification, tariff, regulation, or practice" of carriers that the Board finds to be unjust or unreasonable, it may take corrective measures (§ 18). As an exception to, or qualification upon, this scheme, certain practices

were specifically outlawed and may not, therefore, be approved by the Board: to allow deferred rebates, use fighting ships,

> ". . . Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason, ..."

and treat or contract with shippers in certain unfair or unjustly discriminatory ways; violation of this provision is a misdemeanor punishable by a fine of up to $25,000 (§ 14).[6]

The form that this regulation takes, considered in light of its legislative background, makes clear the congressional purpose. It was found that abuses and discriminations were inherent in the international shipping trade when it was conducted on the basis of cooperation among competitors. It was further found that the alternative to cooperation was cutthroat competition leading to monopoly and, more particularly, working to the serious detriment of American carriers and shippers and to the advantage of their foreign competitors. The conclusion was that the system of cooperation must be domesticated

---

[6] It is worth noting that in §§ 14 Fourth and 15 the statute speaks in terms of "unjust" discrimination, a standard to which it was quite clearly the legislative purpose for the Board to give substance and meaning. Congress had no intention of condemning all of the practices described by the very general language of the two provisions; it relied on the Board to prevent only those that are unwarranted by the competitive situation in which they are found. But in § 14 Third no such qualification was adopted, for the kind of "discriminating and unfair methods" toward which Congress was directing its attention had been clearly identified (*i. e.*, by retaliation against shippers), and they were to be flatly prohibited irrespective of the circumstances in which they might be practiced.

and exposed to, and policed by, a continuing process of regulation. Only the flagrant abuses were flatly prohibited. The pervading purpose of the Shipping Act is to be found in a statement made in the House debate by Representative Burke, a majority member of the Alexander Committee during both the investigation and the consideration of the various bills:

> "Your committee at the conclusion of such hearings and after consideration and due deliberation made its report to Congress upon the subject with many valuable recommendations. Among the recommendations made in such report to Congress were that laws should be passed prohibiting the grossest and most vicious of such unfair practices . . . .
>
> . . . . . .
>
> "It was found by your committee that many of the unfair practices had become so firmly established and contained in many instances elements of usefulness that, with the exception of some of the more prominent ill practices, it was considered that a system of regulation and control of water transportation would be for the best interest of both the public and those interested in water transportation." 53 Cong. Rec. 8095.

It is important to keep in mind the relation of this scheme of regulation to the antitrust laws. Prior to the enactment of the Shipping Act, the ocean transportation industry was, of course, subject to the antitrust laws, and, indeed, as has been noted, proceedings under the Sherman Act had been brought against several conferences by the Government. Congress might have provided that, in addition to being subjected to the general surveillance involved in a comprehensive pattern of regulation, the steamship owners must continue to conform to the affirmative policy in favor of a high level of competition that

underlies the antitrust laws. Such was the condition in which legislation had placed the railroads. They were subject to both Interstate Commerce Commission regulation and the outlawry of the Sherman Act. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505. Not until 1920 were agreements among rail carriers excepted from the antitrust laws. § 407, Transportation Act of 1920, 41 Stat. 456, 480, amending § 5 of the Interstate Commerce Act, 24 Stat. 379, 380. With respect to ocean transportation, however, Congress from the beginning chose to exempt agreements among carriers and between carriers and shippers from the antitrust laws. They thus rejected court-determined competition and preferred to rely upon regulation under an expert administrative agency.

It is in the light of this background that we must consider § 14 Third of the Shipping Act of 1916, which both the Court of Appeals and this Court have construed as prohibiting the dual-rate contract system. The section imposes a heavy fine for conduct it makes criminal and so should be strictly construed. See *Yates* v. *United States*, 354 U. S. 298, 304–305. It deserves narrow construction also on the ground that it is an undoubted exception to a comprehensive and complex scheme of regulation by the Board. For it must be construed not as though it were an isolated piece of writing but as part of a reticulated scheme of government for the shipping industry. No form of conduct should be brought within its terms that was not designed to be included. As the foregoing survey of the legislative history demonstrates, there is no evidence of such purpose with respect to the dual-rate contract system. The evidence in fact points to the intention of its exclusion.

Under no fairly applicable meaning of the word "retaliation" can the conclusion of the Court of Appeals, that

the initiation and maintenance of a dual-rate contract system is retaliation, be sustained. It is clear from the congressional history that the framers of the legislation were concerned with certain forms of conduct, notably refusal of available accommodations, directed against shippers because they had previously done such things as shipping by an independent line or publicly filing complaints against carriers. The very concept of retaliation is that the retaliating party takes action against the party retaliated against after, and because of, some action of the latter. In the dual-rate contract system, there is nothing of this "getting even"; the parties simply enter into an agreement that is designed to guide their future conduct but in no way depends upon or arises out of past conduct. It does violence to the English language—and certainly to the duty of reading congressional language in context—to characterize such a contractual arrangement as "retaliation." As conduct relating to the competitive struggle between carriers combined in a conference and those who prefer to stay out—yes; as an act of reprisal—no.

But if the dual-rate contract system is not "retaliation," then it does not violate § 14 Third, for it seems evident that that section was directed only at retaliation. It is, indeed, rather inartfully drawn, but under the circumstances, and particularly in light of the legislative background, its ambiguities should be resolved in favor of the narrower construction. The recommendation of the Alexander Committee, *supra,* a body on which Congress placed an extraordinarily high degree of reliance with respect to the regulatory aspects of the Shipping Bill, contemplated nothing but "retaliation." When, four months later, the recommendation had been put into the language of proposed legislation, it took substantially the form it takes in the statute as enacted. No doubt, the intention to limit the application of the provision to "retaliation"

is not so clear in the statutory language as it was in the recommendation; however, since there is no evidence of purposefulness in this change, and no apparent reason for it, the alteration in language should not be regarded as having effected a decisive change in the substance of the provision. Attaching such drastic significance to this change in wording has no supporting reason and is contradicted by the underlying philosophy of the legislation. This conclusion is emphasized by the fact that after the change the Committee Reports in both Houses of Congress quoted the language of the recommendation in support of the proposed legislation without qualification. And in the House debate, when Representative Alexander was briefly summarizing the provisions of the bill, he said, in describing the provision that became § 14 Third, nothing more than that it "forbids retaliation against shippers who patronize other carriers, or complain of unfair treatment by refusing, or threatening to refuse, space accommodations when available, or by other unfair practices . . . ." 53 Cong. Rec. 8080. Surely, when there is nothing in the legislative history to suggest that Congress wished to prohibit the dual-rate contract system of which they were fully aware, and everything to suggest that § 14 Third was designed to respond solely to an entirely different problem, that section cannot be stretched to embrace that practice and thereby to undercut the rationale of the legislation.

The Court's construction makes of the latter portions of § 14 Third a general catchall. The relevant words, as abstracted from the entire provision, would be these: "No common carrier by water shall, directly or indirectly . . . resort to . . . discriminating or unfair methods . . . for any . . . reason." Such a provision—even if it be limited to conduct designed to "stifle" competition—would not only make the remainder of § 14 redundant but would be inconsistent with the whole

philosophy, not to say the language, of much of the regulatory portion of the Shipping Act. There is nothing in the words of the statute or in its congressional background to indicate that Congress intended to bury such a broad prohibition in the third portion of a four-part penal section. Moreover, as noted above, the most probable explanation for the generality of the language in § 14 Third is that Congress sought to cover forms of retaliation that shippers had been afraid to bring to the legislators' attention.

Nor is there any merit to the suggestion that if Congress made "deferred rebates" unlawful, the practice of dual-rate contracts—although not specifically prohibited—should also be unlawful because it has "the same objectionable purpose and effect." This mode of approach is a judicial utilization of the salesmanship that offers something as "just as good." This Court certainly has not the power to say that conduct is unlawful simply because it is "just as bad" as some conduct that Congress has specifically prohibited. The principal basis that the Alexander Committee set forth for its conclusion that deferred rebates were objectionable was precisely that the rebates were deferred. The Committee, in outlining the objections that had been made to steamship agreements, noted that "[b]y deferring the payment of the rebate until three or six months following the period to which the rebate applies ship owners effectively tie the merchants to a group of lines for successive periods." Report, *supra,* at 307. The Committee recited the contention that "the ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebate system" (*ibid.*); it is not unlikely that they had in mind the dual-rate contract system. This Court in *Swayne & Hoyt, Ltd.,* v. *United States,* 300 U. S. 297, adopted that point of view when it said (300 U. S., at 307, n. 3):

"The Committee recognized that the exclusive contract system does not necessarily tie up the shipper as completely as 'deferred rebates,' since it does not place him in 'continual dependence' on the carrier by forcing his exclusive patronage for one contract period under threats of forfeit of differentials accumulated during a previous contract period."

Twice this Court has rejected the contention that it now accepts. Twice this Court has held that the Shipping Act of 1916 did not render illegal *per se* a dual-rate contract system enforced by a combination of steamship carriers essentially like the one now before the Court, whereby lower rates are tied to an agreement for exclusive carriage. Such were the decisions, upon full consideration, in *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, in 1932 and again in *Far East Conference* v. *United States*, 342 U. S. 570, in 1952 by a wholly differently constituted Court. In both these cases the claim was that such a dual-rate system constituted a combination in violation of the Sherman Act, for which relief by way of an injunction could be had by a competing carrier outside the conference, as in the *Cunard* case, and by the United States, as in the *Far East Conference* case, under § 4 of the Sherman Act. The immediate issue in both cases was, of course, the applicability of the principle of "primary jurisdiction"—that is, whether the legality of a dual-rate system could be adjudicated by a United States District Court without a determination by the Federal Maritime Board as to whether "the matters complained of" (*United States Navigation Co.* v. *Cunard S. S. Co.*, *supra*, at 478) and whether the dual-rate system "on the merits" (*Far East Conference* v. *United States*, *supra*, at 573) offend the Shipping Act of 1916. The doctrine of "primary jurisdiction" was recognized by Mr. Chief Justice Taft as an achievement whereby its author, Mr. Chief Justice White, "had more to do with placing this vital

part of our practical government on a useful basis than any other judge." (257 U. S. xxv.) The Court's opinion makes of it an empty ritual.

By virtue of these two decisions, an independent shipowner who claimed to be hurt by the operation of a dual-rate contract system, employed as a competitive measure against him by a shipping conference, could not bring his complaint to court as might a manufacturer hurt by an analogous combination competitor. Such a shipowner would have to appeal to the Federal Maritime Board, as did Isbrandtsen. The ensuing Board proceedings would probably be similar to those in this case. On Isbrandtsen's protests, filed January 12, 1953, and amended on January 19, hearings were conducted before a Board Examiner from October 5 to December 23, 1953, in which was compiled a record of over 4,500 pages of testimony and over 150 exhibits. The examiner rendered his recommended decision on September 13, 1954, but on October 6 the Board remanded the record for supplemental findings of fact; these supplemental findings were served on January 17, 1955. Eleven months later the Board filed its detailed, comprehensive report approving the conference's dual-rate system (as amended in accordance with the Board's report) as not unjustly discriminatory or unfair, nor likely to operate to the detriment of the commerce of the United States, nor in violation of the Shipping Act. But all this elaborate process and determination are legally meaningless. The agency is made to serve as a circumlocution office. The sole function of this carnival of procedural emptiness is that of a formal preliminary to a suit in a federal court. For such a suit, the Court now holds, is to proceed in complete disregard of all the hearing, weighing and interpreting of evidence before the Board. The Court is to make a ruling of law with entire indifference to all the findings of the expert body set up to make appropriate findings on the basis of

the law's policy. Surely it is a form of playfulness to make resort to the Board a prerequisite when the judicial determination of law could have been made precisely as though there had been no proceeding before the Board. This is to make a mockery of the doctrine of primary jurisdiction and to interpret the decisions in the *Cunard* and *Far East Conference* cases as utterly wasteful futilities.

Until today the doctrine of "primary jurisdiction" was not an empty ritual. Its observance in scores of cases was not a wasteful futility. In denying to the District Courts jurisdiction in situations like those in the *Cunard* and *Far East Conference* cases the doctrine of primary jurisdiction was not devised for the purposeless delay of giving the same jurisdiction to Courts of Appeals, on condition that they use the administrative agency as a sterile conduit to them. Such a view would denigrate and distort the significance of one of the most important movements in our law. Legal scholars have rightly compared it to the rise of equity, a view endorsed by this Court through Mr. Chief Justice Stone, himself a scholar. See *United States* v. *Morgan,* 307 U. S. 183, 191. The utilization of these administrative agencies is a legislative realization, judicially respected, that the regulatory needs of modern society demand law-enforcing tribunals other than the conventional courts. The doctrine of primary jurisdiction, based as it is on the discharge of functions for which courts normally have neither training and experience nor procedural freedoms, is an essential aspect of this modern administrative law. It is a means of achieving the proper distribution of the law-enforcing roles as between administrative agencies and courts. It gives these agencies the necessary scope for exploring a wide realm of facts, not to be confined within the exclusionary rules of evidence controlling proceedings in courts, to weigh such facts with an expert's understanding and

to choose between allowable inferences where wise choice so often depends on informed judgment.[7] These agencies do not supplant courts. They are subject to what may broadly be called the judicial Rule of Law. Appeal lies to courts to test whether an agency acted within its statutory bounds, on the basis of rational evidence supporting a reasoned conclusion, and ultimately satisfies the constitutional requirement of due process. Within these limits, a large range of discretion is entrusted to administrative agencies to make effective the social and economic policies adopted by Congress in the myriad concrete situations calling for their application. Whether rates are reasonable, whether discriminations are fair, whether particular combined economic arrangements are justified, whether practices that would, for industry generally, fall

[7] "[The] differences in origin and function [between court and agency] preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts. Thus, this Court has recognized that bodies like the Interstate Commerce Commission, into whose mould Congress has cast more recent administrative agencies, 'should not be too narrowly constrained by technical rules as to the admissibility of proof,' *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 44, should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties. Compare *New England Divisions Case*, 261 U. S. 184. To be sure, the laws under which these agencies operate prescribe the fundamentals of fair play. They require that interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion. But to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine." *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 143–144.

afoul the Sherman Act are permissible under a legislative regime for a particular industry that to that extent supersedes the antitrust laws—these and like questions come within the operation of the doctrine of primary jurisdiction, and it limits the power of courts to pass on their merits.

Contrariwise, where a decision of a case depends on determination of a question of law as such, either because of explicit statutory outlawry of some specific conduct or by necessary implication of judicial power because not involving the exercise of administrative discretion or the need of uniform application of specialized competence, the doctrine of primary jurisdiction has no function, because there is no occasion to refer a matter to the administrative agency. *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285 (reaffirmed in *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 69); *Texas & Pacific R. Co.* v. *Gulf, C. & S. F. R. Co.*, 270 U. S. 266; *Civil Aeronautics Board* v. *Modern Air Transport, Inc.*, 179 F. 2d 622, 624–625; see Davis, Administrative Law, 666–668. The course of decisions was accurately summarized in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 254: ". . . we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose." It would be a travesty of law and an abuse of the judicial process to force litigants to undergo an expensive and merely delaying administrative proceeding when the case must eventually be decided on a controlling legal issue wholly unrelated to determinations for the ascertainment of which the proceeding was sent to the agency. Such, however, is the result in this case.

The *Cunard* and *Far East Conference* decisions mean nothing if they do not mean that the denial of jurisdiction to the District Courts to entertain the suits in those

458778 O—58——37

cases and their reference to the Federal Maritime Board, and the holding that the complaints against the dual-rate system in those two cases must be passed on by the Board, constituted the plainest possible recognition that it was for the Board to approve or disapprove the dual-rate contract system complained of, and, therefore, that the practice was not illegal as a matter of law—that is, by virtue of a statutory condemnation. In both cases the Court's attention was directed to the claim of *per se* illegality. In both cases the plaintiffs urged that, since the dual-rate contract system violated § 14, the Board was without power to approve it. Brief for Petitioner, pp. 47–56, *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474; Brief for United States, pp. 22–23 (incorporating by reference Brief for United States, pp. 21–45, *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co.*, 342 U. S. 950), *Far East Conference* v. *United States*, 342 U. S. 570. See also *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 478 (argument of petitioner's counsel). And in *Far East Conference*, the claim that now prevails was a main ground of dissent. See 342 U. S., at 578–579.[8] When an issue is squarely and

[8] The Court in the *Cunard* case discussed the claim in the following terms:

"It is said that the agreement referred to in the bill of complaint cannot legally be approved. But this is by no means clear. . . . [W]hatever may be the form of the agreement, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing and determination would be to usurp that authority. Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications." 284 U. S., at 487.

It may be noted that, after this Court ordered the dismissal of the

fully presented to the Court and its disposition is essential to the result reached in a case, the issue is decided, whether the Court says much or little, whether the opinion is didactic or elliptical. Otherwise very few opinions in which Mr. Justice Holmes spoke for the Court, in most instances tersely and often cryptically, would have formulated decisions.

Nor can these cases be distinguished on their facts. The complaints in both cases alleged that the conferences had initiated the dual-rate contract system in order to eliminate competition. See *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 479–480; Transcript of Record, p. 6, *Far East Conference* v. *United States*, 342 U. S. 570. And the dual-rate agreement involved in *Far East Conference* was, if anything, more coercive and more closely analogous to a system of deferred rebates than is the one involved in the cases before the Court. It provided (§ 4) that if a shipper violated the agreement, the agreement was void, and the shipper became liable to pay "additional freight on all commodities theretofore shipped with such carriers for a period not exceeding twelve months immediately preceding the date of such shipment, at the non-contract rate or rates . . . ." Transcript of Record, p. 18. Such an accumulation of potential liability was much more likely to result in "continual dependence" on the conference than is the liquidated damages provision in the agreement before us. The latter provides for damages of 50 percent of the freight that would have been paid under the agreement (*i. e.*, at the lower, or contract rate) for the shipment made in violation of the agreement; the agreement

---

complaints in the *Cunard* and *Far East Conference* cases, the complaining party in neither case initiated proceedings before the Board concerning the dual-rate system involved. The Government has, however, intervened in Board proceedings involving the systems of other conferences, as it did in the instant case.

does not become void on account of a single violation. There is no basis for concluding that these damages are unreasonably high or that they do not bear a rational relation to the actual loss a carrier sustains when he is denied a shipment to which his contract entitles him.

Since this Court has twice rejected the theory that dual-rate contract systems violate § 14 of the Shipping Act, and since there is nothing in that statute or its legislative history to suggest that those cases were wrongly decided in the light of new knowledge not before the Court when they were decided, the question in this case is, as it was in the earlier two cases, one lying within the Board's administrative discretion. As I see no reason for overturning the detailed, well-reasoned report of the Board in these proceedings, I am of opinion that the decision of the Court of Appeals should be reversed.

MR. JUSTICE HARLAN, dissenting.

Except in one respect, I agree with the dissenting opinion of MR. JUSTICE FRANKFURTER. I do not think that this Court's decisions in *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474, and *Far East Conference* v. *United States*, 342 U. S. 570, have the effect which that opinion attributes to them. Despite the logic of the argument flowing from the doctrine of primary jurisdiction, and the lack of any substantial factual distinction between the agreements in those cases and in this one, I am unable to read *Cunard* and *Far East Conference* as having determined, without any discussion, the far-reaching question which has been decided today. See especially *Cunard*, 284 U. S., at 483–484, 487. On the merits, however, I dissent for the reasons set forth in MR. JUSTICE FRANKFURTER'S opinion.

Syllabus.

BYRD *v.* BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC.

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

No. 57. Argued January 28, 1958.—Restored to the calendar for reargument March 3, 1958.—Reargued April 28–29, 1958.—Decided May 19, 1958.

Basing jurisdiction on diversity of citizenship, petitioner sued in the Federal District Court to recover for injuries allegedly caused by respondent's negligence. Respondent asserted as an affirmative defense that petitioner was respondent's employee for purposes of the State Workmen's Compensation Act and that the Act provided petitioner's exclusive remedy. After hearing respondent's evidence on this issue, the trial judge struck the defense without hearing petitioner's evidence. The Court of Appeals, holding that under state law respondent had established its defense, reversed and directed that judgment be entered for respondent. *Held:* Judgment reversed and cause remanded. Pp. 526–540.

1. The Court of Appeals erred in directing judgment for respondent without allowing petitioner an opportunity to present evidence on the issue of respondent's affirmative defense. Pp. 528–533.

2. Notwithstanding state decisions holding that this statutory defense must be decided by the judge alone, petitioner is entitled in a federal court to have the factual issues raised by the defense presented to the jury. Pp. 533–540.

(a) The state rule requiring judge determination of this defense is not so bound up with state-created rights and obligations as to require its application in federal courts under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. Pp. 535–536.

(b) Although jury determination of the issue may substantially affect the outcome of the case, the policy of *Guaranty Trust Co.* v. *York*, 326 U. S. 99, does not invariably prevail over an affirmative federal policy favoring jury determination of disputed factual questions. Pp. 536–539.

(c) There is here no such strong possibility that the outcome of the suit would be affected by jury determination of the defense as to require federal practice to yield in the interest of uniformity. Pp. 539–540.

238 F. 2d 346, reversed and cause remanded.

Henry Hammer argued the cause for petitioner. With him on the briefs were *Henry H. Edens* and *William E. Chandler, Jr.*

Wesley M. Walker argued the cause for respondent. With him on the reargument and on the briefs was *Ray R. Williams.*

Mr. Justice Brennan delivered the opinion of the Court.

This case was brought in the District Court for the Western District of South Carolina. Jurisdiction was based on diversity of citizenship. 28 U. S. C. § 1332. The petitioner, a resident of North Carolina, sued respondent, a South Carolina corporation, for damages for injuries allegedly caused by the respondent's negligence. He had judgment on a jury verdict. The Court of Appeals for the Fourth Circuit reversed and directed the entry of judgment for the respondent. 238 F. 2d 346. We granted certiorari, 352 U. S. 999, and subsequently ordered reargument, 355 U. S. 950.

The respondent is in the business of selling electric power to subscribers in rural sections of South Carolina. The petitioner was employed as a lineman in the construction crew of a construction contractor. The contractor, R. H. Bouligny, Inc., held a contract with the respondent in the amount of $334,300 for the building of some 24 miles of new power lines, the reconversion to higher capacities of about 88 miles of existing lines, and the construction of 2 new substations and a breaker sta-

tion. The petitioner was injured while connecting power lines to one of the new substations.

One of respondent's affirmative defenses was that, under the South Carolina Workmen's Compensation Act,[1] the petitioner—because the work contracted to be done by his employer was work of the kind also done by the respondent's own construction and maintenance crews—had the status of a statutory employee of the respondent and was therefore barred from suing the respondent at law because obliged to accept statutory compensation benefits as the exclusive remedy for his injuries.[2] Two ques-

---

[1] S. C. Code, 1952, provides:

"§ 72–111. Liability of owner to workmen of subcontractor.

"When any person, in this section and §§ 72–113 and 72–114 referred to as 'owner,' undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and §§ 72–113 to 72–116 referred to as 'subcontractor') for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him."

"§ 72–121. Employees' rights under Title exclude all others against employer.

"The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death."

"§ 72–123. Only one remedy available.

"Either the acceptance of an award under this Title or the procurement and collection of a judgment in an action at law shall be a bar to proceeding further with the alternate remedy."

[2] In earlier proceedings the case was dismissed on the ground that the respondent, a nonprofit corporation, was immune from tort liability under South Carolina law. 118 F. Supp. 868. The Court of Appeals reversed and remanded the case for trial. 215 F. 2d 542.

tions concerning this defense are before us: (1) whether the Court of Appeals erred in directing judgment for respondent without a remand to give petitioner an opportunity to introduce further evidence; and (2) whether petitioner, state practice notwithstanding, is entitled to a jury determination of the factual issues raised by this defense.

I.

The Supreme Court of South Carolina has held that there is no particular formula by which to determine whether an owner is a statutory employer under § 72–111. In *Smith* v. *Fulmer,* 198 S. C. 91, 97, 15 S. E. 2d 681, 683, the State Supreme Court said:

> "And the opinion in the *Marchbanks case* [*Marchbanks* v. *Duke Power Co.,* 190 S. C. 336, 2 S. E. 2d 825, said to be the "leading case" under the statute] reminds us that while the language of the statute is plain and unambiguous, there are so many different factual situations which may arise that no easily applied formula can be laid down for the determination of all cases. In other words, 'it is often a matter of extreme difficulty to decide whether the work in a given case falls within the designation of the statute. It is in each case largely a question of degree and of fact.' "

The respondent's manager testified on direct examination that three of its substations were built by the respondent's own construction and maintenance crews. When pressed on cross-examination, however, his answers left his testimony in such doubt as to lead the trial judge to say, "I understood he changed his testimony, that they had not built three." But the credibility of the manager's testimony, and the general question whether the evidence in support of the affirmative defense presented

a jury issue, became irrelevant because of the interpretation given § 72–111 by the trial judge. In striking respondent's affirmative defense at the close of all the evidence [3] he ruled that the respondent was the statutory employer of the petitioner only if the construction work done by respondent's crews was done for somebody else, and was not the statutory employer if, as the proofs showed, the crews built facilities only for the respondent's own use. "My idea of engaging in the business is to do something for somebody else. What they [the respondent] are doing—and everything they do about repairing lines and building substations, they do it for themselves." On this view of the meaning of the statute, the evidence, even accepting the manager's testimony on direct examination as true, lacked proof of an essential element of the affirmative defense, and there was thus nothing for the petitioner to meet with proof of his own.

The Court of Appeals disagreed with the District Court's construction of § 72–111. Relying on the decisions of the Supreme Court of South Carolina, among others, in *Marchbanks* v. *Duke Power Co.,* 190 S. C. 336, 2 S. E. 2d 825, and *Boseman* v. *Pacific Mills,* 193 S. C. 479, 8 S. E. 2d 878, the Court of Appeals held that the statute granted respondent immunity from the action if the proofs established that the respondent's own crews had constructed lines and substations which, like the work contracted to the petitioner's employer, were necessary for the distribution of the electric power which the respondent was in the business of selling. We ordinarily accept the interpretation of local law by the Court of

[3] The trial judge, in spite of his action striking the defense, permitted the respondent to include the affirmative defense as a ground of its motions for a directed verdict and judgment *non obstante veredicto*.

Appeals, cf. *Ragan* v. *Merchants Transfer Co.*, 337 U. S. 530, 534, and do so readily here since neither party now disputes the interpretation.

However, instead of ordering a new trial at which the petitioner might offer his own proof pertinent to a determination according to the correct interpretation, the Court of Appeals made its own determination on the record and directed a judgment for the respondent. The court noted that the Rural Electric Cooperative Act of South Carolina [4] authorized the respondent to construct, acquire, maintain, and operate electric generating plants, buildings, and equipment, and any and all kinds of property which might be necessary or convenient to accomplish the purposes for which the corporation was organized, and pointed out that the work contracted to the petitioner's employer was of the class which respondent was empowered by its charter to perform.

The court resolved the uncertainties in the manager's testimony in a manner largely favorable to the respondent: "The testimony with respect to the construction of the substations of Blue Ridge, stated most favorably to the . . . [petitioner], discloses that originally Blue Ridge built three substations with its own facilities, but that all of the substations which were built after the war, including the six it was operating at the time of the accident, were constructed for it by independent contractors, and that at the time of the accident it had no one in its direct employ capable of handling the technical detail of substation construction." 238 F. 2d 346, 350.

The court found that the respondent financed the work contracted to the petitioner's employer with a loan from the United States, purchased the materials used in the work, and entered into an engineering service contract with an independent engineering company for the design

[4] S. C. Code, 1952, § 12-1025.

and supervision of the work, concluding from these findings that "the main actor in the whole enterprise was the Cooperative itself." *Ibid.*

Finally, the court held that its findings entitled the respondent to the direction of a judgment in its favor. ". . . [T]here can be no doubt that Blue Ridge was not only in the business of supplying electricity to rural communities, but also in the business of constructing the lines and substations necessary for the distribution of the product . . . ." *Id.*, at 351.

While the matter is not adverted to in the court's opinion, implicit in the direction of verdict is the holding that the petitioner, although having no occasion to do so under the District Court's erroneous construction of the statute, was not entitled to an opportunity to meet the respondent's case under the correct interpretation. That holding is also implied in the court's denial, without opinion, of petitioner's motion for a rehearing sought on the ground that ". . . [T]he direction to enter judgment for the defendant instead of a direction to grant a new trial denies plaintiff his right to introduce evidence in contradiction to that of the defendant on the issue of defendant's affirmative defense, a right which he would have exercised if the District Judge had ruled adversely to him on his motion to dismiss, and thus deprives him of his constitutional right to a jury trial on a factual issue."

We believe that the Court of Appeals erred. We do not agree with the petitioner's argument in this Court that the respondent's evidence was insufficient to withstand the motion to strike the defense and that he is entitled to our judgment reinstating the judgment of the District Court. But the petitioner is entitled to have the question determined in the trial court. This would be necessary even if petitioner offered no proof of his own. Although the respondent's evidence was sufficient to withstand the motion under the meaning given the

statute by the Court of Appeals, it presented a fact question, which, in the circumstances of this case to be discussed *infra,* is properly to be decided by a jury. This is clear not only because of the issue of the credibility of the manager's vital testimony, but also because, even should the jury resolve that issue as did the Court of Appeals, the jury on the entire record—consistent with the view of the South Carolina cases that this question is in each case largely one of degree and of fact—might reasonably reach an opposite conclusion from the Court of Appeals as to the ultimate fact whether the respondent was a statutory employer.

At all events, the petitioner is plainly entitled to have an opportunity to try the issue under the Court of Appeals' interpretation. His motion to dismiss the affirmative defense, properly viewed, was analogous to a defendant's motion for involuntary dismissal of an action after the plaintiff has completed the presentation of his evidence. Under Rule 41 (b) of the Federal Rules of Civil Procedure, in such case "the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." The respondent argues, however, that before the trial judge ruled on the petitioner's motion, the petitioner's counsel, in effect, conceded that he had no other evidence to offer and was submitting the issue of whether the respondent was a statutory employer on the basis of the evidence already in the case. The judge asked petitioner's counsel: "In the event I overrule your motion, do you contemplate putting up any testimony in reply?" Counsel answered: "We haven't discussed it, but we are making that motion. I frankly don't know at this point of any reply that is necessary. I don't know of any evidence in this case—." The interruption which prevented counsel's completion of the answer was the trial judge's

comment: "I am inclined to think so far it is a question of law but I will hear from Mr. Walker [respondent's counsel] on that. I don't know of any issue of fact to submit to the jury. It seems to me under the testimony here there has been—I don't know of any conflict in the testimony, so far as that's concerned, so far." The judge turned to respondent's counsel and there followed a long colloquy with him,[5] at the conclusion of which the judge dismissed the defense upon the ground that under his interpretation of the statute the defense was not sustained without evidence that the respondent's business involved the doing of work for others of the kind done by the petitioner's employer for the respondent. Upon this record it plainly cannot be said that the petitioner submitted the issue upon the evidence in the case and conceded that he had no evidence of his own to offer. The petitioner was fully justified in that circumstance in not coming forward with proof of his own at that stage of the proceedings, for he had nothing to meet under the District Court's view of the statute. He thus cannot be penalized by the denial of his day in court to try the issue under the correct interpretation of the statute. Cf. *Fountain* v. *Filson*, 336 U. S. 681; *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U. S. 801; *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571; *Cone* v. *West Virginia Paper Co.*, 330 U. S. 212.

II.

A question is also presented as to whether on remand the factual issue is to be decided by the judge or by the jury. The respondent argues on the basis of the decision of the Supreme Court of South Carolina in *Adams* v. *Da-*

[5] The only remarks thereafter made by the petitioner's counsel reiterated his statement that he pressed his motion to dismiss the affirmative defense.

vison-Paxon Co., 230 S. C. 532, 96 S. E. 2d 566,[6] that the issue of immunity should be decided by the judge and not by the jury. That was a negligence action brought in the state trial court against a store owner by an employee of an independent contractor who operated the store's millinery department. The trial judge denied the store owner's motion for a directed verdict made upon the ground that § 72–111 barred the plaintiff's action. The jury returned a verdict for the plaintiff. The South Carolina Supreme Court reversed, holding that it was for the judge and not the jury to decide on the evidence whether the owner was a statutory employer, and that the store owner had sustained his defense. The court rested its holding on decisions, listed in footnote 8, *infra,* involving judicial review of the Industrial Commission and said:

> "Thus the trial court should have in this case resolved the conflicts in the evidence and determined the fact of whether . . . [the independent contractor] was performing a part of the 'trade, business or occupation' of the department store-appellant and, therefore, whether . . . [the employee's] remedy is exclusively under the Workmen's Compensation Law." 230 S. C., at 543, 96 S. E. 2d, at 572.

The respondent argues that this state-court decision governs the present diversity case and "divests the jury of its normal function" to decide the disputed fact question of the respondent's immunity under § 72–111. This is to contend that the federal court is bound under *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, to follow the state court's holding to secure uniform enforcement of the immunity created by the State.[7]

---

[6] The decision came down several months after the Court of Appeals decided this case.

[7] See *Cities Service Oil Co.* v. *Dunlap,* 308 U. S. 208; *West* v. *American Tel. & Tel. Co.,* 311 U. S. 223; *Klaxon Co.* v. *Stentor Co.,*

First. It was decided in *Erie R. Co.* v. *Tompkins* that the federal courts in diversity cases must respect the definition of state-created rights and obligations by the state courts. We must, therefore, first examine the rule in *Adams* v. *Davison-Paxon Co.* to determine whether it is bound up with these rights and obligations in such a way that its application in the federal court is required. *Cities Service Oil Co.* v. *Dunlap,* 308 U. S. 208.

The Workmen's Compensation Act is administered in South Carolina by its Industrial Commission. The South Carolina courts hold that, on judicial review of actions of the Commission under § 72–111, the question whether the claim of an injured workman is within the Commission's jurisdiction is a matter of law for decision by the court, which makes its own findings of fact relating to that jurisdiction.[8] The South Carolina Supreme Court states no reasons in *Adams* v. *Davison-Paxon Co.* why, although the jury decides all other factual issues raised by the cause of action and defenses, the jury is displaced as to the factual issue raised by the affirmative defense under § 72–111. The decisions cited to support the holding are those listed in footnote 8, which are concerned solely with defining the scope and method of judicial review of the Indus-

---

313 U. S. 487; *Guaranty Trust Co.* v. *York,* 326 U. S. 99; *Angel* v. *Bullington,* 330 U. S. 183; *Ragan* v. *Merchants Transfer Co.,* 337 U. S. 530; *Woods* v. *Interstate Realty Co.,* 337 U. S. 535; *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541; *Bernhardt* v. *Polygraphic Co.,* 350 U. S. 198; *Sampson* v. *Channell,* 110 F. 2d 754.

[8] *Knight* v. *Shepherd,* 191 S. C. 452, 4 S. E. 2d 906; *Tedars* v. *Savannah River Veneer Co.,* 202 S. C. 363, 25 S. E. 2d 235; *McDowell* v. *Stilley Plywood Co.,* 210 S. C. 173, 41 S. E. 2d 872; *Miles* v. *West Virginia Pulp & Paper Co.,* 212 S. C. 424, 48 S. E. 2d 26; *Watson* v. *Wannamaker & Wells, Inc.,* 212 S. C. 506, 48 S. E. 2d 447; *Gordon* v. *Hollywood-Beaufort Package Corp.,* 213 S. C. 438, 49 S. E. 2d 718; *Holland* v. *Georgia Hardwood Lumber Co.,* 214 S. C. 195, 51 S. E. 2d 744; *Younginer* v. *Jones Construction Co.,* 215 S. C. 135, 54 S. E. 2d 545; *Horton* v. *Baruch,* 217 S. C. 48, 59 S. E. 2d 545.

trial Commission. A State may, of course, distribute the functions of its judicial machinery as it sees fit. The decisions relied upon, however, furnish no reason for selecting the judge rather than the jury to decide this single affirmative defense in the negligence action. They simply reflect a policy, cf. *Crowell* v. *Benson,* 285 U. S. 22, that administrative determination of "jurisdictional facts" should not be final but subject to judicial review. The conclusion is inescapable that the *Adams* holding is grounded in the practical consideration that the question had theretofore come before the South Carolina courts from the Industrial Commission and the courts had become accustomed to deciding the factual issue of immunity without the aid of juries. We find nothing to suggest that this rule was announced as an integral part of the special relationship created by the statute. Thus the requirement appears to be merely a form and mode of enforcing the immunity, *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 108, and not a rule intended to be bound up with the definition of the rights and obligations of the parties. The situation is therefore not analogous to that in *Dice* v. *Akron, C. & Y. R. Co.,* 342 U. S. 359, where this Court held that the right to trial by jury is so substantial a part of the cause of action created by the Federal Employers' Liability Act that the Ohio courts could not apply, in an action under that statute, the Ohio rule that the question of fraudulent release was for determination by a judge rather than by a jury.

Second. But cases following *Erie* have evinced a broader policy to the effect that the federal courts should conform as near as may be—in the absence of other considerations—to state rules even of form and mode where the state rules may bear substantially on the question whether the litigation would come out one way in the federal court and another way in the state court if the fed-

eral court failed to apply a particular local rule.[9] *E. g., Guaranty Trust Co.* v. *York, supra; Bernhardt* v. *Polygraphic Co.,* 350 U. S. 198. Concededly the nature of the tribunal which tries issues may be important in the enforcement of the parcel of rights making up a cause of action or defense, and bear significantly upon achievement of uniform enforcement of the right. It may well be that in the instant personal-injury case the outcome would be substantially affected by whether the issue of immunity is decided by a judge or a jury. Therefore, were "outcome" the only consideration, a strong case might appear for saying that the federal court should follow the state practice.

But there are affirmative countervailing considerations at work here. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command [10]—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. *Jacob* v. *New York,* 315 U. S. 752.[11] The policy of uniform enforcement of state-created

---

[9] Cf. Morgan, Choice of Law Governing Proof, 58 Harv. L. Rev. 153; 3 Beale, Conflict of Laws, § 594.1; Restatement of the Law, Conflict of Laws, pp. 699–701.

[10] Our conclusion makes unnecessary the consideration of—and we intimate no view upon—the constitutional question whether the right of jury trial protected in federal courts by the Seventh Amendment embraces the factual issue of statutory immunity when asserted, as here, as an affirmative defense in a common-law negligence action.

[11] The Courts of Appeals have expressed varying views about the effect of *Erie R. Co.* v. *Tompkins* on judge-jury problems in diversity cases. Federal practice was followed in *Gorham* v. *Mutual Benefit Health & Accident Assn.,* 114 F. 2d 97 (C. A. 4th Cir. 1940); *Diederich* v. *American News Co.,* 128 F. 2d 144 (C. A. 10th Cir. 1942);

rights and obligations, see, *e. g., Guaranty Trust Co.* v. *York, supra,* cannot in every case exact compliance with a state rule [12]—not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury. *Herron* v. *Southern Pacific Co.,* 283 U. S. 91. Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.

We think that in the circumstances of this case the federal court should not follow the state rule. It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts. In *Herron* v. *Southern Pacific Co., supra,* the trial judge in a personal-injury negligence action brought in the District Court for Arizona on diversity grounds directed a verdict for the defendant when it appeared as a matter of law that the plaintiff was guilty of contributory negligence. The federal judge refused to be bound by a provision of the Arizona Constitution which made the jury the sole arbiter of the ques-

---

McSweeney v. *Prudential Ins. Co.,* 128 F. 2d 660 (C. A. 4th Cir. 1942); *Ettelson* v. *Metropolitan Life Ins. Co.,* 137 F. 2d 62 (C. A. 3d Cir. 1943); *Order of United Commercial Travelers* v. *Duncan,* 221 F. 2d 703 (C. A. 6th Cir. 1955). State practice was followed in *Cooper* v. *Brown,* 126 F. 2d 874 (C. A. 3d Cir. 1942); *Gutierrez* v. *Public Service Interstate Transportation Co.,* 168 F. 2d 678 (C. A. 2d Cir. 1948); *Prudential Ins. Co.* v. *Glasgow,* 208 F. 2d 908 (C. A. 2d Cir. 1953); *Pierce Consulting Engineering Co.* v. *City of Burlington,* 221 F. 2d 607 (C. A. 2d Cir. 1955); *Rowe* v. *Pennsylvania Greyhound Lines,* 231 F. 2d 922 (C. A. 2d Cir. 1956).

[12] This Court held in *Sibbach* v. *Wilson & Co.,* 312 U. S. 1, that Federal Rules of Civil Procedure 35 should prevail over a contrary state rule.

tion of contributory negligence.[13] This Court sustained the action of the trial judge, holding that "state laws cannot alter the essential character or function of a federal court" because that function "is not in any sense a local matter, and state statutes which would interfere with the appropriate performance of that function are not binding upon the federal court under either the Conformity Act or the 'rules of decision' Act." *Id.*, at 94. Perhaps even more clearly in light of the influence of the Seventh Amendment, the function assigned to the jury "is an essential factor in the process for which the Federal Constitution provides." *Id.*, at 95. Concededly the *Herron* case was decided before *Erie R. Co.* v. *Tompkins,* but even when *Swift* v. *Tyson,* 16 Pet. 1, was governing law and allowed federal courts sitting in diversity cases to disregard state decisional law, it was never thought that state statutes or constitutions were similarly to be disregarded. *Green* v. *Neal's Lessee,* 6 Pet. 291. Yet *Herron* held that state statutes and constitutional provisions could not disrupt or alter the essential character or function of a federal court.[14]

Third. We have discussed the problem upon the assumption that the outcome of the litigation may be substantially affected by whether the issue of immunity is decided by a judge or a jury. But clearly there is not present here the certainty that a different result would follow, cf. *Guaranty Trust Co.* v. *York, supra,* or even the strong possibility that this would be the case, cf. *Bernhardt* v.

---

[13] "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury." § 5, Art. 18.

[14] *Diederich* v. *American News Co.,* 128 F. 2d 144, decided after *Erie R. Co.* v. *Tompkins,* held that an almost identical provision of the Oklahoma Constitution was not binding on a federal judge in a diversity case.

Polygraphic Co., supra. There are factors present here which might reduce that possibility. The trial judge in the federal system has powers denied the judges of many States to comment on the weight of evidence and credibility of witnesses, and discretion to grant a new trial if the verdict appears to him to be against the weight of the evidence. We do not think the likelihood of a different result is so strong as to require the federal practice of jury determination of disputed factual issues to yield to the state rule in the interest of uniformity of outcome.[15]

The Court of Appeals did not consider other grounds of appeal raised by the respondent because the ground taken disposed of the case. We accordingly remand the case to the Court of Appeals for the decision of the other questions, with instructions that, if not made unnecessary by the decision of such questions, the Court of Appeals shall remand the case to the District Court for a new trial of such issues as the Court of Appeals may direct.

Reversed and remanded.

MR. JUSTICE WHITTAKER, concurring in part and dissenting in part.

In 1936 the South Carolina Legislature passed an Act known as "The South Carolina Workmen's Compensation Law." S. C. Code, 1952, Tit. 72. It created a new, complete, detailed and exclusive plan for the compensa-

---

[15] *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464, is not contrary. It was there held that the federal court should follow the state rule defining the evidence sufficient to raise a jury question whether the state-created right was established. But the state rule did not have the effect of nullifying the function of the federal judge to control a jury submission as did the Arizona constitutional provision which was denied effect in *Herron*. The South Carolina rule here involved affects the jury function as the Arizona provision affected the function of the judge: The rule entirely displaces the jury without regard to the sufficiency of the evidence to support a jury finding of immunity.

tion by an "employer" of his "employee" [1] for bodily injuries sustained by the latter which arise "by accident out of and in the course of the employment," whether with or without fault of the employer. § 72–14. The Act also prescribes the measure and nature of the remedy,[2] which "shall exclude all other rights and remedies of such employee . . . against his employer, at common law or otherwise, on account of such injury" (§ 72–121), and vests exclusive jurisdiction in the South Carolina Industrial Commission over all claims falling within the purview of the Act (§ 72–66), subject to review by appeal to the State's courts upon "errors of law." § 72–356.

Section 72–111 expands the definition of the terms "employee" and "employer" (note 1) by providing, in substance, that when an " 'owner' " of premises "undertakes to perform or execute any work *which is a part of his trade, business or occupation* and contracts with any other person [called "subcontractor"] for the execution or performance by or under such subcontractor *of the whole or any part of the work undertaken* by such owner, the owner *shall be liable to pay to any workman employed in the work any compensation* under this Title which he would have been liable to pay *if the workman had been immediately employed by him.*" (Emphasis supplied.) Employees of such subcontractors are commonly called "statutory employees" of the "owner."

Petitioner, a lineman employed by a "subcontractor" who had contracted to build more than 25 miles of new transmission lines and to convert from single-phase to double-phase more than 87 miles of existing transmission lines and to construct two substations and a breaker station for the "owner," was severely injured by an acci-

[1] The terms "employee" and "employer" are conventionally defined in §§ 72–11 and 72–12.

[2] S. C. Code, 1952, c. 4, §§ 72–151 to 72–165.

dent which arose out of and in the course of that employment. Subsequent to his injury he sought and received the full benefits provided by the South Carolina Workmen's Compensation Law.

Diversity existing, petitioner then brought this common-law suit in a Federal District Court in South Carolina against the "owner," the respondent here, for damages for his bodily injury, which, he alleged, had resulted from the "owner's" negligence. The respondent-"owner" answered setting up, among other defenses, the affirmative claim that petitioner's injury arose by accident out of and in the course of his employment, as a lineman, by the subcontractor while executing the contracted work "which [was] a part of [the owner's] trade, business or occupation." It urged, in consequence, that petitioner was its "statutory employee" and that, therefore, his exclusive remedy was under the South Carolina Workmen's Compensation Law, and that exclusive jurisdiction of the subject matter of his claim was vested in the State's Industrial Commission and, hence, the federal court lacked jurisdiction over the subject matter of this common-law suit.

At the trial petitioner adduced evidence upon the issue of negligence and rested his case in chief. Thereupon respondent, in support of its affirmative defense, adduced evidence tending to show (1) that its charter, issued under the Rural Electric Cooperative Act of South Carolina (S. C. Code, 1952, § 12–1025), authorized it to construct and operate electric generating plants and transmission lines essential to its business of generating and distributing electricity; (2) that it had (before the Second World War) constructed substations with its own direct employees and facilities, although the six substations which it was operating at the time petitioner was injured had been built by contractors, and that when

petitioner was injured it did not have in its direct employ any person capable of constructing a substation; [3] (3) that it regularly employed a crew of 16 men—8 linemen and 8 groundmen—two-thirds of whose time was spent in constructing new transmission lines and extensions, and that such was "a part of [its] trade, business [and] occupation." This evidence stood undisputed when respondent rested its case.

At the close of respondent's evidence petitioner moved to strike respondent's affirmative jurisdictional defense, and all evidence adduced in support of it. Respondent made known to the court that when petitioner had rested it wished to move for a directed verdict in its favor. Thereupon the colloquy between the court and counsel, which is set forth in substance in MR. JUSTICE FRANKFURTER'S dissenting opinion, occurred. The District Court sustained petitioner's motion and struck respondent's affirmative jurisdictional defense and its supporting evidence from the record. His declared basis for that action was that the phrase in § 72–111 "a part of his trade, business or occupation" related only to work being performed by the "owner" "for somebody else." There-

[3] As I see it, the evidence referred to in "(1)" is only collaterally material, and that referred to in "(2)" is wholly immaterial, to the issue of whether petitioner was respondent's statutory employee *at the time of the injury*, because that question, under the South Carolina Workmen's Compensation Law, does not depend upon what particular trade, business or occupation the "owner" lawfully might pursue, or lawfully might have pursued in the past. Rather, it depends upon what work he is engaged in at the time of the injury—*i. e.*, whether the contracted work "*is* a part of [the owner's] trade, business or occupation." The statute thus speaks in the present tense, and, hence, the relevant inquiry here is limited to whether the work being done by petitioner for the "owner" *at the time of the injury* was a part of the trade, business, or occupation of the "owner" *at that time*.

after, the district judge heard arguments upon and overruled respondent's motion for a directed verdict,[4] and submitted the case to the jury which returned a verdict for petitioner.

On appeal, the Court of Appeals found that the district judge's construction of § 72–111 was not supportable under controlling South Carolina decisions. It further found that respondent's evidence disclosed that respondent "was not only in the business of supplying electricity to rural communities, but [was] also in the business of constructing the lines and substations necessary for the distribution of the product," and that the contracted work was of like nature and, hence, was "a part of [respondent's] trade, business or occupation," within the meaning of § 72–111, and, therefore, petitioner was respondent's statutory employee, and, hence, the court was without jurisdiction over the subject matter of the claim. Upon this basis, it reversed the judgment of the District Court with directions to enter judgment for respondent. 238 F. 2d 346.

This Court now vacates the judgment of the Court of Appeals and remands the case to it for decision of questions not reached in its prior opinion, with directions, if not made unnecessary by its decision of such questions, to remand the case to the District Court for a new trial upon such issues as the Court of Appeals may direct.

I agree with and join in that much of the Court's opinion. I do so because—although, as found by the

---

[4] The Court's opinion and MR. JUSTICE FRANKFURTER's dissent comment upon the fact that the district judge stated to respondent's counsel that he would "allow" him to include in his motion for a directed verdict the affirmative jurisdictional defense which had just been stricken. To my mind this is wholly without significance, for the district judge was without power to control what points and arguments respondent's counsel might urge in support of his motion for a directed verdict.

Court of Appeals, respondent's evidence was ample, *prima facie,* to sustain its affirmative jurisdictional defense—petitioner had not waived his right to adduce evidence in rebuttal upon that issue, in other words had not "rested," at the time the district judge erroneously struck respondent's jurisdictional defense and supporting evidence from the record. In these circumstances, I believe that the judgment of the Court of Appeals, insofar as it directed the District Court to enter judgment for respondent, would deprive petitioner of his legal right, which he had not waived, to adduce evidence which he claims to have and desires to offer in rebuttal of respondent's *prima facie* established jurisdictional defense. The procedural situation then existing was not legally different from a case in which a defendant, without resting, moves, at the close of the plaintiff's case, for a directed verdict in its favor which the court erroneously sustains, and, on appeal, is reversed for that error. It could not fairly be contended, in those circumstances, that the appellate court might properly direct the trial court to enter judgment for the plaintiff and thus deprive the defendant, who had not rested, of his right to offer evidence in defense of plaintiff's case. Rule 50, Fed. Rules Civ. Proc. It is urged by respondent that, from the colloquy between the district judge and counsel, which, as stated, is set forth in substance in MR. JUSTICE FRANKFURTER'S dissenting opinion, it appears that petitioner had "rested," and thus had waived his right to adduce rebuttal evidence upon the issue of respondent's jurisdictional defense, before the district judge sustained his motion to strike that defense and the supporting evidence. But my analysis of the record convinces me that petitioner, in fact, never did so. For this reason I believe that so much of the judgment of the Court of Appeals as directed the District Court to enter judgment for respondent deprives petitioner of his right to adduce rebuttal evidence upon the

issue of respondent's *prima facie* established jurisdictional defense, and, therefore, cannot stand.

But the Court's opinion proceeds to discuss and determine the question whether, upon remand to the District Court, *if such becomes necessary,* the jurisdictional issue is to be determined by the judge or by the jury—a question which, to my mind, is premature, not now properly before us, and is one we need not and should not now reach for or decide. The Court, although premising its conclusion "upon the assumption that the outcome of the litigation may be substantially affected by whether the issue of immunity [5] is decided by a judge or a jury," holds that the issue is to be determined by a jury—not by the judge. I cannot agree to this conclusion for the following reasons.

As earlier shown, the South Carolina Workmen's Compensation Law creates a new, complete, detailed and exclusive bundle of rights respecting the compensation by an "employer" of his "employee" for bodily injuries sustained by the latter which arise by accident out of and in the course of the employment, regardless of fault, and vests exclusive jurisdiction in the State's Industrial Commission over all such claims, subject to review by appeal in the South Carolina courts only upon "errors of law." Consonant with § 72–66, which vests exclusive jurisdiction over such claims in the Commission, and with § 72–356, which allows judicial review only upon "errors of law," the Supreme Court of the State has uniformly held that the question, in cases like the present, whether

---

[5] Here, as at other places in its opinion, the Court treats with the South Carolina Workmen's Compensation Law as an "immunity" of the employer from liability. To me, the question is not one of immunity. Rather, it is which of two tribunals—the Industrial Commission or the court of general jurisdiction—has jurisdiction, to the exclusion of the other, over the subject matter of the action, and, hence, the power to award relief upon it.

jurisdiction over such claims is vested in the Industrial Commission or in the courts presents a question of law for determination by the court, not a jury. In *Adams* v. *Davison-Paxon Co.*, 230 S. C. 532, 96 S. E. 2d 566 (1957), which appears to be the last case by the Supreme Court of the State on the question, plaintiff, an employee of a concessionaire operating the millinery department in defendant's store, was injured, she claimed by negligence, while using a stairway in the store. She brought a common-law suit for damages against the owner of the store. The latter defended upon the ground, among others, that the operation of the millinery department, though under a contract with the concessionaire, plaintiff's employer, was "a part of [its] trade, business or occupation," that the plaintiff was therefore its statutory employee under § 72–111 and exclusive jurisdiction over the subject matter of plaintiff's claim was vested in the Industrial Commission, and that the court was without jurisdiction over the subject matter in her common-law suit. It seems that the trial court submitted this issue, along with others, to the jury which returned a verdict for plaintiff. On appeal the Supreme Court of the State reversed, saying:

> "It has been consistently held that whether the claim of an injured workman is within the jurisdiction of the Industrial Commission *is a matter of law for decision by the Court, which includes the finding of the facts which relate to jurisdiction. Knight v. Shepherd,* 191 S. C. 452, 4 S. E. (2d) 906; *Tedars v. Savannah River Veneer Company,* 202 S. C. 363, 25 S. E. (2d) 235, 147 A. L. R. 914; *McDowell v. Stilley Plywood Co.,* 210 S. C. 173, 41 S. E. (2d) 872; *Miles v. West Virginia Pulp & Paper Co.,* 212 S. C. 424, 48 S. E. (2d) 26; *Watson v. Wannamaker & Wells, Inc.,* 212 S. C. 506, 48 S. E. (2d) 447; *Gordon v. Hollywood-Beaufort Package Corp.,* 213 S. C. 438,

49 S. E. (2d) 718; *Holland v. Georgia Hardwood Lbr. Co.*, 214 S. C. 195, 51 S. E. (2d) 744; *Younginer v. J. A. Jones Const. Co.*, 215 S. C. 135, 54 S. E. (2d) 545; *Horton v. Baruch*, 217 S. C. 48, 59 S. E. (2d) 545.

"*Thus the trial court should have in this case resolved the conflicts in the evidence and determined the fact of whether Emporium* [the concessionaire] *was performing a part of the 'trade, business or occupation' of the department store-appellant and, therefore, whether respondent's remedy is exclusively under the Workmen's Compensation Law.*" 230 S. C., at 543, 96 S. E. 2d, at 571. (Emphasis supplied.)

It thus seems to be settled under the South Carolina Workmen's Compensation Law, and the decisions of the highest court of that State construing it, that the question whether exclusive jurisdiction, in cases like this, is vested in its Industrial Commission or in its courts of general jurisdiction is one for decision by the court, not by a jury. The Federal District Court, in this diversity case, is bound to follow the substantive South Carolina law that would be applied if the trial were to be held in a South Carolina court, in which State the Federal District Court sits. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. A Federal District Court sitting in South Carolina may not legally reach a substantially different result than would have been reached upon a trial of the same case "in a State court a block away." *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 109.

The Court's opinion states: "Concededly the nature of the tribunal which tries issues may be important in the enforcement of the parcel of rights making up a cause of action or defense, and bear significantly upon achievement of uniform enforcement of the right. It may well be that in the instant personal-injury case the outcome

would be substantially affected by whether the issue of immunity is decided by a judge or a jury." And the Court premises its conclusion "upon the assumption that the outcome of the litigation may be substantially affected by whether the issue of immunity is decided by a judge or a jury." Upon that premise, the Court's conclusion, to my mind, is contrary to our cases. "Here [as in *Guaranty Trust Co.* v. *York, supra*] we are dealing with a right to recover derived not from the United States but from one of the States. When, because the plaintiff happens to be a non-resident, such a right is enforceable in a federal as well as in a State court, *the forms and mode of enforcing the right* may at times, naturally enough, vary because the two judicial systems are not identic. But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State *nor can it substantially affect the enforcement of the right as given by the State.*" *Guaranty Trust Co.* v. *York, supra,* at 108–109. (Emphasis supplied.)

The words "substantive" and "procedural" are mere conceptual labels and in no sense talismanic. To call a legal question by one or the other of those terms does not resolve the question otherwise than as a purely authoritarian performance. When a question though denominated "procedural" is nevertheless so "substantive" as materially to affect the result of a trial, federal courts, in enforcing state-created rights, are not free to disregard it, on the ground that it is "procedural," for such would be to allow, upon mere nomenclature, a different result in a state court from that allowable in a federal court though both are, in effect, courts of the State and "sitting side by side." *Klaxon Co.* v. *Stentor Co.,* 313 U. S. 487, 496. "The federal court enforces the state-created right

by rules of procedure which it has acquired from the Federal Government and which therefore are not identical with those of the state courts. Yet, *in spite of that difference in procedure,* the federal court enforcing a state-created right in a diversity case is, as we said in *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 108, in substance 'only another court of the State.' The federal court therefore may not 'substantially affect the enforcement of the right as given by the State.' *Id.,* 109." *Bernhardt* v. *Polygraphic Co.,* 350 U. S. 198, 202–203. (Emphasis supplied.) "Where local law qualifies or abridges [the right], the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie R. Co.* v. *Tompkins* is transgressed." *Ragan* v. *Merchants Transfer Co.,* 337 U. S. 530, 533. "It is therefore immaterial whether [state-created rights] are characterized either as 'substantive' or 'procedural' in State court opinions in any use of those terms unrelated to the specific issue before us. *Erie R. Co.* v. *Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, *the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.* The nub of the policy that underlies *Erie R. Co.* v. *Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result. And so, putting to one side abstractions regarding 'substance' and 'procedure,' we have held that in diversity cases the federal

courts must follow the law of the State . . . ." *Guaranty Trust Co.* v. *York, supra,* at 109. (Emphasis supplied.)

Inasmuch as the law of South Carolina, as construed by its highest court, requires its courts—not juries—to determine whether jurisdiction over the subject matter of cases like this is vested in its Industrial Commission, and inasmuch as the Court's opinion concedes "that in the instant personal-injury case the outcome would be substantially affected by whether the issue of immunity is decided by a judge or a jury," it follows that in this diversity case the jurisdictional issue must be determined by the judge—not by the jury. Insofar as the Court holds that the question of jurisdiction should be determined by the jury, I think the Court departs from its past decisions. I therefore respectfully dissent from part II of the opinion of the Court.

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

This is a suit for common-law negligence, brought in a United States District Court in South Carolina because of diversity of citizenship, 28 U. S. C. § 1332. Respondent is a cooperative, organized and operating under the South Carolina Rural Electric Cooperative Act, S. C. Code, 1952, § 12–1001 *et seq.,* engaged in distributing electric power to its members, and extending the availability of power to new users, in rural areas of the State. Incident to the expansion of its facilities and services, it had made a contract with R. H. Bouligny, Inc., whereby the latter was to construct 24.19 miles of new power lines, to rehabilitate and convert to higher capacity 87.69 miles of existing lines, and to construct two substations and a breaker station. In the execution of this contract, petitioner, a citizen of North Carolina, and a lineman for Bouligny, was seriously burned when he attempted to make a connection between the equipment in one of the

new substations and an outside line through which, by a mistake on the part of another of Bouligny's employees, current was running. Petitioner filed a claim against Bouligny pursuant to the South Carolina Workmen's Compensation Law, S. C. Code, 1952, § 72–1 *et seq.*, under which both Bouligny and respondent operated, and recovered the full benefits under the Law. He then brought this suit.

Respondent defended on the ground, among others, that, since petitioner was injured in the execution of his true employer's (Bouligny's) contract with respondent to perform a part of its "trade, business or occupation," respondent was petitioner's "statutory employer" and therefore liable to petitioner under § 72–111 of the State's Workmen's Compensation Law.[1] It would follow from this that petitioner, by virtue of his election to proceed against Bouligny, was barred from proceeding against respondent, either under the statute or at common law (§§ 72–121, 72–123).[2] After all the evidence was in, the

---

[1] "§ 72–111. Liability of owner to workmen of subcontractor.

"When any person, in this section and §§ 72–113 and 72–114 referred to as 'owner,' undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and §§ 72–113 to 72–116 referred to as 'subcontractor') for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him."

[2] "§ 72–121. Employee's rights under Title exclude all others against employer.

"The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents,

court granted petitioner's motion to strike the defense, on the ground that an activity could not be a part of a firm's "trade, business or occupation" unless it was being performed "for somebody else." The court also denied respondent's motion for a directed verdict and submitted the case to the jury, which returned a verdict for petitioner in the amount of $126,786.80.

On appeal, the United States Court of Appeals for the Fourth Circuit found the District Court's construction of § 72–111 unsupportable under controlling South Carolina decisions.[3] In concluding that respondent had sustained its defense, the appellate court cited the following evidence elicited at trial. Respondent employed a sixteen-man "outside crew," two-thirds of whose time was spent in such construction work as building new power lines and extensions; since World War II the demand for electrical service had been so great that independent contractors had to be employed to do much of the necessary construction work. All of respondent's construction work, regardless of who was actually performing it, was done under the supervision of an engineering firm with which respondent has an engineering service contract. Testimony as to the construction of substations was not altogether consistent; however, stated most favorably to petitioner—and that is the light in which the Court of Appeals considered it—that evidence was to the effect

---

dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death.

. . . . .

"§ 72–123. Only one remedy available.

"Either the acceptance of an award under this Title or the procurement and collection of a judgment in an action at law shall be a bar to proceeding further with the alternate remedy."

[3] It may be noted that not even petitioner's counsel supports the trial court's theory regarding the South Carolina Workmen's Compensation Law.

that respondent had with its own facilities constructed three substations, although it had built none of the six it was operating at the time petitioner was injured, nor was respondent at that time employing personnel capable of constructing substations. The construction work in connection with which petitioner was injured was clearly among the functions respondent was empowered to perform by the statute under which it was organized; moreover, this construction was necessary to the discharge of respondent's duty to serve the area in which it operated. Finally, respondent was the "main actor" in this particular construction project: it secured the necessary financing; its consulting engineer prepared the plans (approved by respondent) and supervised the construction; it purchased the materials of which the substations were constructed; it had the responsibility of de-energizing and re-energizing existing lines that were involved in the work. From this evidence the Court of Appeals was satisfied that "there can be no doubt that Blue Ridge was not only in the business of supplying electricity to rural communities, but also in the business of constructing the lines and substations necessary for the distribution of the product," 238 F. 2d 346, 351. The Court of Appeals, having concluded that respondent's defense should have been sustained, directed the District Court to enter judgment for the respondent. The District Court had decided the question of whether or not respondent was a statutory employer without submitting it to the jury. It is not altogether clear whether it did so because it thought it essentially a nonjury issue, as it is in the South Carolina courts under *Adams* v. *Davison-Paxon Co.*, 230 S. C. 532, 96 S. E. 2d 566, or because there was no controverted question of fact to submit to the jury.

The construction of the state law by the Court of Appeals is clearly supported by the decisions of the Supreme Court of South Carolina, and so we need not rest on the

usual respect to be accorded to a reading of a local statute by a Federal Court of Appeals. *Estate of Spiegel* v. *Commissioner,* 335 U. S. 701, 708. It is clear from the state cases that a determination as to whether a defendant is an "employer" for purposes of § 72–111 will depend upon the entire circumstances of the relationship between such defendant and the work being done on its behalf; no single factor is determinative. Both the approach of the Court of Appeals and the conclusions that it reached from the evidence in this case are entirely consistent with prior declarations of South Carolina law by the highest court of that State.[4]

In holding respondent a statutory employer, the Court of Appeals was giving the South Carolina Workmen's Compensation Law the liberal construction called for by the Supreme Court of that State. In *Yeomans* v. *Anheuser-Busch, Inc.,* 198 S. C. 65, 72, 15 S. E. 2d 833, 835, that court said:

> "[T]he basic purpose of the Compensation Act is the inclusion of employers and employees, and not their exclusion; and we add that doubts of jurisdiction must be resolved in favor of inclusion rather than exclusion."

It would be short-sighted to overlook the fact that exclusion of an employer in a specific case such as this one

---

[4] For example, whether or not the defendant had ever itself performed the work contracted out has not been thought to be a conclusive criterion. In fact, in *Boseman* v. *Pacific Mills,* 193 S. C. 479, 8 S. E. 2d 878, the court rejected the defendant's contention that, because it had never performed the work in question, it could not be held an employer. See also *Hopkins* v. *Darlington Veneer Co.,* 208 S. C. 307, 38 S. E. 2d 4; *Kennerly* v. *Ocmulgee Lumber Co.,* 206 S. C. 481, 34 S. E. 2d 792. Nor is the question whether or not the accomplishment of the work involved requires specialized skill determinative. See *Marchbanks* v. *Duke Power Co.,* 190 S. C. 336, 2 S. E. 2d 825.

might well have the consequence of denying any recovery at all to other employees *vis-à-vis* this employer and others similarly situated. The Court of Appeals, through the experienced Judge Soper, recognized the short-sighted illiberality of yielding to the temptation of allowing a single recovery for negligence to stand and do violence to the consistent and legislatively intended interpretation of the statute in *Berry* v. *Atlantic Greyhound Lines,* 114 F. 2d 255, 257:

> "It may well be, and possibly this is true in the instant case, that sometimes a recovery might be had in a common law action for an amount much larger than the amount which would be received under a Compensation Act. This, though, is more than balanced by the many advantages accorded to an injured employee in a proceeding under a Compensation Act which would not be found in a common law action."

When, after the evidence was in, petitioner moved to strike respondent's defense based on § 72–111, the following colloquy ensued:

> "The Court: In the event I overrule your motion, do you contemplate putting up any testimony in reply? You have that right, of course. On this point, I mean.
>
> "Mr. Hammer [petitioner's counsel]: We haven't discussed it, but we are making that motion. I frankly don't know at this point of any reply that is necessary. I don't know of any evidence in this case—
>
> . . . . .
>
> "The Court: The reason I am making that inquiry as to whether you intend to put up any more testimony in the event I overrule your motion, counsel

> may wish to move for a directed verdict on that ground since it is a question of law. But that is his prerogative after all the evidence is in. Of course, he can't move for a directed verdict as long as you have a right to reply.
>
> "Mr. Hammer: We are moving at this time in the nature of a voluntary dismissal.
>
> "The Court: You move to dismiss that defense?
>
> "Mr. Hammer: Yes, sir, at this stage of the game."

After argument by counsel, the court made its ruling, granting petitioner's motion. Respondent having indicated its intention to move for a directed verdict, the court then said, "I will allow you to include in that Motion for Directed Verdict your defense which I have stricken, if you desire. . . ." Respondent's motion was overruled.

It is apparent that petitioner had no intention of introducing any evidence on the issue of whether respondent was his statutory employer and that he was prepared to—and did—submit the issue to the court on that basis. Clearly petitioner cannot be said to have relied upon, and thus to have been misled by, the court's erroneous construction of the law, for it was before the court had disclosed its view of the law that petitioner made apparent his willingness to submit the issue to it on the basis of respondent's evidence. If petitioner could have cast any doubt on that evidence or could have brought in any other matter relevant to the issue, it was his duty to bring it forward before the issue was submitted to the court. For counsel to withhold evidence on an issue submitted for decision until after that issue has been resolved against him would be an abuse of the judicial process that this Court surely should not countenance, however strong the philanthropic appeal in a particular case. Nor does

it appear that petitioner had any such "game" in mind. He gave not the slightest indication of an intention to introduce any additional evidence, no matter how the court might decide the issue. It seems equally clear that, had the trial court decided the issue—on any construction—in favor of the respondent, the petitioner was prepared to rely solely upon his right of appeal.

We are not to read the record as though we are making an independent examination of the trial proceedings. We are sitting in judgment on the Court of Appeals' review of the record. That court, including Chief Judge Parker and Judge Soper, two of the most experienced and esteemed circuit judges in the federal judiciary, interpreted the record as it did in light of its knowledge of local practice and of the ways of local lawyers. In ordering judgment entered for respondent, it necessarily concluded, as a result of its critical examination of the record, that petitioner's counsel chose to have the issue decided on the basis of the record as it then stood. The determination of the Court of Appeals can properly be reversed only if it is found that it was baseless. Even granting that the record is susceptible of two interpretations, it is to disregard the relationship of this Court to the Courts of Appeals, especially as to their function in appeals in diversity cases, to substitute our view for theirs.

The order of the Court of Appeals that the District Court enter judgment for the respondent is amply sustained on either theory as to whether or not the issue was one for the court to decide. If the question is for the court, the Court of Appeals has satisfactorily resolved it in accordance with state decisions. And if, on the other hand, the issue is such that it would have to be submitted to the jury if there were any crucial facts in controversy, both the District Court and the Court of Appeals agreed that there was no conflict as to the rele-

vant evidence—not, at any rate, if such inconsistency as existed was resolved in favor of petitioner. According to the governing view of South Carolina law, as given us by the Court of Appeals, that evidence would clearly have required the District Court to grant a directed verdict to the respondent. Accordingly, I would affirm the judgment.

MR. JUSTICE HARLAN, dissenting.

I join in MR. JUSTICE FRANKFURTER'S dissenting opinion, but desire to add two further reasons why I believe the judgment of the Court of Appeals should be affirmed. As I read that court's opinion, it held that under South Carolina law the construction of facilities needed to transmit electric power was necessarily a part of the business of furnishing power, whether such construction was performed by the respondent itself or let out to others, and that in either case respondent would be liable to petitioner for compensation as his statutory employer. Since there is no dispute that respondent at the time of the accident was engaged in the business of furnishing power and that petitioner was injured while engaged in construction in furtherance of that business, I do not perceive how any further evidence which might be adduced by petitioner could change the result reached by the Court of Appeals. In any event, in the circumstances disclosed by the record before us, we should at the very least require petitioner to make some showing here of the character of the further evidence he expects to introduce before we disturb the judgment below.

PAYNE *v.* ARKANSAS.

CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

No. 99. Argued March 3, 1958.—Decided May 19, 1958.

Petitioner, a mentally dull 19-year-old Negro with a fifth-grade education, was convicted in a state court of first degree murder and sentenced to death. At his trial, there was admitted in evidence, over his objection, a confession shown by undisputed evidence to have been obtained in the following circumstances: He was arrested without a warrant and never taken before a magistrate or advised of his right to remain silent or to have counsel, as required by state law. After being held incommunicado for three days without counsel, advisor or friend, and with very little food, he confessed after being told by the Chief of Police that "there would be 30 or 40 people there in a few minutes that wanted to get him" and that, if he would tell the truth, the Chief of Police probably would keep them from coming in. *Held:* Petitioner was denied due process of law contrary to the Fourteenth Amendment; the judgment of the State Supreme Court affirming the conviction is reversed; and the cause is remanded for further proceedings not inconsistent with this opinion. Pp. 561–569.

(a) It is obvious from the *totality* of the course of conduct shown by undisputed evidence that the confession was coerced and did not constitute an "expression of free choice." Pp. 562–567.

(b) Even though there may have been sufficient evidence, apart from the coerced confession, to support a conviction, the admismission in evidence of the coerced confession, over petitioner's objection, vitiates the judgment, because it violates the Due Process Clause of the Fourteenth Amendment. Pp. 567–568.

(c) *Stein* v. *New York*, 346 U. S. 156, distinguished. P. 568, n. 15.

226 Ark. 910, 225 S. W. 2d 312, reversed and cause remanded.

Wiley A. Branton argued the cause and filed a brief for petitioner.

Thorp Thomas, Assistant Attorney General of Arkansas, argued the cause for respondent. With him on the brief was *Bruce Bennett,* Attorney General.

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

Petitioner, a 19-year-old Negro, was convicted by a jury in Jefferson County, Arkansas, of first degree murder and sentenced to death by electrocution. On appeal to the Supreme Court of Arkansas he pressed two main contentions: (1) that the trial court erred in overruling his motion to suppress, and in receiving in evidence over his objection, a coerced and false confession, and that the error takes and deprives him of his life without due process of law in violation of the Fourteenth Amendment of the Constitution, and (2) that the trial court erred in overruling his motion to quash the panel of petit jurors upon the ground that Negroes were systematically excluded, or their number limited, in the selection of the jury panel, and that the error deprives him of the equal protection of the laws and of due process of law, in violation of the Fourteenth Amendment of the Constitution. The court held that these contentions were without merit and affirmed the judgment. 226 Ark. 910, 295 S. W. 2d 312. He then applied to us for a writ of certiorari, based on these contentions, which we granted because the constitutional questions presented appeared to be substantial. 353 U. S. 929.

We will first consider petitioner's contention that the confession was coerced, and that its admission in evidence over his objection denied him due process of law, in violation of the Fourteenth Amendment.

The use in a state criminal trial of a defendant's confession obtained by coercion—whether physical or mental—is forbidden by the Fourteenth Amendment.[1] Enforce-

[1] See, *e. g.*, *Brown* v. *Mississippi*, 297 U. S. 278; *Chambers* v. *Florida*, 309 U. S. 227; *Lisenba* v. *California*, 314 U. S. 219; *Ashcraft* v. *Tennessee*, 322 U. S. 143; *Malinski* v. *New York*, 324 U. S. 401; *Haley* v. *Ohio*, 332 U. S. 596; *Watts* v. *Indiana*, 338 U. S. 49; *Stroble* v. *California*, 343 U. S. 181; *Leyra* v. *Denno*, 347 U. S. 556;

ment of the criminal laws of the States rests principally with the state courts, and generally their findings of fact, fairly made upon substantial and conflicting testimony as to the circumstances producing the contested confession—as distinguished from inadequately supported findings or conclusions drawn from uncontroverted happenings—are not this Court's concern;[2] yet where the claim is that the prisoner's confession is the product of coercion we are bound to make our own examination of the record to determine whether the claim is meritorious. "The performance of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury, or both."[3] The question for our decision then is whether the confession was coerced. That question can be answered only by reviewing the circumstances under which the confession was made. We therefore proceed to examine those circumstances as shown by this record.

Near 6:30 p. m. on October 4, 1955, J. M. Robertson, an elderly retail lumber dealer in the City of Pine Bluff, Arkansas, was found in his office dead or dying from crushing blows inflicted upon his head. More than $450 was missing from the cash drawer. Petitioner, a 19-year-old Negro with a fifth-grade education,[4] who had been employed by Robertson for several weeks, was suspected

---

Fikes v. *Alabama,* 352 U. S. 191. These cases illustrate the settled view of this Court that the admission in evidence over objection of a coerced confession vitiates a judgment of conviction.

[2] *Watts* v. *Indiana, supra,* at 50–53. Cf. *Ashcraft* v. *Tennessee, supra,* at 153; *Malinski* v. *New York, supra,* at 404; *Haley* v. *Ohio, supra,* at 598; and *Leyra* v. *Denno, supra,* at 558.

[3] *Lisenba* v. *California, supra,* at 237–238. See also *Brown* v. *Mississippi, supra,* at 278; *Chambers* v. *Florida, supra,* at 228–229; *Haley* v. *Ohio, supra,* at 599; *Watts* v. *Indiana, supra,* at 50.

[4] Petitioner was mentally dull and "slow to learn" and was in the fifth grade when he became 15 years of age. Because of his age he was arbitrarily promoted to the seventh grade and soon thereafter quit school.

of the crime. He was interrogated that night at his home by the police, but they did not then arrest him. Near 11 a. m. the next day, October 5, he was arrested without a warrant and placed in a cell on the first floor of the city jail. Arkansas statutes provide that an arrest may be made without a warant when an officer "has reasonable grounds for believing that the person arrested has committed a felony," [5] and that when an arrest is made without a warrant the person arrested "shall be forthwith carried before the most convenient magistrate of the county in which the arrest is made," [6] and when the person arrested is brought before such magistrate it is the latter's duty to "state the charge [against the accused and to] inquire . . . whether he desires the aid of counsel [and to allow him] a reasonable opportunity" to obtain counsel.[7] It is admitted that petitioner, though arrested without a warrant, was never taken before a magistrate, and that the statutes mentioned were not complied with.

Petitioner was held incommunicado without any charge against him from the time of his arrest at 11 a. m. on October 5 until after his confession on the afternoon of October 7, without counsel, advisor or friend being permitted to see him. Members of his family who sought to see him were turned away, because the police did not "make it a practice of letting anyone talk to [prisoners] while they are being questioned." Two of petitioner's brothers and three of his nephews were, to his knowledge, brought by the police to the city jail and questioned during the evening of petitioner's arrest, and one of his brothers was arrested and held in jail overnight. Petitioner asked permission to make a telephone call but his request was denied.

---

[5] Ark Stat., 1947, § 43–403.

[6] Ark. Stat., 1947, § 43–601.

[7] Ark. Stat., 1947, § 43–605.

Petitioner was not given lunch after being lodged in the city jail on October 5, and missed the evening meal on that day because he was then being questioned in the office of the chief of police. Near 6:30 the next morning, October 6, he was taken by the police, without breakfast, and also without shoes or socks,[8] on a trip to Little Rock, a distance of about 45 miles, for further questioning and a lie detector test, arriving there about 7:30 a. m. He was not given breakfast in that city, but was turned over to the state police who gave him a lie detector test and questioned him for an extended time not shown in the record. At about 1 p. m. that day he was given shoes and also two sandwiches—the first food he had received in more than 25 hours. He was returned to the city jail in Pine Bluff at about 6:30 that evening—too late for the evening meal—and placed in a cell on the second floor. The next morning, October 7, he was given breakfast—which, except for the two sandwiches he had been given at Little Rock at 1 p. m. the day before, was the only food he had received in more than 40 hours.

We come now to an even more vital matter. Petitioner testified,[9] concerning the conduct that immediately induced his confession, as follows: "I was locked up upstairs and Chief Norman Young came up [about 1 p. m. on October 7] and he told me that I had not told him all of the story—he said that there was 30 or 40 people outside that wanted to get to me, and he said if I would come in and tell him the truth that he would probably keep them from coming in." When again asked what the chief of police had said to him on that occasion petitioner testified: "Chief Norman Young said thirty or forty people

[8] His shoes and socks had been taken from him for laboratory examination of suspected bloodstains.

[9] Petitioner took the stand both on the hearing of the motion to suppress the confession, which was held in chambers outside the presence of the jury, and upon the trial before the jury.

were outside wanting to get in to me and he asked me if I wanted to make a confession he would try to keep them out." The chief of police, on cross-examination, admitted that he had made the substance of that statement to petitioner,[10] and had told him that he would be permitted to confess to the chief "in private." In this setting, petitioner immediately agreed to make a statement to the chief. The chief then took petitioner to his private office, and almost immediately after arriving at that place there was a knock on the door. The chief opened the door and stepped outside, leaving the door ajar, and petitioner heard him say " 'He is fixing to confess now,' and he would like to have me alone." Petitioner did not know what persons or how many were outside the door. The chief re-entered his office and began questioning petitioner who orally confessed that he had committed the crime. Thereupon Sergeant Halsell of the State Police and Sheriff Norton were admitted to the room, and under questioning by Sergeant Halsell petitioner gave more details concerning the crime. Soon afterward a court reporter was called in and several businessmen were also admitted to the

---

[10] The chief of police testified:

"Q. When did the defendant first tell you he was going to confess? A. Approximately 1:00 P. M. on the afternoon of the 7th.

"Q. Now where were you at the time? A. At the time that he told me he was ready to confess he was in the jail in an upstairs cell and I was standing outside of the cell talking to him.

"Q. Were any other officers present? A. There was not.

"Q. State whether or not anything was said to the defendant to the effect that there would be 30 or 40 people there in a few minutes that wanted to get him? A. I told him that would be possible there would be that many—it was possible there could be that many.

"Q. Did you promise the defendant that he would have an opportunity to confess in private? A. I did.

"Q. Did you then go down to your office? A. We did."

room. Sergeant Halsell then requestioned petitioner and the questions and answers were taken by the reporter in shorthand. After being transcribed by the reporter, the typed transcription was returned to the room about 3 p. m. and was read and signed by petitioner and witnessed by the officers and businessmen referred to. Thus the "confession" was obtained.

At the beginning of the trial petitioner's counsel moved to suppress the confession because obtained by coercion culminating in a threat of mob violence. Following Arkansas procedure (*McClellan* v. *State*, 203 Ark. 386, 156 S. W. 2d 800), a hearing upon that motion was held before the trial judge in chambers, at which the facts above recited were shown without dispute. In addition petitioner testified that the confession did not contain the truth, and when asked why he made it, he answered: "Well, as a matter of fact lawyer Branton I was more than afraid because Chief Norman Young had already told me that there was 30 or 40 peoples outside and the way he stated it, if I hadn't, if I didn't make the confession that he would let them in, from the conversation, from the way that he told me." The trial judge overruled the motion to suppress the confession. The same evidence was then repeated before the jury, and the confession was admitted in evidence over petitioner's objection. The court instructed the jury to disregard the confession if they found it was not voluntarily made. The jury returned a general verdict finding petitioner guilty of first degree murder as charged and assessed the penalty of death by electrocution. Judgment accordingly was entered on the verdict.

That petitioner was not physically tortured affords no answer to the question whether the confession was coerced, for "[t]here is torture of mind as well as body; the will is as much affected by fear as by force. . . . A

confession by which life becomes forfeit must be the expression of free choice." *Watts* v. *Indiana,* 338 U. S. 49, 52, 53.[11] The undisputed evidence in this case shows that petitioner, a mentally dull 19-year-old youth, (1) was arrested without a warrant, (2) was denied a hearing before a magistrate at which he would have been advised of his right to remain silent and of his right to counsel, as required by Arkansas statutes, (3) was not advised of his right to remain silent or of his right to counsel, (4) was held incommunicado for three days, without counsel, advisor or friend, and though members of his family tried to see him they were turned away, and he was refused permission to make even one telephone call, (5) was denied food for long periods, and, finally, (6) was told by the chief of police "that there would be 30 or 40 people there in a few minutes that wanted to get him," which statement created such fear in petitioner as immediately produced the "confession." It seems obvious from the *totality* of this course of conduct,[12] and particularly the culminating threat of mob violence, that the confession was coerced and did not constitute an "expression of free choice," [13] and that its use before the jury, over petitioner's objection, deprived him of "that fundamental fairness essential to the very concept of justice," [14] and, hence, denied him due process of law, guaranteed by the Fourteenth Amendment.

Respondent suggests that, apart from the confession, there was adequate evidence before the jury to sustain the

---

[11] The cases of *Chambers* v. *Florida, supra,* at 240; *Lisenba* v. *California, supra,* at 237, 240; *Haley* v. *Ohio, supra,* at 600; *Ashcraft* v. *Tennessee, supra,* at 154; and *Ward* v. *Texas,* 316 U. S. 547, 555, all announce the same principle.

[12] See *Fikes* v. *Alabama, supra,* at 197.

[13] *Watts* v. *Indiana, supra,* at 53.

[14] *Lisenba* v. *California, supra,* at 236; *Lyons* v. *Oklahoma,* 322 U. S. 596, 605.

verdict. But where, as here, a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession. And in these circumstances this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment.[15]

The admitted facts, set out above, make applicable the conclusion reached in *Chambers* v. *Florida,* 309 U. S. 227, 241: "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death." The judgment must be reversed because of the admission in evidence of the coerced confession. It is therefore unnecessary at this time for us to discuss or decide the other question presented by petitioner—whether the overruling of his motion to quash the panel of petit jurors upon the ground that Negroes were systematically excluded, or their number limited, in the selection of the jury panel denied him the equal protection of the laws under the

---

[15] *Watts* v. *Indiana, supra,* at 50; *Malinski* v. *New York, supra,* at 404; *Lyons* v. *Oklahoma, supra,* at 597. *Stein* v. *New York,* 346 U. S. 156, is not to the contrary, for in that case this Court did not find that the confession was coerced. Indeed it was there recognized that when "the ruling admitting the confession is found on review to be erroneous, the conviction, at least normally, should fall with the confession. . . . [R]eliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence. A forced confession is a false foundation for any conviction . . . ." *Id.,* at 191–192.

Fourteenth Amendment—for we will not assume that the same issue will be present upon a new trial.

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

Reversed.

MR. JUSTICE HARLAN, concurring.

I join in the reversal of the judgment in this case because the Police Chief's testimony, quoted in footnote 10 of the Court's opinion, seems to me to require acceptance of petitioner's claim that his confession was induced through fear of mob violence.

MR. JUSTICE BURTON, on this record, would accept the conclusion of the state court and jury that petitioner's confession was voluntary. Therefore, he would affirm the judgment rendered. See his dissent in *Moore* v. *Michigan,* 355 U. S. 155, 165.

MR. JUSTICE CLARK, dissenting.

I believe that on this record the state courts properly held petitioner's confession voluntary. Moreover, even if the confession be deemed coerced, there is sufficient other evidence of guilt to sustain the conviction on the authority of *Stein* v. *New York,* 346 U. S. 156, 188–194 (1953). Just five years ago this Court established in *Stein* that there was no constitutional error "if the jury admitted and relied on the confession," or "rejected it and convicted on other evidence." 346 U. S., at 193–194. For purpose of making the latter determination, this Court assumed there that the confession was found coerced by the jury. It makes no difference that the determination of coercion here is by this Court rather than by the jury, for as is evident from the majority

458778 O—58——40

opinion, the inquiry is the same—whether the confession was coerced. I must apply the *Stein* rule here because the Arkansas procedure on admission of challenged confessions is identical to that which we approved in that case. See *Nolan* v. *State,* 205 Ark. 103, 104, 167 S. W. 2d 503–504; *Dinwiddie* v. *State,* 202 Ark. 562, 570, 151 S. W. 2d 93, 95–96.

CIUCCI *v.* ILLINOIS.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 157. Argued March 13, 1958.—Decided May 19, 1958.

1. In an Illinois State Court, petitioner was charged in four separate indictments with murdering his wife and three children, all of whom were found dead in a burning building with bullet wounds in their heads. In three successive trials, petitioner was convicted of the first degree murder of his wife and two children. At each of the trials the prosecution introduced into evidence the details of all four deaths. At the first two trials the jury fixed the penalty at imprisonment. At the third trial the penalty was fixed at death, and the State Supreme Court affirmed. *Held:* The State was constitutionally entitled to prosecute these individual offenses singly at separate trials, and to utilize therein all relevant evidence, in the absence of proof establishing that such a course of action entailed fundamental unfairness. *Hoag* v. *New Jersey, ante,* p. 464. Pp. 572–573.
2. In his brief in this Court, petitioner appended a number of articles which had appeared in Chicago newspapers after the first and second trials attributing to the prosecution dissatisfaction with the prison sentences and determination to prosecute petitioner until a death sentence was obtained; but neither these articles nor their subject matter was included in the record certified to this Court from the State Supreme Court. *Held:* Not being part of the record, and not having been considered by the state courts, that material may not be considered here. Pp. 572–573.
3. The judgment is affirmed, with leave to petitioner to institute such further proceedings as may be available to him for the purpose of substantiating the claim that he was deprived of due process. P. 573.

8 Ill. 2d 619, 137 N. E. 2d 40, affirmed.

George N. Leighton argued the cause for petitioner. With him on the brief were *Loring B. Moore* and *William R. Ming, Jr.*

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.

Petitioner was charged in four separate indictments with murdering his wife and three children, all of whom, with bullet wounds in their heads, were found dead in a burning building during the early hours of December 5, 1953. In three successive trials, petitioner was found guilty of the first degree murder of his wife and two of his children. At each of the trials the prosecution introduced into evidence details of all four deaths. Under Illinois law the jury is charged with the responsibility of fixing the penalty for first degree murder from 14 years' imprisonment to death. Ill. Rev. Stat., 1957, c. 38, § 360. At the first two trials, involving the death of the wife and one of the children, the jury fixed the penalty at 20 and 45 years' imprisonment respectively. At the third trial, involving the death of a second child, the penalty was fixed at death. On appeal the Supreme Court of Illinois affirmed the conviction, 8 Ill. 2d 619, 137 N. E. 2d 40, and we granted certiorari to consider petitioner's claim that this third trial violated the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. 353 U. S. 982.

It is conceded that under Illinois law each of the murders, although apparently taking place at the same time, constituted a separate crime and it is undisputed that evidence of the entire occurrence was relevant in each of the three prosecutions. In his brief in this Court petitioner has appended a number of articles which had appeared in Chicago newspapers after the first and second trials attributing to the prosecution certain statements expressing extreme dissatisfaction with the prison sen-

tences fixed by the jury and announcing a determined purpose to prosecute petitioner until a death sentence was obtained. Neither these articles nor their subject matter is included in the record certified to this Court from the Supreme Court of Illinois.

The five members of the Court who join in this opinion are in agreement that upon the record as it stands no violation of due process has been shown. The State was constitutionally entitled to prosecute these individual offenses singly at separate trials, and to utilize therein all relevant evidence, in the absence of proof establishing that such a course of action entailed fundamental unfairness. *Hoag* v. *New Jersey, ante,* pp. 464, 467; see *Palko* v. *Connecticut,* 302 U. S. 319, 328. MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN, although believing that the matters set forth in the aforementioned newspaper articles might, if established, require a ruling that fundamental unfairness existed here, concur in the affirmance of the judgment because this material, not being part of the record, and not having been considered by the state courts, may not be considered here.

Accordingly, the judgment of the Supreme Court of Illinois is affirmed, with leave to petitioner to institute such further proceedings as may be available to him for the purpose of substantiating the claim that he was deprived of due process.

It is so ordered.

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

This case presents an instance of the prosecution being allowed to harass the accused with repeated trials and convictions on the same evidence, until it achieves its desired result of a capital verdict.

Petitioner's wife and three children were found dead in a burning building. It was later established that

death was due both to the fire and to bullet wounds each had received in the head. Petitioner was first tried on an indictment charging that he had murdered his wife. At that trial the evidence was not limited to the wife's death. The deaths of the three children were also introduced, and testimony as to the cause of death of all of the victims was received. This trial was in effect a trial for the murder of all four victims for the gruesome details of each of the four deaths were introduced into evidence. Petitioner was found guilty. Under Illinois law the jury determines the sentence in a murder case between a minimum of 14 years' imprisonment and a maximum of death. Ill. Rev. Stat., 1957, c. 38, § 360. At that first trial the jury fixed the penalty at 20 years' imprisonment.

The prosecutor demanded another trial. Accordingly petitioner was next tried on a charge of murdering one of his daughters.

At the second trial the same evidence was introduced as in the first trial. Evidence concerning the four deaths once more was used. Once more all the gruesome details of the four crimes were presented to the jury. Once more the accused was tried in form for one murder, in substance for four. This time a different jury again found petitioner guilty and sentenced him to 45 years' imprisonment.

The prosecutor was still not satisfied with the result. And so a third trial was had, the one involved here.

In this third trial, petitioner was charged with murdering his son. This time petitioner objected before trial that he was being subjected to double jeopardy. He also moved to exclude testimony concerning the other deaths and after verdict he protested that he had been denied a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment. The trial court overruled those objections. At the trial complete evidence of all of the deaths and their causes was again introduced. Once more the gruesome details of four murders were presented to

a jury—the gathering of the family in their home, the fire at 2 a. m., the .22 caliber bullets in the bodies of the four victims, the borrowing by the accused of a .22 rifle, the arrival of the firemen, the autopsies at the morgue. This time a third jury sentenced petitioner to death.

In my view the Due Process Clause of the Fourteenth Amendment prevents this effort by a State to obtain the death penalty. No constitutional problem would have arisen if petitioner had been prosecuted in one trial for as many murders as there were victims. But by using the same evidence in multiple trials the State continued its relentless prosecutions until it got the result it wanted. It in effect tried the accused for four murders three consecutive times, massing in each trial the horrible details of each of the four deaths. This is an unseemly and oppressive use of a criminal trial that violates the concept of due process contained in the Fourteenth Amendment, whatever its ultimate scope is taken to be.

MR. JUSTICE BLACK concurs in this dissent on the ground that the Fourteenth Amendment bars a State from placing a defendant twice in jeopardy for the same offense.

SACHER *v.* UNITED STATES.

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

No. 828. Decided May 19, 1958.

Petitioner was convicted of violating 2 U. S. C. § 192 by failing to answer three questions put to him by a subcommittee of the Internal Security Subcommittee of the Senate Committee on the Judiciary, and his conviction was sustained by a divided Court of Appeals. *Held:* His refusal to answer related to questions not clearly pertinent to the subject on which the two-member subcommittee conducting the hearing had been authorized to take testimony. Therefore, the conditions necessary to sustain a conviction for deliberately refusing to answer questions pertinent to the authorized subject matter of a congressional hearing were wanting. Certiorari is granted and the judgment is reversed. *Watkins* v. *United States,* 354 U. S. 178. Pp. 576–578.

102 U. S. App. D. C. 264, 252 F. 2d 828, reversed and remanded.

Hubert T. Delany, Frank J. Donner and *Telford Taylor* for petitioner.

Solicitor General Rankin, Assistant Attorney General Tompkins, Philip R. Monahan and *Doris H. Spangenburg* for the United States.

PER CURIAM.

The petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. Charged in a three-count indictment for violation of R. S. § 102, as amended, 2 U. S. C. § 192, for failure to answer three questions put to him by a subcommittee of the Internal Security Subcommittee of the Senate Committee on the Judiciary, the petitioner, having waived

trial by jury, was found guilty on all counts and sentenced to six months' imprisonment and to pay a fine of $1,000. After the sentence was sustained by the Court of Appeals, 99 U. S. App. D. C. 360, 240 F. 2d 46, this Court, having granted a petition for certiorari, remanded the case, 354 U. S. 930, to the Court of Appeals for reconsideration in light of *Watkins* v. *United States,* 354 U. S. 178. On reargument before the Court of Appeals sitting *en banc,* a divided court again affirmed the conviction. 102 U. S. App. D. C. 264, 252 F. 2d 828.

The broad scope of authority vested in Congress to conduct investigations as an incident to the "legislative Powers" granted by the Constitution is not questioned. See *Watkins* v. *United States, supra,* at 215. But when Congress seeks to enforce its investigating authority through the criminal process administered by the federal judiciary, the safeguards of criminal justice become operative. The subject matter of inquiry before the subcommittee at which petitioner appeared as a witness concerned the recantation of prior testimony by a witness named Matusow. In the course of the hearing, the questioning of petitioner entered upon a "brief excursion," 99 U. S. App. D. C. 360, 367, 240 F. 2d 46, 53, into proposed legislation barring Communists from practice at the federal bar, a subject not within the subcommittee's scope of inquiry as authorized by its parent committee. Inasmuch as petitioner's refusal to answer related to questions not clearly pertinent to the subject on which the two-member subcommittee conducting the hearing had been authorized to take testimony, the conditions necessary to sustain a conviction for deliberately refusing to answer questions pertinent to the authorized subject matter of a congressional hearing are wanting. *Watkins* v. *United States, supra.* The judgment of the

Court of Appeals is therefore reversed and the cause remanded to the District Court with directions to dismiss the indictment.

Reversed.

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

MR. JUSTICE HARLAN, concurring.

In joining the Court's opinion, I am constrained to write these few words with reference to my Brother CLARK's suggestion that the Court should hear argument in this case. As the limited scope of the Subcommittee's authority is not in dispute, the controlling issue is whether the pertinency of the questions put to petitioner was of such "undisputable clarity" as to justify his punishment in a court of law for refusing to answer them. *Watkins* v. *United States*, 354 U. S. 178, 214. That issue can only be determined by scrutiny of the record, and a full-dress argument could hardly shed further light on the matter. In such circumstances prompt disposition of the case before us certainly constitutes sound judicial administration. For my part, it is abundantly evident that the pertinency of none of the three questions involved can be regarded as undisputably clear, as indeed is evidenced by the different interpretations of the record advanced by the members of this Court and of the Court of Appeals who have considered the issue.

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

Petitioner concedes that the subject matter under inquiry, the Matusow recantation, "was clearly defined by the subcommittee and [he] was specifically notified as to what that subject was at the time he was sub-

poenaed."* If any of the three questions which petitioner refused to answer is clearly pertinent to that subject, the judgment must be sustained, since a general sentence was imposed after conviction on three counts, one for each refusal. *Claassen* v. *United States,* 142 U. S. 140 (1891).

The third question, covered by the third count of the indictment, was whether petitioner was or ever had been "a member of the Lawyers' Section of the Communist Party, U. S. A." I think it obvious that the "brief excursion" into proposed legislation barring Communist lawyers from the federal courts did not carry as far as this question, which was vital to a matter in which the Committee properly was interested—petitioner's role in a Communist conspiracy to procure Matusow's recantation. The context of the question clearly relates it to the recantation rather than the proposed legislation. Just prior to asking about membership in the Lawyers' Section of the Party, the Committee asked three times whether petitioner had attended a birthday party for one Alexander Bittelman. Petitioner replied that he did not remember. The Committee already had reports that he was at the party, which numbered 50 high Communists among its guests, and that information was one of the reasons why he was called before the Committee. He then was asked if he had "any connection with the legal commission or law commission of the Communist Party," for the Committee also had information that either he or one Nathan Witt probably was the head of a group of important Communists constituting a lawyers' commission to formulate legal strategy for the party. Upon answering that he

*The concession appears in petitioner's application for certiorari last year, No. 884, 1956 Term, which we granted, 354 U. S. 930, in connection with our remand in light of *Watkins* v. *United States,* 354 U. S. 178 (1957). Nothing in the present application for certiorari controverts the concession.

"[did] not know of any such organization," he was asked the question at issue, namely, whether he was or had been a member of the Lawyers' Section of the Party. Its relationship to the Matusow recantation is confirmed by the Committee's next question, asking whether petitioner had attended a Communist meeting in 1947 "at the home of Angus Cameron," publisher of Matusow's autobiography.

When the question is viewed in context, it seems to me that pertinency is clearly established. Petitioner is a seasoned lawyer with trial experience. Both questions and answers may go afield in the examination of a witness—a truism to every trial practitioner—but that fact cannot license a witness' refusal to answer questions which are relevant.

In any event the Government should be given a chance to present oral argument on the pertinency of the question under the third count before petitioner is freed. Opportunity for a hearing is particularly important here because the issue is one that confronts the Committees of the Congress day after day. For these reasons I dissent from the summary reversal of petitioner's conviction.

BABCOCK *v.* CALIFORNIA.

APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY.

No. 853. Decided May 19, 1958.

Appeal dismissed for want of a substantial federal question.

Austin Clapp for appellant.

Roger Arnebergh and *Philip E. Grey* for appellee.

PER CURIAM.

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

NORTH WESTERN-HANNA FUEL CO. ET AL. *v.* UNITED STATES ET AL.

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

No. 861. Decided May 19, 1958.

161 F. Supp. 714, affirmed.

John F. Donelan and *Lee Loevinger* for appellants.

Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston, Robert W. Ginnane and *Charlie H. Johns* for the United States and the Interstate Commerce Commission, appellees.

Curtis H. Berg for the Canadian National Railway Co. et al., appellees.

PER CURIAM.

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

PORCHETTA *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 863. Decided May 19, 1958.

Appeal dismissed and certiorari denied.
Reported below: 167 Ohio St. 14, 145 N. E. 2d 407.

Henry Lavine for appellant.

John T. Corrigan 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 YORK TRAP ROCK CORP. *v.* TOWN OF CLARKSTOWN, NEW YORK, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 867. Decided May 19, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: 3 N. Y. 2d 844, 938, 144 N. E. 2d 725, 146 N. E. 2d 188.

John F. Lane for appellant.

PER CURIAM.

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

ALHAMBRA GOLD MINE CORP. *v.* ALHAMBRA-SHUMWAY MINES, INC.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT.

No. 880. Decided May 19, 1958.

Appeal dismissed.

Reported below: 155 Cal. App. 2d 46, 317 P. 2d 649.

Jerome Weber for appellant.

Richard Z. Lamberson for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. *Gospel Army* v. *Los Angeles,* 331 U. S. 543.

BROWNING *v.* KANSAS.

APPEAL FROM THE SUPREME COURT OF KANSAS.

No. 620, Misc. Decided May 19, 1958.

Appeal dismissed.

Reported below: 182 Kan. 244, 320 P. 2d 844.

PER CURIAM.

The appeal is dismissed.

EUBANKS *v.* LOUISIANA.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

No. 550. Argued April 30–May 1, 1958.—Decided May 26, 1958.

Petitioner, a Negro, was indicted by an all-white grand jury in Louisiana for the murder of a white woman. He moved to quash the indictment on the ground that Negroes had been systematically excluded from grand juries in the parish in which he was indicted, including the grand jury which returned the indictment against him. After a hearing, his motion was overruled, and he was tried, convicted and sentenced to death. The State Supreme Court affirmed. *Held:* The consistent exclusion of Negroes from grand juries shown by the record in this case denied petitioner the equal protection of the laws guaranteed by the Fourteenth Amendment, and the judgment is reversed. Pp. 585–589.

(a) When a jury selection plan, whatever it is, operates in such a way as always to result in the complete and long-continued exclusion of any representative at all from a large group of Negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand. *Patton* v. *Mississippi*, 332 U. S. 463. P. 587.

(b) The uniform and long-continued exclusion of Negroes from grand juries shown by the record in this case cannot be attributed to chance, to accident, or to the fact that no sufficiently qualified Negroes have ever been included in the lists submitted to the various local judges for selection as grand jurors; and it seems clear that Negroes have been consistently barred from jury service because of their race. Pp. 585–588.

(c) Local tradition cannot justify failure to comply with the constitutional mandate requiring equal protection of the laws. P. 588.

232 La. 289, 94 So. 2d 262, reversed and cause remanded.

Herbert J. Garon argued the cause for petitioner. With him on the brief was *Leopold Stahl.*

Michael E. Culligan, Assistant Attorney General of Louisiana, argued the cause for respondent. With him

on the brief were *Jack P. F. Gremillion,* Attorney General, and *Leon D. Hubert, Jr. William P. Schuler* filed an appearance for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

In an unbroken line of cases stretching back almost 80 years this Court has held that a criminal defendant is denied the equal protection of the laws guaranteed by the Fourteenth Amendment if he is indicted by a grand jury or tried by a petit jury from which members of his race have been excluded because of their race.[1] Our only concern here is with the application of this established principle to the facts disclosed by the record now before us.

The petitioner, a young Negro, was indicted by an all-white grand jury in the Parish of Orleans, Louisiana, for murder of a white woman. He moved to quash the indictment on the ground that Negroes had been systematically excluded from grand juries in the parish, including the grand jury which returned the indictment against him. After a hearing, his motion was overruled, and he was tried, convicted and sentenced to death. The Louisiana Supreme Court affirmed, holding that the record disclosed no discriminatory exclusion of Negroes from his grand jury, 232 La. 289, 94 So. 2d 262. We granted certiorari, 355 U. S. 812.

The method by which grand juries are selected in the parish is not controverted. A jury commission is

---

[1] *Strauder* v. *West Virginia,* 100 U. S. 303; *Neal* v. *Delaware,* 103 U. S. 370; *Gibson* v. *Mississippi,* 162 U. S. 565; *Carter* v. *Texas,* 177 U. S. 442; *Rogers* v. *Alabama,* 192 U. S. 226; *Martin* v. *Texas,* 200 U. S. 316; *Norris* v. *Alabama,* 294 U. S. 587; *Hale* v. *Kentucky,* 303 U. S. 613; *Pierre* v. *Louisiana,* 306 U. S. 354; *Smith* v. *Texas,* 311 U. S. 128; *Hill* v. *Texas,* 316 U. S. 400; *Akins* v. *Texas,* 325 U. S. 398; *Patton* v. *Mississippi,* 332 U. S. 463; *Cassell* v. *Texas,* 339 U. S. 282; *Hernandez* v. *Texas,* 347 U. S. 475; *Reece* v. *Georgia,* 350 U. S. 85.

458778 O—58——41

required to select, "impartially, from the citizens of the Parish of Orleans having the qualifications requisite to register as voters, the names of not less than seven hundred and fifty persons competent . . . to serve as jurors." [2] Twice each year the Commissioners draw the names of 75 persons from this group. The list of 75 is then submitted to one of the six judges of the local criminal court who, in rotation, choose a new grand jury of 12 every six months.[3] Obviously the judges have broad discretion in selecting from the list provided by the Commission. *State* v. *Dorsey,* 207 La. 928, 22 So. 2d 273. Several of them interview a substantial number of prospective jurors before making their choice. Others, including the judge who chose the jury that indicted petitioner, testified that they usually selected on the basis of personal knowledge or reputation in the community. Petitioner does not challenge this system of choosing grand jurors, as such, but he does contend that it has been administered by the local judges so that members of the Negro race have been systematically excluded from grand jury service.

Although Negroes comprise about one-third of the population of the parish, the uncontradicted testimony of various witnesses established that only one Negro had been picked for grand jury duty within memory. And this lone exception apparently resulted from the mistaken impression that the juror was white. From 1936, when the Commission first began to include Negroes in the pool of potential jurors, until 1954, when petitioner was indicted, 36 grand juries were selected in the parish. Six or more Negroes were included in each list submitted to the local judges. Yet out of the 432 jurors selected only the single Negro was chosen. Undisputed testi-

[2] La. Rev. Stat., 1950, Tit. 15, § 194.

[3] *Id.,* § 196.

mony also proved that a substantial number of the large Negro population in the parish were educated, registered to vote and possessed the qualifications required for jury service, all of which is emphasized by the fact that since 1936 the Commission has regularly selected Negroes for the grand jury panel. Indeed, Negroes have served on the federal grand jury in the parish for many years.

In *Patton* v. *Mississippi,* 332 U. S. 463, 469, this Court declared, in a unanimous opinion, that "When a jury selection plan, whatever it is, operates in such way as always to result in the complete and long-continued exclusion of any representative at all from a large group of Negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand." This is essentially the situation here. True, the judges now serving on the local court testified generally that they had not discriminated against Negroes in choosing grand juries, and had only tried to pick the best available jurors. But as Chief Justice Hughes said for the Court in *Norris* v. *Alabama,* 294 U. S. 587, 598, "If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the [Equal Protection Clause]—adopted with special reference to their protection—would be but a vain and illusory requirement." Compare *Reece* v. *Georgia,* 350 U. S. 85, 88; *Hernandez* v. *Texas,* 347 U. S. 475, 481. This is particularly true here where several of the parish judges apparently have never even interviewed a Negro in selecting grand jurors. We are reluctantly forced to conclude that the uniform and long-continued exclusion of Negroes from grand juries shown by this record cannot be attributed to chance, to accident, or to the fact that no sufficiently qualified Negroes have ever been included in the lists submitted to the various local judges. It seems

clear to us that Negroes have been consistently barred from jury service because of their race.

It may well be, as one of the parish judges recently stated, that "the selection of grand juries in this community throughout the years has been controlled by a tradition and the general thinking of the community as a whole is under the influence of that tradition." [4] But local tradition cannot justify failure to comply with the constitutional mandate requiring equal protection of the laws.

---

[4] *Louisiana* v. *Dowels*, Crim. Dist. Ct., No. 139–324, Oct. 1952 (unreported opinion). In that case the trial judge quashed an indictment because Negroes had been systematically and intentionally excluded from parish grand juries:

"Our situation in Orleans seems to be particularly vulnerable to the theory of the United States Supreme Court 'that chance and accident alone can hardly explain the continuous omission of negroes from grand juries over a long period of time' because we have five and in the last four years, six courts, selecting grand juries and the record shows that notwithstanding the number of courts that select grand juries, and regardless of which court selects a grand jury, or when that court selects a grand jury, or how that court selects a grand jury, or how often one court or all courts have selected a grand jury, or over what period of time any court or all courts continue to select grand juries, the omission of negroes is consistent, constant and the same.

. . . . . .

"While this court is conscious of its fallibility, it is firm in its opinion that this record in the Supreme Court of Louisiana or of the United States, would support no other ruling except a ruling quashing the indictment herein because of intentional and systematic exclusion of negroes from grand juries in Orleans Parish because of race and color and in violation of the Fourteenth Amendment, inclusive of the grand jury that returned the indictment in this case, because that grand jury is not differentiated from the pattern of jury selection that consistently eliminated colored persons from grand juries."

So far as appears this is the only instance in the parish where an indictment has been annulled because of racial discrimination.

"A prisoner whose conviction is reversed by this Court need not go free if he is in fact guilty, for [the State] may indict and try him again by the procedure which conforms to constitutional requirements.[5] But no State is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid. Nor is this Court at liberty to grant or withhold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty." *Hill* v. *Texas,* 316 U. S. 400, 406.

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

It is so ordered.

---

[5] For example in *Pierre* v. *Louisiana,* 306 U. S. 354, a Negro's conviction was reversed because members of his race had been discriminatorily excluded from the grand jury which indicted him. On remand another grand jury, this time composed in part of Negroes, was impaneled and returned a new indictment. The defendant was then tried and convicted by a petit jury which included a Negro. See *State* v. *Pierre,* 198 La. 619, 3 So. 2d 895.

RAINWATER ET AL., DOING BUSINESS AS R. S. RAINWATER & SONS, ET AL. *v.* UNITED STATES.

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

No. 276. Argued April 2, 1958.—Decided May 26, 1958.

A claim against the Commodity Credit Corporation, a wholly owned government corporation operating within and as a part of the Department of Agriculture as an administrative device for the purpose of carrying out federal farm programs with public funds, is a claim "against the Government of the United States, or any department or officer thereof" within the meaning of the civil provisions of the False Claims Act. Pp. 590–594.

224 F. 2d 27, affirmed.

Leon B. Catlett argued the cause and filed a brief for petitioners.

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

MR. JUSTICE BLACK delivered the opinion of the Court.

This case involves two related suits by the United States to recover damages and forfeitures under the civil provisions of the False Claims Act.[1] In each instance

[1] R. S. § 3490 (1878): "Any person . . . who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight [R. S. § 5438 (1878)] shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act . . . ."

R. S. § 5438 (1878): "Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing

the complaint alleged that the defendants had successfully presented false applications for crop loans to the Commodity Credit Corporation, a wholly owned government corporation. The defendants moved to dismiss the complaints, arguing that a claim against Commodity was not a claim "against the Government of the United States, or any department or officer thereof" as required by the Act. The District Court granted the motions to dismiss, but the Court of Appeals reversed and remanded for trial. 244 F. 2d 27. Because of a conflict in the circuits [2] we granted certiorari, 355 U. S. 811, solely to consider whether false claims against Commodity are covered by the False Claims Act.

Commodity is an "agency and instrumentality of the United States, within the Department of Agriculture, subject to the general supervision and direction of the Secretary of Agriculture." [3] It was created by Congress to support farm prices and to assist in maintaining and distributing adequate supplies of agricultural commodities. Its capital was provided by congressional appropriation. Any impairment of this capital, which at times has been great due to the nature of its activities,[4] is replaced out of the public treasury; any gains are returned to that treasury. All of its officers and other personnel are employees of the Department of Agriculture and are compensated as such. Like other government corporations, Commodity is subject to the provisions of the Government Corporation Control Act which

---

such claim to be false, fictitious, or fraudulent . . . shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."

[2] See *United States* v. *McNinch*, 242 F. 2d 359, cert. granted, 355 U. S. 808, reversed in part and affirmed in part, *post*, p. 595.

[3] See the Commodity Credit Corporation Charter Act, 62 Stat. 1070, as amended, 15 U. S. C. § 714 *et seq.*

[4] See, *e. g.*, 67 Stat. 222; 70 Stat. 238.

provides such close budgetary, auditing and fiscal controls that little more than a corporate name remains to distinguish it from the ordinary government agency.[5] In brief, Commodity is simply an administrative device established by Congress for the purpose of carrying out federal farm programs with public funds.

In our judgment Commodity is a part of "the Government of the United States" for purposes of the False Claims Act.[6] That Act was originally passed in 1863 after disclosure of widespread fraud against the Government during the War Between the States. It seems quite clear that the objective of Congress was broadly to protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims were made. Cf. *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, 544–545.[7] By any ordinary standard the language of the Act is certainly comprehensive enough to achieve this purpose. In reaching our conclusion, we are aware that the civil portion of the Act incorporates, as a test of liability, the provisions of the criminal section as they were set out in § 5438 of the Revised Statutes of 1878,[8] and that according to

---

[5] 59 Stat. 597, as amended, 31 U. S. C. § 841 *et seq.*

[6] Cf. *Cherry Cotton Mills, Inc.,* v. *United States,* 327 U. S. 536; *Inland Waterways Corp.* v. *Young,* 309 U. S. 517; *Emergency Fleet Corp.* v. *Western Union Telegraph Co.,* 275 U. S. 415.

[7] See Cong. Globe, 37th Cong., 3d Sess. 952–958. Cf. H. R. Rep. No. 2, Part 2, 37th Cong., 2d Sess.

[8] Originally Congress provided both criminal and civil sanctions in the same statute. 12 Stat. 696. By the Revised Statutes of 1878 the civil sanctions were codified as § 3490, while the criminal provisions were separately enacted as § 5438. Section 3490 permitted the Government to recover forfeitures and damages for those acts prohibited by § 5438, *e. g.,* submission of false or fraudulent claims "against the Government of the United States, or any department or officer thereof." See note 1, *supra.* The civil provisions as enacted in § 3490 have never been altered.

familiar principles the scope of these provisions should be confined to their literal terms. Yet even penal provisions must be "given their fair meaning in accord with the evident intent of Congress." *United States* v. *Raynor,* 302 U. S. 540, 552.

In 1918 Congress amended the criminal provisions of the False Claims Act so that they explicitly prohibited false claims against "any corporation in which the United States of America is a stockholder." [9] Petitioners contend that this amendment shows that the criminal provisions had not previously covered government corporations. From this they argue—relying on the rule that incorporation of a statute by reference generally does not include subsequent amendments to that statute—that the civil provisions, which have never been amended, also do not cover false claims against such corporations.

Despite its surface plausibility this argument cannot withstand analysis. At most, the 1918 amendment is merely an expression of how the 1918 Congress interpreted a statute passed by another Congress more than a half century before. Under these circumstances such interpretation has very little, if any, significance. Cf. *Higgins* v. *Smith,* 308 U. S. 473, 479–480; *United States* v. *Stafoff,* 260 U. S. 477, 480. Aside from this, the language of the 1918 amendment as well as its background indicates that Congress was primarily concerned with protecting certain government corporations, like the United States Shipping Board Emergency Fleet Corporation, chartered under local laws and organized so that private parties could share stock ownership with the United States. See 39 Stat. 731; *United States* v. *Bowman,* 260 U. S. 94, 101–102. Any expression of congressional opinion regarding that type of corporation is of little value in deciding the applicability of the False Claims Act to a

[9] 40 Stat. 1015.

wholly owned and closely controlled government instrumentality like Commodity.

None of the cases relied on by petitioner call for a result different from the one we reach. *Pierce* v. *United States,* 314 U. S. 306, where the Court refused to apply a statute making criminal the impersonation of an officer of the United States to a person posing as an officer of the Tennessee Valley Authority, concerned another statute enacted for other purposes.[10] Moreover, it rested in substantial part on the fact that the TVA Act specifically listed a number of federal criminal statutes as applicable to TVA operations but omitted the false impersonation statute. The cases presenting questions of governmental immunity, *e. g., Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U. S. 381, or intragovernmental organization, *e. g., United States ex rel. Skinner & Eddy Corp.* v. *McCarl,* 275 U. S. 1, involved nothing more than a search for congressional purpose with respect to the problems then before the Court.

Affirmed.

---

[10] Also see *United States* v. *Strang,* 254 U. S. 491. Compare *United States* v. *Walter,* 263 U. S. 15, 18, and *Emergency Fleet Corp.* v. *Western Union Telegraph Co.,* 275 U. S. 415.

UNITED STATES *v.* McNINCH, DOING BUSINESS AS HOME COMFORT CO., ET AL.

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

No. 146. Argued April 1, 1958.—Decided May 26, 1958.

1. A claim against the Commodity Credit Corporation is a claim "against the Government of the United States, or any department or officer thereof" within the meaning of the civil provisions of the False Claims Act. *Rainwater* v. *United States, ante,* p. 590. Pp. 595–596.
2. The Federal Housing Administration, an unincorporated agency in the Executive Department created by the President pursuant to congressional authority to administer a number of federal housing programs and operating with funds originally appropriated by Congress, is a part of the "Government of the United States" within the meaning of the civil provisions of the False Claims Act. Pp. 596–598.
3. A lending institution's application to the Federal Housing Administration for credit insurance is not a "claim" as that term is used in the False Claims Act. Pp. 598–600.

242 F. 2d 359, affirmed in part, reversed in part, and cause remanded.

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

A. C. Epps and *Edwin P. Gardner* argued the cause for respondents. On the briefs were *Mr. Epps* and *Charles W. Laughlin* for Cato Bros., Inc., et al., and *Mr. Gardner* and *Edward W. Mullins* for McNinch et al., respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

This case was argued with *Rainwater* v. *United States, ante,* p. 590, also decided today. It involves three separate actions by the Government to recover damages and

forfeitures under the False Claims Act.[1] These actions—which will be referred to, after the principal defendant in each instance, as *Cato, Toepleman* and *McNinch*—were initially brought in different Federal District Courts but on appeal were disposed of by the Court of Appeals in a single opinion. 242 F. 2d 359.[2]

In *Cato* and *Toepleman* the District Court found the defendants had submitted false claims for crop support loans to the Commodity Credit Corporation, and entered judgment in favor of the Government for the forfeitures provided by the False Claims Act. The Court of Appeals reversed on the ground that a false claim against Commodity was not a claim "against the Government of the United States, or any department or officer thereof" within the meaning of that Act. The sole question before us, so far as these two actions are concerned, is whether the Court of Appeals erred in so deciding. For the reasons set forth in *Rainwater* we hold that it did.

McNinch raises different questions concerning alleged false claims against the Federal Housing Administration. By statute the FHA is authorized to insure qualified banks and other private lending institutions against a substantial portion of any losses sustained by them in

---

[1] R. S. §§ 3490, 5438 (1878), which are set out in note 1, *Rainwater* v. *United States*, *ante*, p. 590.

[2] In *Cato* the suit was filed in the Eastern District of Virginia. The defendants were Cato Brothers, Inc., a Virginia corporation, and Wilfred Cato, William Cato and Magie Stone, all directors and officers of the corporation. *Toepleman* was brought in the Eastern District of North Carolina. Named as defendants were Frederick Toepleman and Garland Greenway, as individuals and partners. After trial, the District Court exonerated Greenway and he is no longer involved. In *McNinch* the action was instituted in the Eastern District of South Carolina. The defendants were Howard McNinch, Rosalie McNinch and Garis Zeigler.

lending money for the repair or alteration of homes.[3] After a lending institution has been approved by the FHA that agency promises to insure, upon payment of a specified premium, any home improvement loan made by the institution. A borrower desiring to obtain an insured loan applies directly to the private lender, which has final authority to decide whether the loan should be made. If a loan is granted, the lender reports the details to the FHA which automatically insures the loan as soon as the required premium is paid.

The Government's complaint in *McNinch* charged the defendants with causing a qualified bank to present a number of false applications for credit insurance to the FHA.[4] The defendants moved to dismiss the complaint, asserting that it failed to state a cause of action. The District Court granted the motion, holding that an application for credit insurance was not a "claim" within the meaning of the False Claims Act. The Court of Appeals affirmed on that same basis as well as on the alternative ground that a false claim against the FHA was not a claim "against the Government of the United States, or any department or officer thereof."

---

[3] In general see 48 Stat. 1246, as amended, 12 U. S. C. § 1701 *et seq.*; 24 CFR §§ 200.2–200.3, 201.1–201.16.

[4] In somewhat greater detail the complaint made the following assertions: The defendants Howard and Rosalie McNinch were officers of an unincorporated home construction business and the defendant Zeigler was one of their salesmen. The defendants presented several applications for FHA-insured loans to a qualified bank. The loans were sought on behalf of homeowners for the purpose of financing residential repairs and improvements which the business had contracted to make. The applications contained statements misrepresenting the financial eligibility of the homeowners and were accompanied by fictitious credit reports. The bank, relying on this false information, granted the loans which in turn were routinely insured by the FHA.

1. In our judgment the Court of Appeals quite plainly erred in holding that the FHA was not part of the "Government of the United States" for purposes of the False Claims Act. The FHA is an unincorporated agency in the Executive Department created by the President pursuant to congressional authorization. Its head, the Federal Housing Commissioner, is appointed by the President with the Senate's consent, and the powers of the agency are vested in him. The agency is responsible for the administration of a number of federal housing programs and operates with funds originally appropriated by Congress. In short, the FHA is about as much a part of the Government as any agency can be.

2. Although the problem is not easy, we believe the courts below were correct in holding that a lending institution's application for credit insurance under the FHA program is not a "claim" as that term is used in the False Claims Act. We acknowledge the force in the Government's argument that literally such an application could be regarded as a claim, in the sense that the applicant asserts a right or privilege to draw upon the Government's credit. But it must be kept in mind, as we explained in *Rainwater,* that in determining the meaning of the words "claim against the Government" we are actually construing the provisions of a criminal statute.[5] Such provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible to numerous definitions. See *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, 542; *United States* v. *Wiltberger,* 5 Wheat. 76, 95–96.

In normal usage or understanding an application for credit insurance would hardly be thought of as a "claim

[5] See note 8, *Rainwater* v. *United States, ante,* p. 592, and the text at that point.

against the Government." As the Court of Appeals for the Third Circuit said in this same context, "the conception of a claim against the government normally connotes a demand for money or for some transfer of public property." *United States* v. *Tieger,* 234 F. 2d 589, 591. In agreeing to insure a home improvement loan the FHA disburses no funds nor does it otherwise suffer immediate financial detriment. It simply contracts, for a premium, to reimburse the lending institution in the event of future default, if any.[6]

The False Claims Act was originally adopted following a series of sensational congressional investigations into the sale of provisions and munitions to the War Department. Testimony before the Congress painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war.[7] Congress wanted to stop this plundering of the public treasury.[8] At the same time it is equally clear that the False Claims Act was not designed to reach every kind of fraud practiced on the Government. From the language of that Act, read as a whole in the light of normal usage, and the available legislative history we are led to the conclusion that an application for credit insurance does not fairly come within the scope that Congress intended the Act to have.[9] This question has

---

[6] Since there has been no default here, we need express no view as to whether a lending institution's demand for reimbursement on a defaulted loan originally procured by a fraudulent application would be a "claim" covered by the False Claims Act.

[7] See, *e. g.,* H. R. Rep. No. 2, Part 2, 37th Cong., 2d Sess.

[8] Cong. Globe, 37th Cong., 3d Sess. 952–958.

[9] The manager of the bill in the Senate stated its objective as follows:

"I will simply say to the Senate that this bill has been prepared at the urgent solicitation of the officers who are connected with the

now been considered by the Courts of Appeals for the Third, Fourth, and Fifth Circuits, as well as by District Courts in those circuits, and all have reached the same conclusion.[10]

The judgment of the Court of Appeals is affirmed in *McNinch* and reversed in *Cato* and *Toepleman* and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

---

administration of the War Department and Treasury Department. The country, as we know, has been full of complaints respecting the frauds and corruptions practiced in *obtaining pay from the Government* during the present war; and it is said, and earnestly urged upon our attention, that further legislation is pressingly necessary to prevent *this great evil;* and I suppose there can be no doubt that these complaints are, in the main, well founded. From the attention I have been able to give the subject, I am satisfied that more stringent provisions are required for the purpose of punishing and preventing *these frauds;* and with a view to apply a more speedy and vigorous remedy in *cases of this kind* the present bill has been prepared." (Emphasis added.) Cong. Globe, 37th Cong., 3d Sess. 952.

Apparently there were no committee reports nor any record of the proceedings in the House.

[10] See *United States* v. *Tieger,* 234 F. 2d 589, cert. denied, 352 U. S. 941; *United States* v. *Cochran,* 235 F. 2d 131, cert. denied, 352 U. S. 941.

Although offered in a somewhat different context the statement of the Court in *United States* v. *Cohn,* 270 U. S. 339, 345–346, also has relevancy here:

"While the word 'claim' may sometimes be used in the broad juridical sense of 'a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty,' *Prigg* v. *Pennsylvania,* 16 Pet. 539, 615, it is clear, in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a 'claim upon or against' the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant."

MR. JUSTICE DOUGLAS, concurring in part and dissenting in part.

I agree with the Court as respects the false claims made against the Commodity Credit Corporation. I disagree as to the claims against the Federal Housing Administration. The allegations are that McNinch and others, having contracted to make alterations and improvements in various homes, presented to a South Carolina bank several fraudulent loan applications. The applications were accompanied by fictitious credit reports and misrepresented the financial eligibility of the homeowners. These loan applications were made with the intent that they be accepted by the Federal Housing Administration for insurance.[1] These are the allegations, which for present purposes we must assume are correct.

---

[1] The Federal Housing Commissioner is empowered to insure qualified lending institutions against losses sustained as a result of loans made by them for the purpose of financing alterations, repairs, and improvements upon or in connection with real property, 48 Stat. 1246, as amended, 12 U. S. C. § 1703 (a). Under the Regulations (24 CFR §§ 200.2–200.3) a lending institution is first approved by FHA to grant loans eligible for insurance and is given a contract of insurance under which the FHA in general agrees to indemnify the insured against losses sustained by it up to an aggregate amount equal to 10% of the total sums advanced by the institution in eligible loans and reported to FHA for insurance. A borrower desiring to obtain a loan makes application to the lending institution, either directly or through contractors, on an FHA form which provides for the disclosure of certain information, 24 CFR § 200.3 (a). Within 31 days after the loan is made, the lending institution must report the details of the loan transaction to the FHA on an agency form provided for that purpose, 24 CFR § 200.3 (c). After the details of the transaction have been reported to it, FHA computes the insurance premium which will be due and payable by the lending institution, records the transaction, and acknowledges the loan for insurance. *Ibid.*

458778 O—58——42

The South Carolina bank had been approved by FHA as a lending institution. The bank approved the requested loans and applied to FHA for insurance. FHA insured the loans. Thereupon the proceeds of the loans were deposited to the accounts of these respondents in the South Carolina bank.

The statute, R. S. §§ 3490, 5438, 31 U. S. C. § 231, covers anyone who fraudulently "makes or causes to be made, or presents or causes to be presented, for payment or approval . . . any claim" against the United States. No claim has been tendered against the United States for "payment." But a claim has been presented for "approval" in the meaning of the Act. For the United States has been induced by fraudulent representations to insure these loans. One who has the endorsement of the United States on his paper has acquired property of substantial value. It is a property right of value because it represents a claim against the United States. It is of course contingent until a default occurs. But when fradulent, it represents an effort to "cheat the United States" (*United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, 544) to the extent that the United States underwrites the losses on the loans. The fact that precise damages are not shown is not fatal, as *Rex Trailer Co.* v. *United States,* 350 U. S. 148, 153, holds.

This cheating of the United States is as real, as substantial, and as damaging as those specific abuses against which the managers of this legislation railed when it was before the Congress.[2] We do not have to stretch the law to include this type of "claim," as this form of insurance is a well-recognized property interest. See *Fidelity & Deposit Co.* v. *Arenz,* 290 U. S. 66. The obtaining of

---

[2] Cong. Globe, 37th Cong., 3d Sess. 952 (1863); and see H. R. Rep. No. 2, 37th Cong., 2d Sess.

credit risk insurance from the Government by fraudulent means is a form of plundering as flagrant as the presentation for "payment or approval" of any other type of claim against the Treasury. As Judge Rives said in his dissent in *United States* v. *Cochran,* 235 F. 2d 131, 135, "Inducing the Government to pledge its credit by a false and fraudulent claim" is as much within the Act as "inducing it to part with its money or property."

KOVACS *v.* BREWER.

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 200. Argued April 3, 1958.—Decided May 26, 1958.

In 1951, a New York court granted petitioner's husband a divorce and awarded custody of their five-year-old daughter to her paternal grandfather, who removed the child to North Carolina, where she has since resided. In a proceeding in 1954, the New York court modified its decree and granted custody to the mother. Fourteen months later, the mother sued in North Carolina for custody of the child, presenting a certified copy of the New York decree and claiming that it was entitled to "full faith and credit" in North Carolina, "except as to matters showing changed circumstances since the date of such decree." The North Carolina trial court found that the welfare of the child demanded that she remain in her grandfather's custody and held that it was not bound to give effect to the New York decree. The Supreme Court of North Carolina sustained the trial court, declaring, apparently as an alternative ground of decision, that the New York decree was not binding because the divorce court had no jurisdiction to modify its original custody award after the child had become a resident and domiciliary of North Carolina. *Held:* The case is remanded to the North Carolina Supreme Court for clarification of its holding, so that the courts of that State may have an opportunity to determine the issue of changed circumstances, if they have not already done so. Pp. 604–608.

245 N. C. 630, 97 S. E. 2d 96, judgment vacated and cause remanded.

Louis Haimoff argued the cause for petitioner. On the brief was *Harris B. Steinberg.*

No appearance for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

On January 17, 1951, a New York court granted George Brewer, Jr., a decree of divorce from his wife, now Aida Kovacs. Custody of their five-year-old daughter, Jane, was awarded to George Brewer, Sr., the paternal

grandfather, pending discharge of Brewer, Jr., from the Navy. As contemplated by the decree, the grandfather removed the child to his home in North Carolina where she has since resided. In November 1954 the mother asked the New York divorce court to modify its decree and award her custody of the child. Although the father and grandfather presented affidavits through counsel challenging the mother's claim, the court granted custody to her. In modifying its decree the court apparently relied, in part, on findings that the grandfather was ill with heart trouble and diabetes and that the living accommodations which he was able to provide for the child were not as suitable as those then offered by the mother.

The grandfather refused to surrender the child, but the mother took no steps to enforce her custody award until February 1956—14 months after the decree had been modified. At that time she brought the present action in a North Carolina state court to secure the child.[1] She offered a certified copy of the New York decree and asserted that it was "entitled to full faith and credit in the courts of North Carolina except as to matters showing changed circumstances since the date of such decree." The father and grandfather again challenged her right to the child. They presented numerous affidavits attesting to facts which they argued demonstrated that the child's best interests would be served by leaving her in North Carolina with the grandparents. Many of these facts had been presented to the New York court at the time the divorce decree was modified, but new evidence was also offered concerning the child's surround-

[1] Under North Carolina law "custody of children of parents who have been divorced outside of North Carolina . . . may be determined in a special proceeding instituted by either of said parents . . . ." N. C. Gen. Stat. Ann., 1950, § 50–13.

ings, her school and church experiences and her life in general, particularly with reference to the period that had elapsed between the time when the divorce court modified its decree and the date of the North Carolina proceedings.[2]

After hearing the case on affidavits, stipulations and the pleadings, the trial court made numerous findings. Among other things, it determined that for more than a year immediately preceding the hearing the grandfather had required no medical care for heart or diabetic ailments and was able to work and to properly care for his granddaughter. The court also found that a 17-year-old stepson, who had been residing in the grandfather's home at the time the New York decree was modified, had moved from the home thus leaving more space for the remaining occupants and giving the grandfather a better opportunity to provide for the grandchild. On the basis of these and other findings the trial court concluded that it was "not bound by or required to give effect to the decree of the Court of the State of New York made in 1954" and that the welfare of the child demanded that she remain under the grandfather's custody in the environment to which she had become accustomed.

On appeal the North Carolina Supreme Court approved the trial court's findings, and without specifying any particular reason upheld its "conclusion of law." The court then went on to declare, seemingly as an alternative ground of decision, that the New York decree was not binding because the divorce court had no jurisdiction to modify its original custody award after the child had become a resident and domiciliary of North Carolina. 245 N. C. 630, 97 S. E. 2d 96. We granted

---

[2] Unlike the situation in the New York modification proceeding, the child, father and grandfather were all present before the North Carolina court.

certiorari to consider the claim that the North Carolina courts had failed to give full faith and credit to the judicial proceedings of another State. 355 U. S. 810.

In this Court the petitioner, Mrs. Kovacs, contends (1) that the New York divorce court had jurisdiction to modify its decree by awarding her custody of the child, (2) that in any event the question of jurisdiction was *res judicata* in the North Carolina courts because both the father and grandfather had appeared in the New York proceeding, and (3) that the North Carolina courts failed to give the custody decree, as modified, the faith and credit required by the Federal Constitution and statute.[3] She argues that the North Carolina courts were obligated to give the custody decree the same effect as it had in New York, a question which we reserved in *New York ex rel. Halvey* v. *Halvey,* 330 U. S. 610, 615–616. As presented, the case obviously raises difficult and important questions of constitutional law, questions which we should postpone deciding as long as a reasonable alternative exists.[4]

Whatever effect the Full Faith and Credit Clause may have with respect to custody decrees, it is clear, as the Court stated in *Halvey,* "that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered." 330 U. S., at 615. Petitioner concedes

[3] Art. IV, § 1, declares: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." By statute Congress has provided that judgments "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." 28 U. S. C. § 1738.

[4] This approach is reinforced here by the fact that neither the father nor the grandfather appeared or submitted a brief in this Court in support of their right to custody.

that a custody decree is not *res judicata* in New York if changed circumstances call for a different arrangement to protect the child's health and welfare.[5] In the courts below the question of changed circumstances was raised in the pleadings, considerable evidence was introduced on that issue, and the trial court made a number of findings which demonstrated that the facts material to the proper custody of the child were no longer the same in 1956 as in 1954 when the New York decree was modified. And though it is not clear from the opinion of the North Carolina Supreme Court, it may be, particularly in view of this background, that it intended to decide the case, at least alternatively, on that basis. Under all the circumstances we think it advisable to remand to the North Carolina courts for clarification, and, if they have not already decided, so they may have an opportunity to determine the issue of changed circumstances. Cf. *Minnesota* v. *National Tea Co.*, 309 U. S. 551; *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101, 105. If those courts properly find that changed conditions make it to the child's best interest for the grandfather to have custody, decision of the constitutional questions now before us would be unnecessary. Those questions we explicitly reserve without expressly or impliedly indicating any views about them.

The judgment of the Supreme Court of North Carolina is vacated and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

---

[5] There is some indication that in New York a local custody decree may be modified whenever the best interest of the child demands, whether there have been changed circumstances or not. See, *e. g.*, 6A Gilbert-Bliss' N. Y. Civ. Prac., 1944, § 1170. Cf. *Bachman* v. *Mejias*, 1 N. Y. 2d 575, 580, 136 N. E. 2d 866, 868; *Sutera* v. *Sutera*, 1 App. Div. 2d 356, 358, 150 N. Y. S. 2d 448, 451–452.

MR. JUSTICE FRANKFURTER, dissenting.

At stake in this case is the welfare of a child. More immediately the question before us is what restriction, if any, does the Constitution of the United States impose on a state court when it is determining the custody of a child before it. The contest here for the child's custody is between her mother and her grandparents: a mother whom a New York court, in divorce proceedings while the child was present in New York, did not find to be a suitable custodian, and the grandparents, living in North Carolina, to whom the New York court decreed the custody of the child and with whom the child, now twelve years of age, has lived happily for the last six and one-half years. A second New York decree, rendered while the child was in North Carolina, awarded her custody to the mother. A North Carolina court, after a full hearing, with all the relevant parties, including the child, before it, has found that the child's welfare precludes severance of the child's custody from the grandparents.

The facts are these: Petitioner and George Brewer, Jr., son of respondent, were married in New York City in 1945. A child, Jane Elizabeth, was born to them in 1946. In 1950 Brewer, Jr., instituted a divorce action against petitioner in New York, and on January 17, 1951, the New York court granted him a divorce. Finding that "the best interests of the child" so required, that court awarded custody of Jane Elizabeth to respondent until Brewer, Jr., should be discharged from the Navy, at which time he might assume sole custody. The child was at that time both domiciled and resident in New York. After the decree was rendered petitioner went into hiding with the child. Respondent secured control of the child by writ of habeas corpus after she was found in September 1951 and took her to his home in North Carolina, where the child has been living with respondent and his wife until the

present time. Brewer, Jr., the child's father and respondent's son, is still in the Navy.

In 1954, after having married one Kovacs, petitioner applied to the New York court for a modification of the divorce decree so that custody of the child be awarded to her. In December 1954 the New York court, through a judge other than the one who had rendered the original decree, awarded to petitioner custody of the child, who was not before the court but in North Carolina, on the ground that "[t]he accommodations and surround[ing]s of the mother are acceptable for the welfare of the infant and would be more desirable for an eight year old girl, whose bringing up belongs to her mother."

Respondent refused to deliver the child to petitioner as directed by the New York decree. In February 1956 petitioner brought this suit in a North Carolina court, seeking to have respondent compelled to surrender custody of the child to petitioner and to have custody awarded to petitioner by the court. After a full hearing on the merits of the question of the child's proper custody, at which petitioner, respondent, Brewer, Jr., and the child were present, the North Carolina court denied the relief requested by petitioner; it determined that it was not required to give effect to the 1954 New York decree and awarded custody of the child to respondent.* The

*Among the many relevant circumstances the court canvassed at the hearing were the age, health, religious activities, and community interests of respondent; the suitability of his residence from the standpoint of size, location, appearance, and equipment; the training and interests of respondent's wife; the child's religious and scholastic record, associations, and health; and the educational and recreational facilities available to the child. On the basis of the evidence, the court made the following findings of fact, among others:

"13. That the petitioner, Aida Kovacs, is not a fit and proper person to have the care, custody and control of the minor, Jane Elizabeth Brewer.

"14. That George A. Brewer, Sr. is a man of excellent character,

Supreme Court of North Carolina affirmed, 245 N. C. 630, 97 S. E. 2d 96, holding that since the child was not before the New York court when it rendered the 1954 decree, that decree was without extraterritorial effect.

While there is substantial accord among the courts as to the practical outcome of cases involving the extraterritorial effect of custody decrees, there has been no little confusion and lack of clarity in the language they have employed in justifying those results. The uncritical reliance of courts, in dealing with the problem raised by this case, upon such concepts as "change of circumstances" has led one learned commentator to remark that "words have been the chief trouble-makers in this field." Stansbury, Custody and Maintenance Law Across State Lines, 10 Law & Contemp. Prob. 819, 826. Although the question presented here is a narrow one, it is of a kind that confronts state courts with great frequency: does the Federal Constitution require North Carolina to give effect to the second New York decree, awarding custody of the child to the petitioner? The evident implication of the Court's opinion today is that, unless "circumstances have changed" since the latter decree, it must be given full faith and credit.

It was the purpose of the Full Faith and Credit Clause to preclude dissatisfied litigants from taking advantage of the federal character of the Nation by relitigating in one State issues that had been duly decided in another. The clause was thus designed to promote a major policy of the law: that there be certainty and finality and an end to harassing litigation. But when courts are confronted

---

good habits and conduct, and is a fit and suitable person to have the care, custody and control of the minor, Jane Elizabeth Brewer.

"15. That the welfare, interest and development of the child will be materially promoted by allowing her to remain in the custody of George A. Brewer, Sr. and in the environment to which she has become accustomed and upon which in a measure she depends."

with the responsibility of determining the proper custody of children, a more important consideration asserts itself to which regard for curbing litigious strife is subordinated—namely, the welfare of the child. That, in the familiar phrase used by the Supreme Court of North Carolina in this case, "is the polar star by which the courts must be guided in awarding custody." 245 N. C., at 635, 97 S. E. 2d, at 100–101. When the care and protection of the minors within their borders falls to States they must be free to do "what is best for the interest of the child," *Finlay* v. *Finlay,* 240 N. Y. 429, 433, 148 N. E. 624, 626 (1925) (per Cardozo, J.); see *Queen* v. *Gyngall,* [1893] 2 Q. B. 232, 241 ("The Court is placed in a position . . . to act as supreme parent of children, and must exercise that jurisdiction in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child").

Because the child's welfare is the controlling guide in a custody determination, a custody decree is of an essentially transitory nature. The passage of even a relatively short period of time may work great changes, although difficult of ascertainment, in the needs of a developing child. Subtle, almost imperceptible, changes in the fitness and adaptability of custodians to provide for such needs may develop with corresponding rapidity. A court that is called upon to determine to whom and under what circumstances custody of an infant will be granted cannot, if it is to perform its function responsibly, be bound by a prior decree of another court, irrespective of whether "changes in circumstances" are objectively provable. To say this is not to say that a court should pay no attention to a prior decree or to the *status quo* established by it. These are, of course, among the relevant and even important circumstances that a court should consider when exercising a judgment on what the welfare of a child before it requires. See *New York ex rel. Allen* v. *Allen,*

105 N. Y. 628, 11 N. E. 143, 144 (1887) (Illinois custody decree was "a fact or circumstance bearing upon the discretion to be exercised without dictating or controlling it").

In short, both the underlying purpose of the Full Faith and Credit Clause and the nature of the decrees militate strongly against a constitutionally enforced requirement of respect to foreign custody decrees. New York itself, the State for whose decree full faith and credit is here demanded, has rejected the applicability of that requirement to custody decrees. See, *e. g., Bachman* v. *Mejias,* 1 N. Y. 2d 575, 580, 136 N. E. 2d 866, 868 (1956) ("The full faith and credit clause does not apply to custody decrees"); *New York ex rel. Herzog* v. *Morgan,* 287 N. Y. 317, 320, 39 N. E. 2d 255, 256 (1942); *New York ex rel. Allen* v. *Allen, supra; Hicks* v. *Bridges,* 2 App. Div. 2d 335, 339, 155 N. Y. S. 2d 746, 751 (1956); *New York ex rel. Kniffin* v. *Knight,* 184 Misc. 545, 550, 56 N. Y. S. 2d 108, 113 (1945). And writers on the subject have observed a marked tendency among other state courts to arrive at this same conclusion, although often spelling out their judgments in traditional terms. See Ehrenzweig, Interstate Recognition of Custody Decrees, 51 Mich. L. Rev. 345; Stansbury, *supra.*

This case vividly illustrates the evil of requiring one court, which may be peculiarly well-situated for making the delicate determination of what is in the child's best interests, to defer to a prior foreign decree, which may well be the result of a superficial or abstract judgment on what the child's welfare requires. In this case, the New York decree was rendered in a proceeding at which the child was not present—indeed, was not even within the State—by a judge who, so far as the record shows, had never seen her. Whatever force such a decree might have in New York, the Federal Constitution at all events does not require its blind acceptance elsewhere. The mini-

mum nexus between court and child that must exist before the court's award of the child's custody should carry any authority is that the court should have been in a position adequately to inform itself regarding the needs and desires of the child, of what is in the child's best interests. And the very least that should be expected in order that the investigation be responsibly thorough and enlightening is that the child be physically within the jurisdiction of the court and so available as a source for arriving at Solomon's judgment. See Stumberg, The Status of Children in the Conflict of Laws, 8 U. of Chi. L. Rev. 42, 56, 58, 62. To dispense with this requirement is seriously to undermine the conscientious efforts that most state courts expend to carry out their functions in child custody cases in a responsible way.

Whatever may be the Court's formal disavowal, a federal question can be found for review here only if the Court requires, however implicitly, that North Carolina give full faith and credit to the second New York decree. For if the Supreme Court of North Carolina is obliged to find that "circumstances have changed" since the second New York decree in order not to be bound by it, it must be that that decree has legal significance under the Full Faith and Credit Clause. The State Supreme Court has already declared unqualifiedly—not as an "alternative ground" but as a necessary disposition of a constitutional claim—that it is not bound by the New York decree. But now the North Carolina decree is allowed to stand only if the highest court of that State will shelter its basis for leaving the custody of this child to the grandparents, under whose nurturing care she has been all these years, by labeling the factors that have led to this determination as "changed circumstances" from what the absentee court had found. Inevitably this is to open the door wide to evasion of the Full Faith and Credit Clause after finding in it a command regarding

custody decrees that it does not carry. The Supreme Court of Errors of Connecticut pointed out almost fifty years ago that, "[a]s a finding of changed conditions is one easily made when a court is so inclined, and plausible grounds therefor can quite generally be found, it follows that the recognition extraterritorially which custody orders will receive or can command is liable to be more theoretical than of great practical consequence." *Morrill* v. *Morrill,* 83 Conn. 479, 492–493, 77 A. 1, 6 (1910). See also Stumberg, Principles of Conflict of Laws (2d ed.), 328–329.

This Court should indeed be rigorous in avoiding constitutional issues where a reasonable alternative exists. But a constitutional issue cannot be, and is not, avoided when a ruling is made that necessarily—and not the less because it does so impliedly—includes it. To what end must the Supreme Court of North Carolina justify its determination that the child should remain with her grandfather, by finding that there has been a change from the conditions under which the New York decree was rendered, unless in default of such a justification that court must be held to have disregarded its constitutional duty to give full faith and credit to the New York decree? If this construction as to the extraterritorial enforceability of the *in absentia* New York decree is not the necessarily implied meaning of today's decision, it can mean only that this Court is enforcing the local North Carolina law of conflicts as to the respect to be paid the prior New York decree.

To be sure, there are situations where the Court properly disavows passing on a constitutional question because it is not clear whether it is here. If a state court judgment rests on an unclear admixture of federal and state grounds and therefore does not of itself disclose the required federal question as a basis for this Court's jurisdiction, the ambiguity may be removed by remanding

the case to the state court for a clarifying opinion or an appropriate certificate. But surely it cannot be said of the decision under review, as was true in *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 555, that "there is considerable uncertainty as to the precise grounds for the decision [of the state court]." Any uncertainty is here interpolated; the North Carolina opinion carries no ambiguity. When this case goes back to the North Carolina Supreme Court, that court, with entire respect for this Court's action, accepting the Court's formal disavowal, may say it rightfully exercised its jurisdiction under local law in not being concerned with "changed circumstances" relating to the absentee New York decree of 1954, because the North Carolina court, with the child before it, on its view of controlling North Carolina law, need justify its custodial decree only by considering whether the child's interests require a change in its custody from the present propitious circumstances. And this for the reason that the Court purports not to suggest to the North Carolina court its duty under the United States Constitution to respect the New York decree of 1954 unless there be a finding that the circumstances on which that decree was based have changed.

I would affirm the judgment of the Supreme Court of North Carolina.

Syllabus.

INTERNATIONAL ASSOCIATION OF MACHINISTS ET AL. *v.* GONZALES.

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT.

No. 31. Argued December 12, 1957.—Decided May 26, 1958.

Claiming to have been expelled from membership in an international union and its local union in violation of his rights under the constitutions and by-laws of the unions, a former union member sued in a California State Court for restoration of his membership and for damages for his illegal expulsion. The Court entered judgment ordering his reinstatement and awarding him damages for lost wages and physical and mental suffering. *Held:* The National Labor Relations Act as amended, does not exclude this exercise of state power, and the judgment is affirmed. Pp. 618–623.

(a) The protection of union members in their contractual rights as members has not been undertaken by federal law, and state power to order reinstatement in a union is not precluded by the fact that the union's conduct may also involve an unfair labor practice and there is a remote possibility of conflict with enforcement of national policy by the National Labor Relations Board. Pp. 618–620.

(b) Likewise, a state court can award damages for breach of the contract by wrongful ouster, since, even if the Board could award back pay, it could not compensate for other injuries suffered by an ousted union member, and the danger of conflict with federal policy is no greater than from an order of reinstatement. Pp. 620–623.

142 Cal. App. 2d 207, 298 P. 2d 92, affirmed.

Plato E. Papps and *Eugene K. Kennedy* argued the cause for petitioners. With them on the brief was *Bernard Dunau.*

Lloyd E. McMurray argued the cause and filed a brief for respondent.

458778 O—58——43

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Claiming to have been expelled from membership in the International Association of Machinists and its Local No. 68 in violation of his rights under the constitution and by-laws of the unions, respondent, a marine machinist, brought this suit against the International and Local, together with their officers, in a Superior Court in California for restoration of his membership in the unions and for damages due to his illegal expulsion. The case was tried to the court, and, on the basis of the pleadings, evidence, and argument of counsel, detailed findings of fact were made, conclusions of law drawn, and a judgment entered ordering the reinstatement of respondent and awarding him damages for lost wages as well as for physical and mental suffering. The judgment was affirmed by the District Court of Appeal, 142 Cal. App. 2d 207, 298 P. 2d 92, and the Supreme Court of California denied a petition for hearing. We brought the case here, 352 U. S. 966, since it presented another important question concerning the extent to which the National Labor Relations Act, 49 Stat. 449, as amended, 29 U. S. C. §§ 141–188, has excluded the exercise of state power.

The crux of the claim sustained by the California court was that under California law membership in a labor union constitutes a contract between the member and the union, the terms of which are governed by the constitution and by-laws of the union, and that state law provides, through mandatory reinstatement and damages, a remedy for breach of such contract through wrongful expulsion. This contractual conception of the relation between a member and his union widely prevails in this country and has recently been adopted by the House of Lords in *Bonsor* v. *Musicians' Union,* [1956] A. C. 104. It has been the law of Cali-

fornia for at least half a century. See *Dingwall* v. *Amalgamated Assn. of Street R. Employees,* 4 Cal. App. 565, 88 P. 597. Though an unincorporated association, a labor union is for many purposes given the rights and subjected to the obligations of a legal entity. See *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, 383–392; *United States* v. *White,* 322 U. S. 694, 701–703.

That the power of California to afford the remedy of reinstatement for the wrongful expulsion of a union member has not been displaced by the Taft-Hartley Act is admitted by petitioners. Quite properly they do not attack so much of the judgment as orders respondent's reinstatement. As *Garner* v. *Teamsters Union,* 346 U. S. 485, could not avoid deciding, the Taft-Hartley Act undoubtedly carries implications of exclusive federal authority. Congress withdrew from the States much that had theretofore rested with them. But the other half of what was pronounced in *Garner*—that the Act "leaves much to the states"—is no less important. See 346 U. S., at 488. The statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation. See *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, 474–477.

Since we deal with implications to be drawn from the Taft-Hartley Act for the avoidance of conflicts between enforcement of federal policy by the National Labor Relations Board and the exertion of state power, it might be abstractly justifiable, as a matter of wooden logic, to suggest that an action in a state court by a member of a union for restoration of his membership rights is precluded. In such a suit there may be embedded circumstances that could constitute an unfair labor practice under § 8 (b)(2) of the Act. In the judgment of the

Board, expulsion from a union, taken in connection with other circumstances established in a particular case, might constitute an attempt to cause an employer to "discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . ." 61 Stat. 141, 29 U. S. C. § 158 (b)(2). But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. The proviso to § 8 (b)(1) of the Act states that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ." 61 Stat. 141, 29 U. S. C. § 158 (b)(1). The present controversy is precisely one that gives legal efficacy under state law to the rules prescribed by a labor organization for "retention of membership therein." Thus, to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights. Such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of the national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act. See *United Constr. Workers* v. *Laburnum Constr. Corp.*, 347 U. S. 656.

Although petitioners do not claim that the state court lacked jurisdiction to order respondent's reinstatement, they do contend that it was without power to fill out this

remedy by an award of damages for loss of wages and suffering resulting from the breach of contract. No radiation of the Taft-Hartley Act requires us thus to mutilate the comprehensive relief of equity and reach such an incongruous adjustment of federal-state relations touching the regulation of labor. The National Labor Relations Board could not have given respondent the relief that California gave him according to its local law of contracts and damages. Although, if the unions' conduct constituted an unfair labor practice, the Board might possibly have been empowered to award back pay, in no event could it mulct in damages for mental or physical suffering. And the possibility of partial relief from the Board does not, in such a case as is here presented, deprive a party of available state remedies for all damages suffered. See *International Union, United Automobile Workers* v. *Russell, post,* p. 634.

If, as we held in the *Laburnum* case, certain state causes of action sounding in tort are not displaced simply because there may be an argumentative coincidence in the facts adducible in the tort action and a plausible proceeding before the National Labor Relations Board, a state remedy for breach of contract also ought not be displaced by such evidentiary coincidence when the possibility of conflict with federal policy is similarly remote. The possibility of conflict from the court's award of damages in the present case is no greater than from its order that respondent be restored to membership. In either case the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member. This is emphasized by the fact that the subject matter of the litigation in the present case, as the parties and the court conceived it, was the breach of a contract governing the

relations between respondent and his unions.* The suit did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice under § 8 (b)(2). This important distinction between the purposes of federal and state regulation has been aptly described: "Although even these state court decisions may lead to possible conflict between the federal labor board and state courts they do not present potentialities of conflicts in kind or degree which require a hands-off directive to the states. A state court decision requiring restoration of membership requires consideration of and judgment upon matters wholly outside the scope of the National Labor Relations Board's determination with reference to employer discrimination after union ouster from membership. The state court proceedings deal with arbitrariness and misconduct vis-à-vis the individual union members and the union; the Board proceeding,

*"In determining the question of whether the exclusive jurisdiction to grant damages in a case of this kind lies in the Labor Relations Board, it is first necessary to determine the character of the pleadings and issues in this case. The petition alleged a breach of contract between the union and plaintiff, one of its members. . . . It took the form of a petition for writ of mandate because damages alone would not be adequate to restore to petitioner the things of value he had lost by reason of the breach. No charge of 'unfair labor practices' appears in the petition. The answer to the petition denied its allegations and challenged the jurisdiction of the court, but said nothing about unfair labor practices. The evidence adduced at the trial showed that plaintiff, because of his loss of membership, was unable to obtain employment and was thereby damaged. However, this damage was not charged nor treated as the result of an unfair labor practice but as a result of the breach of contract. Thus the question of unfair labor practice was not raised nor was any finding on the subject requested of, or made by, the court." 142 Cal. App. 2d 207, 217, 298 P. 2d 92, 99.

looking principally to the nexus between union action and employer discrimination, examines the ouster from membership in entirely different terms." Isaacson, Labor Relations Law: Federal versus State Jurisdiction, 42 A. B. A. J. 415, 483.

The judgment is

Affirmed.

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

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE DOUGLAS joins, dissenting.

By sustaining a state-court damage award against a labor organization for conduct that was subject to an unfair labor practice proceeding under the Federal Act, this Court sanctions a duplication and conflict of remedies to which I cannot assent. Such a disposition is contrary to the unanimous decision of this Court in *Garner* v. *Teamsters C. & H. Local Union,* 346 U. S. 485.

In *Garner,* we rejected an attempt to secure preventive relief under state law for conduct over which the Board had remedial authority. We held that the necessity for uniformity in the regulation of labor relations subject to the Federal Act forbade recourse to potentially conflicting state remedies. The bases of that decision were clearly set forth:

> "Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.[1]
>
> . . . . .

[1] 346 U. S., at 490.

> "Further, even if we were to assume, with petitioners, that distinctly private rights were enforced by the state authorities, it does not follow that the state and federal authorities may supplement each other in cases of this type. The conflict lies in remedies, not rights. The same picketing may injure both public and private rights. But when two separate remedies are brought to bear on the same activity, a conflict is imminent." [2]

The two subsequent opinions of this Court that have undertaken to restate the holding in *Garner*, one of them written by the author of today's majority opinion, confirm its prohibition against duplication of remedies. *Weber* v. *Anheuser-Busch*, 348 U. S. 468, 479; [3] *United Constr. Workers* v. *Laburnum Constr. Corp.*, 347 U. S. 656, 663, 665.[4] And if elucidating litigation was required to dispel the Delphic nature of that doctrine, the requisite concreteness has been adequately supplied. This Court has consistently turned back efforts to utilize state remedies for conduct subject to proceedings for relief under the Federal Act. *District Lodge 34, Int'l*

---

[2] 346 U. S., at 498–499.

[3] "In *Garner* the emphasis was not on two conflicting labor statutes but rather on two similar remedies, one state and one federal, brought to bear on precisely the same conduct."

[4] "In the *Garner* case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. . . . The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived."

And see *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1, 6: "The National Act expressly deals with the conduct charged to appellant which was the basis of the state tribunals' actions. Therefore, if the National Board had not declined jurisdiction, state action would have been precluded by our decision in *Garner* v. *Teamsters Union*, ..."

Assn. of Machinists v. *L. P. Cavett Co.*, 355 U. S. 39; *Local Union 429, Int'l Brotherhood of Electrical Workers* v. *Farnsworth & Chambers Co.*, 353 U. S. 969; *Retail Clerks International Assn.* v. *J. J. Newberry Co.*, 352 U. S. 987; *Pocatello Building & Constr. Trades Council* v. *C. H. Elle Constr. Co.*, 352 U. S. 884; *Building Trades Council* v. *Kinard Constr. Co.*, 346 U. S. 933. With the exception of cases allowing the State to exercise its police power to punish or prevent violence, *United A., A. & A. I. W.* v. *Wisconsin Employment Relations Board*, 351 U. S. 266; *Youngdahl* v. *Rainfair, Inc.*, 355 U. S. 131, the broad holding of *Garner* has never been impaired. Certainly *United Constr. Workers* v. *Laburnum Constr. Corp., supra,* did not have that effect. The *Laburnum* opinion carefully notes that the Federal Act excludes conflicting state procedures, and emphasizes that "Congress has neither provided nor suggested any substitute" [5] for the state relief there being sustained.[6]

The principles declared in *Garner* v. *Teamsters C. & H. Local Union, supra,* were not the product of imperfect consideration or untried hypothesis. They comprise the fundamental doctrines that have guided this Court's preemption decisions for over a century. When Congress, acting in a field of dominant federal interest as part of a comprehensive scheme of federal regulation, confers rights and creates remedies with respect to certain conduct, it has expressed its judgment on the desirable scope of regulation, and state action to supplement it is as "conflicting," offensive and invalid as state action in derogation. *E. g., Pennsylvania* v. *Nelson*, 350 U. S. 497; *Mis-*

[5] 347 U. S., at 663.

[6] Speaking of the *Laburnum* case in *Weber* v. *Anheuser-Busch*, 348 U. S. 468, 477, the Court stated that "this Court sustained the state judgment on the theory that there was no compensatory relief under the federal Act and no federal administrative relief with which the state remedy conflicted."

souri P. R. Co. v. *Porter,* 273 U. S. 341; *Houston* v. *Moore,* 5 Wheat. 1, 21–23. This is as true of a state common-law right of action as it is of state regulatory legislation. *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426. As recently as *Guss* v. *Utah Labor Relations Board,* 353 U. S. 1, we had occasion to re-emphasize the vitality of these pre-emption doctrines in a labor case where, due to NLRB inaction, the conduct involved was either subject to state regulation or it was wholly unregulated. We set aside a state-court remedial order directed at activity that had been the subject of unfair labor practice charges with the Board, declaring that: "the [secession of jurisdiction] proviso to § 10 (a) is the exclusive means whereby States may be enabled to act concerning the matters which Congress has entrusted to the National Labor Relations Board." [7]

That the foregoing principles of pre-emption apply to the type of dispute involved in this case cannot be doubted. Comment hardly need be made upon the comprehensive nature of the federal labor regulation in the Taft-Hartley Act. One of its declared purposes is "to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce . . . ." [8] The Act deals with the very conduct involved in this case by declaring in § 8 (b)(2) that it shall be an unfair labor practice for a labor organization to cause or attempt to cause an employer to discriminate in regard to hire or tenure of employment against an employee who has been denied union membership on some ground other than failure to tender periodic dues.[9] The evidence disclosed the probability of a § 8 (b)(2) unfair labor practice in the union's refusal to

[7] 353 U. S., at 9.

[8] 29 U. S. C. § 141.

[9] 29 U. S. C. § 158 (b)(2).

dispatch Gonzales from its hiring hall after his expulsion from membership and his inability thereafter to obtain employment. If a causal relation between the nondispatch and the refusal to hire is an essential element of § 8 (b)(2),[10] there was ample evidence to satisfy that requirement. A few months after Gonzales' expulsion, the union signed a multiemployer collective bargaining agreement with a hiring-hall provision. One witness testified that there was no material difference between hiring procedures before and after the date of that agreement.[11] There were other indications to the same effect.[12] In any event, since the uncontested facts disclose the probability of a § 8 (b)(2) unfair labor practice, the existence of the same must for pre-emption purposes be assumed. As we said in *Weber* v. *Anheuser-Busch, supra,* at 478, "The point is rather that the Board, and not the state court, is empowered to pass upon such issues in the first instance."

Assuming that the union conduct involved constituted a § 8 (b)(2) unfair labor practice,[13] the existence of a conflict of remedies in this case cannot be denied. Section 10 (c) of the Act empowers the Board to redress such conduct by requiring the responsible party to reimburse the worker for the pay he has lost. Relying upon the identical conduct on which the Board would premise its back-

---

[10] But cf. *International Union of Operating Engineers, Local No. 12,* 113 N. L. R. B. 655, 662–663, enforcement granted, 237 F. 2d 670.

[11] Reply Brief for Petitioner, p. 4; R. 73–74, 134.

[12] The state appellate court concluded that "employers of the type of labor provided by members of this organization only hire through the union hiring hall." 142 Cal. App. 2d 207, 214, 298 P. 2d 92, 97. The opening statement for Gonzales in the trial court declared that "everytime he applies for a job, he is told to go to the hall to get a clearance . . . ." R. 36. Gonzales' testimony on that subject was excluded as hearsay. R. 60–61.

[13] It is unnecessary to consider whether a § 8 (b)(1)(A) violation was also involved.

pay award,[14] the state court has required of the union precisely what the Board would require: that Gonzales be made whole for his lost wages. Such a duplication and conflict of remedies is the very thing this Court condemned in *Garner*.

The further recovery of $2,500 damages for "mental suffering, humiliation and distress" serves to aggravate the evil. When Congress proscribed union-inspired job discriminations and provided for a recovery of lost wages by the injured party, it created all the relief it thought necessary to accomplish its purpose. Any additional redress under state law for the same conduct cannot avoid disturbing this delicate balance of rights and remedies. The right of action for emotional disturbance, like the punitive recovery the plaintiff sought unsuccessfully in this case, is a particularly unwelcome addition to the scheme of federal remedies because of the random nature of any assessment of damages. Without a reliable gauge to which to relate their verdict, a jury may fix an amount in response to those "local procedures and attitudes toward labor controversies" from which the *Garner* case sought to isolate national labor regulation. The prospect of such recoveries will inevitably exercise a regulatory effect on labor relations.

The state and federal courts that have considered the permissibility of damage actions for the victims of job discrimination lend their weight to the foregoing conclusion. While most sustain the State's power to reinstate members wrongfully ousted from the union, they are unanimous in denying the State's power to award dam-

---

[14] The cause of action under state law arose when the union denied Gonzales the benefits of membership by refusing dispatch. Subsequent employer refusals to hire merely established the damages. With the unfair labor practice, on the other hand, employer refusal or failure to hire is an essential element of the wrongful conduct. In either case Gonzales is required to prove the same union and employer conduct to qualify for compensation.

ages for the employer discriminations that result from nonmembership.[15]

The legislative history and structure of the Federal Act lend further support to a conclusion of pre-emption. While § 8 (b)(2) and the other provisions defining unfair labor practices on the part of labor organizations were first introduced in the Taft-Hartley Act, similar conduct by an employer had been an unfair labor practice under § 8 (3) of the Wagner Act, 49 Stat. 452. Committee reports dealing with that provision leave no doubt that the Congress was prescribing a complete code of federal labor regulation that did not contemplate actions in the state court for the same conduct.

> "The Board is empowered, according to the procedure provided in section 10, to prevent any person from engaging in any unfair labor practice listed in section 8 'affecting commerce', as that term is defined in section 2 (7). This power is vested exclusively in the Board and is not to be affected by any other means of adjustment or prevention.
>
> . . . . . .
>
> "The most frequent form of affirmative action required in cases of this type is specifically provided for, i. e., the reinstatement of employees with or without back pay, as the circumstances dictate. *No private right of action is contemplated.*"[16] (Emphasis supplied.)

---

[15] *Born* v. *Laube,* 213 F. 2d 407, rehearing denied, 214 F. 2d 349; *McNish* v. *American Brass Co.,* 139 Conn. 44, 89 A. 2d 566; *Morse* v. *Local Union No. 1058 Carpenters and Joiners,* 78 Idaho 405, 304 P. 2d 1097; *Sterling* v. *Local 438, Liberty Assn. of Steam and Power Pipe Fitters,* 207 Md. 132, 113 A. 2d 389; *Real* v. *Curran,* 285 App. Div. 552, 138 N. Y. S. 2d 809; *Mahoney* v. *Sailors' Union of the Pacific,* 45 Wash. 2d 453, 275 P. 2d 440.

[16] H. R. Rep. No. 1147 on S. 1958, 74th Cong., 1st Sess. 23–24; H. R. Rep. No. 972 on S. 1958, 74th Cong., 1st Sess. 21; H. R. Rep. No. 969 on H. R. 7978, 74th Cong., 1st Sess. 21.

There is nothing in the Taft-Hartley amendments that detracts in the slightest from this unequivocal declaration that private rights of action are not contemplated within the scheme of remedies Congress has chosen to prescribe in the regulation of labor relations.[17] It is consistent with every indication of legislative intent. As the Act originally passed the House, § 12 created a private right of action in favor of persons injured by certain unfair labor practices.[18] The Senate rejected that approach, and the Section was deleted by the Conference.

Special considerations prompted adoption of a Senate amendment creating an action for damages sustained from one unfair labor practice, the secondary boycott.[19]

---

[17] The new Act deleted the provision in § 10 (a) that the Board's power to prevent unfair labor practices was "exclusive," but the Committee reports make abundantly clear that the deletion was only made to avoid conflict with the new provisions authorizing a federal-court injunction against unfair labor practices (§ 10 (j) and (*l*), 29 U. S. C. § 160 (j) and (*l*)), and the provision making unions suable in the federal courts (§ 301, 29 U. S. C. § 185). H. R. Conf. Rep. No. 510 on H. R. 3020, 80th Cong., 1st Sess. 52. *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183.

[18] H. R. 3020, 80th Cong., 1st Sess.; H. R. Rep. No. 245 on H. R. 3020, 80th Cong., 1st Sess. 43–44.

[19] § 303, Labor Management Relations Act of 1947, 29 U. S. C. § 187. An examination of the Committee reports and debates concerning this provision reveals that the additional relief was a product of congressional concern that, for this type of conduct, the Board's ordinary cease-and-desist order was "a weak and uncertain remedy." Corrective action was entirely in the discretion of the Board, and the delay involved in setting its processes in motion could work a great hardship on the victims of the boycott. S. Rep. No. 105 on S. 1126, Supp. Views, 80th Cong., 1st Sess. 54–55; 93 Cong. Rec. 4835–4838. The Senate rejected a proposal for injunctive relief in the state courts (93 Cong. Rec. 4847), but created this federal right of action for damages. Senator Taft, the author of the amendment, voiced its two objectives: it would effect restitution for the injured parties (93 Cong. Rec. 4844, 4858), and "the threat of a suit for damages is a tremendous deterrent to the institution of secondary boycotts and jurisdictional strikes" (93 Cong. Rec. 4858).

Aside from the obvious argument that the express inclusion of one private action in the scheme of remedies provided by the Act indicates that Congress did not contemplate others, the content of § 301 furnishes another distinguishing feature. The right of action is federal in origin, assuring the uniformity of substantive law so essential to matters having an impact on national labor regulation.[20] The right of action that the majority sanctions here, on the other hand, is a creature of state law and may be expected to vary in content and effect according to the locality in which it is asserted. Free to operate as what Senator Taft characterized "a tremendous deterrent" [21] to the unfair labor practice for which it gives compensation, this damage recovery constitutes a state-created and state-administered addition to the structure of national labor regulation that cannot claim even the virtue of uniformity.

Since the majority's decision on the permissibility of a state-court damage award is at war with the policies of the Federal Act and contrary to the decisions of this Court, it is not surprising that the bulk of its opinion is concerned with the comforting irrelevancy of the State's conceded power to reinstate the wrongfully expelled. But it will not do to assert that the "possibility of conflict with federal policy" is as "remote" in the case of damages as with reinstatement. As we have seen, the Board has no power to order the restoration of union membership rights, while its power to require the payment of back pay is well recognized and often exercised. If a state court may duplicate the latter relief, and award exemplary or pain and suffering damages as well, employees will be deterred from resorting to the curative machinery of the

---

[20] "By this provision [§ 303], the Act assures uniformity, otherwise lacking, in rights of recovery in the state courts . . . ." *United Constr. Workers* v. *Laburnum Constr. Corp.*, 347 U. S. 656, 665–666.

[21] 93 Cong. Rec. 4858.

Federal Act. The majority apparently blinks at that result in order that the state court may "fill out this remedy." To avoid "mutilat[ing]" the state equity court's conventional powers of relief, the majority reaches a decision that will frustrate the remedial pattern of the Federal Act. How different that is from *Guss* v. *Utah Labor Relations Board, supra,* where the remedial authority of a State was denied *in its entirety* because Congress had "expressed its judgment in favor of uniformity."

The majority draws satisfaction from the fact that this was a suit for breach of contract, not an attempt to regulate or remedy union conduct designed to bring about an employer discrimination. But the presence or absence of pre-emption is a consequence of the effect of state action on the aims of federal legislation, not a game that is played with labels or an exercise in artful pleading. In a pre-emption case decided upon what now seem to be discarded principles,[22] the author of today's majority opinion declared: "Controlling and therefore superseding

---

[22] Compare the characterization of the *Laburnum* case in *Weber* v. *Anheuser-Busch, supra,* with the proportions that case has assumed in today's decision.

Then: "*United Constr. Workers* v. *Laburnum Constr. Corp.*, 347 U. S. 656, was an action for damages based on violent conduct, which the state court found to be a common-law tort. While assuming that an unfair labor practice under the Taft-Hartley Act was involved, this Court sustained the state judgment on the theory that there was no compensatory relief under the federal Act and no federal administrative relief with which the state remedy conflicted." 348 U. S., at 477.

Now: "If, as we held in the *Laburnum* case, certain state causes of action sounding in tort are not displaced simply because there may be an argumentative coincidence in the facts adducible in the tort action and a plausible proceeding before the National Labor Relations Board, a state remedy for breach of contract also ought not be displaced by such evidentiary coincidence when the possibility of conflict with federal policy is similarly remote." *Ante,* p. 621.

federal power cannot be curtailed by the State even though the ground of intervention be different than that on which federal supremacy has been exercised." *Weber* v. *Anheuser-Busch, supra,* at 480. I would adhere to the view of pre-emption expressed by that case and by *Garner* v. *Teamsters C. & H. Local Union, supra,* and reverse the judgment below.

458778 O—58——44

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW–CIO) ET AL. *v.* RUSSELL.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 21. Argued December 11–12, 1957.—Decided May 26, 1958.

In 1952, respondent, a nonunion employee in an industry affecting interstate commerce, brought a common-law tort action in a state court against a labor union and its agent to recover compensatory and punitive damages for malicious interference with his lawful occupation, alleging that, by mass picketing and threats of violence during a strike, they prevented him from entering the plant where he was employed and from engaging in his employment for over a month. It is assumed that such action also constituted an unfair labor practice under § 8 (b) (1) (A) of the National Labor Relations Act, as amended, for which the National Labor Relations Board could have awarded respondent back pay under § 10 (c). *Held:* The Act did not give the Board such exclusive jurisdiction over the subject matter as to preclude the state court from entertaining the action and awarding compensatory and punitive damages. Pp. 635–646.

(a) The union's activity in this case clearly was not protected by federal law. P. 640.

(b) Congress has not deprived a victim of the kind of tortious conduct here involved of his common-law rights of action for all damages suffered. *United Workers* v. *Laburnum Corp.*, 347 U. S. 656. Pp. 640–642.

(c) That, under § 10 (c) of the Federal Act, the Board had limited power to award back pay to respondent does not create such a conflict as to deprive the state courts of jurisdiction to award common-law damages for lost pay. Pp. 642–645.

(d) To hold that the limited power of the Board under § 10 (c) to award back pay in its discretion excludes the power of the State to enforce the employee's common-law rights of action would, in effect, grant to unions a substantial immunity from the consequences of mass picketing or coercion such as was employed here. Pp. 645–646.

(e) An employee's right to recover in the state courts *all* damages caused him by this kind of tortious conduct cannot fairly be said to be pre-empted without a clearer declaration of congressional policy than is found here. P. 646.

(f) The power to award punitive damages is within the jurisdiction of the state courts but not within that of the Board. P. 646.

264 Ala. 456, 88 So. 2d 175, affirmed.

J. R. Goldthwaite, Jr. argued the cause for petitioners. With him on the brief were *Harold A. Cranefield* and *Kurt L. Hanslowe.*

Norman W. Harris argued the cause and filed a brief for respondent.

MR. JUSTICE BURTON delivered the opinion of the Court.

The issue before us is whether a state court, in 1952, had jurisdiction to entertain an action by an employee, who worked in an industry affecting interstate commerce, against a union and its agent, for malicious interference with such employee's lawful occupation. In *United Workers* v. *Laburnum Corp.,* 347 U. S. 656, 657, we held that Congress had not "given the National Labor Relations Board such exclusive jurisdiction over the subject matter of a common-law tort action for damages as to preclude an appropriate state court from hearing and determining its issues where such conduct constitutes an unfair labor practice" under the Labor Management Relations Act, 1947, or the National Labor Relations Act, as amended.[1] For the reasons hereafter stated, we uphold the jurisdiction of the state courts in this case as we did in the *Laburnum* case.

This action was instituted in the Circuit Court of Morgan County, Alabama, in 1952, by Paul S. Russell,

[1] 61 Stat. 136, 29 U. S. C. § 141.

the respondent, against the petitioners, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, an unincorporated labor organization, here called the union, and its agent, Volk, together with other parties not now in the case. Russell was a maintenance electrician employed by Calumet and Hecla Consolidated Copper Company (Wolverine Tube Division) in Decatur, Alabama, at $1.75 an hour and earned approximately $100 a week. The union was the bargaining agent for certain employees of that Division but Russell was not a member of the union nor had he applied for such membership.

The allegations of his amended complaint may be summarized as follows: The union, on behalf of the employees it represented, called a strike to commence July 18, 1951. To prevent Russell and other hourly paid employees from entering the plant during the strike, and to thus make the strike effective, petitioners maintained a picket line from July 18 to September 24, 1951. This line was located along and in the public street which was the only means of ingress and egress to the plant. The line consisted of persons standing along the street or walking in a compact circle across the entire traveled portion of the street. Such pickets, on July 18, by force of numbers, threats of bodily harm to Russell and of damage to his property, prevented him from reaching the plant gates. At least one striker took hold of Russell's automobile. Some of the pickets stood or walked in front of his automobile in such a manner as to block the street and make it impossible for him, and others similarly situated, to enter the plant. The amended complaint also contained a second count to the same general effect but alleging that petitioners unlawfully conspired with other persons to do the acts above described.

The amended complaint further alleged that petitioners willfully and maliciously caused Russell to lose time from

his work from July 18 to August 22, 1951, and to lose the earnings which he would have received had he and others not been prevented from going to and from the plant. Russell, accordingly, claimed compensatory damages for his loss of earnings and for his mental anguish, plus punitive damages, in the total sum of $50,000.

Petitioners filed a plea to the jurisdiction. They claimed that the National Labor Relations Board had jurisdiction of the controversy to the exclusion of the state court. The trial court overruled Russell's demurrer to the plea. However, the Supreme Court of Alabama reversed the trial court and upheld the jurisdiction of that court, even though the amended complaint charged a violation of § 8 (b)(1)(A) of the Federal Act.[2] 258 Ala. 615, 64 So. 2d 384.

On remand, petitioners' plea to the jurisdiction was again filed but this time Russell's demurrer to it was sustained. The case went to trial before a jury and resulted in a general verdict and a judgment for Russell in the amount of $10,000, including punitive damages. On appeal, the Supreme Court of Alabama reaffirmed the Circuit Court's jurisdiction. It also affirmed the judgment for Russell on the merits, holding that Russell had proved the tort of wrongful interference with a lawful occupation. 264 Ala. 456, 88 So. 2d 175. Because of the importance of the jurisdictional issue, we granted certiorari. 352 U. S. 915.

---

[2] We assume, for the purposes of this case, that the union's conduct did violate § 8 (b)(1)(A) which provides:

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

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ." 61 Stat. 141, 29 U. S. C. § 158 (b)(1)(A).

There was much conflict in the testimony as to what took place in connection with the picketing but those conflicts were resolved by the jury in favor of Russell.[3] Accepting a view of the evidence most favorable to him, the jury was entitled to conclude that petitioners did, by mass picketing and threats of violence, prevent him from entering the plant and from engaging in his employment

---

[3] Among the instructions given to the jury were the following requested by petitioners:

"5. I charge you that unless you are reasonably satisfied from the evidence in this case that the proximate cause of [respondent's] inability to work at the Decatur plant of Calumet and Hecla Consolidated Copper Company (Wolverine Tube Division) during the period from July 18, 1951 to August 22, 1951, was that a picket line was conducted by the [petitioners] in a manner which by force and violence, or threats of force and violence prevented [respondent] from entering the plant, and unless you are also reasonably satisfied from the evidence that work would have been available to [respondent] in the plant during said period, except for picketing in such manner, you should not return a verdict for the [respondent].

"6. I charge you that unless you are reasonably satisfied from the evidence that the acts complained of by [respondent] occurred, and that the [respondent] suffered a loss of wages as the natural and proximate result of said acts, you should return your verdict for the [petitioners]."

In its main charge to the jury, the trial court included the following statement:

"If, in this case, after considering all the evidence and under the instructions I have given you, you are reasonably satisfied that at the time complained of and in doing the acts charged, the [petitioners] . . . actuated by malice and actuated by ill-will, committed the unlawful and wrongful acts alleged, you, in addition to the actual damages, if any, may give damages for the sake of example and by way of punishing the [petitioners] or for the purpose of making the [petitioners] smart, not exceeding in all the amount claimed in the complaint.

"In order to authorize the fixing of such damages, you must be reasonably satisfied from the evidence that there was present willfulness or wantonness and a reckless disregard of the rights of the other person."

from July 18 to August 22. The jury could have found that work would have been available within the plant if Russell, and others desiring entry, had not been excluded by the force, or threats of force, of the strikers.[4]

[4] On the evidence before it, the jury was entitled to find that about 400 of the employees who had attended union meetings on July 17 were in front of the plant gates at 8 o'clock the following morning. A crowd of between 1,500 and 2,000 people, including the above 400, was near the plant gates when the first shift was due to report for work at 8 a. m. Between 700 and 800 automobiles were parked along the street which led to and ended at the plant. A picket line of 25 to 30 strikers, carrying signs and walking about three feet apart, moved in a circle extending completely across the street. Adjacent to the street at that point, there was a group of about 150 people, some of whom changed places with those in the circle. On the other side of the street, there was another group of about 50 people. Many members of the first shift came, bringing their lunches, in expectation of working that day as usual. Russell was one of these and he tried to reach the plant gates. Because of the crowd, he proceeded slowly to within 20 or 30 feet of the picket line. There he felt a drag on his car and stopped. While thus stopped, the regional director of the union came to him and said, "If you are salaried, you can go on in. If you are hourly, this is as far as you can go." Russell nevertheless edged toward the entrance until someone near the picket line called out, "He's going to try to go through." Another yelled, "Looks like we're going to have to turn him over to get rid of him," and several yelled, "Turn him over." No one actually attempted to turn over Russell's car but the picket line effectively blocked his further progress. He remained there for more than an hour and a half. From time to time, he tried to ease his car forward but, when he did so, the pickets would stop walking and turn their signs toward his car, some of them touching the car. When he became convinced that he could not get through the picket line without running over somebody or getting turned over, he went home. The plant's offices were open and salaried employees worked there throughout the strike. Russell and other hourly employees necessary to operate the plant were prevented from reaching the company gates in the manner described. During the next five weeks he kept in touch with the unchanged situation at the plant entrance, and set about securing signatures to a petition of enough employees, who wished to resume work, to operate the plant. After obtaining over 200 signatures, the

This leaves no significant issue of fact for decision here. The principal issue of law is whether the state court had jurisdiction to entertain Russell's amended complaint or whether that jurisdiction had been pre-empted by Congress and vested exclusively in the National Labor Relations Board.

At the outset, we note that the union's activity in this case clearly was not protected by federal law. Indeed the strike was conducted in such a manner that it could have been enjoined by Alabama courts. *Youngdahl* v. *Rainfair, Inc.*, 355 U. S. 131; *Auto Workers* v. *Wisconsin Board*, 351 U. S. 266.

In the *Laburnum* case, *supra*, the union, with intimidation and threats of violence, demanded recognition to which it was not entitled. In that manner, the union prevented the employer from using its regular employees and forced it to abandon a construction contract with a consequent loss of profits. The employer filed a tort action in a Virginia court and received a judgment for about $30,000

---

petition was presented to the company on or about August 18. On August 20, the company advertised in a local newspaper that on August 22 the plant would resume operations. All employees were requested to report to work at 8 a. m. on August 22. At that time, about 70 state highway patrol officers and 20 local police officers were at the gates and convoyed into the plant about 230 hourly paid employees reporting for work. Russell was among them and he was immediately put to work. Thereafter, he had no difficulty in entering the plant.

There also was evidence that on August 20 the company sought to run its switch engine out of the yard to bring in cars containing copper ingots. The engine, however, was met by strikers—some of whom stood in its path. One pulled out the engine's ignition key and threw it away. Others in the crowd cut the engine's fan belts, air hoses and spark plug wires, removed the distributor head and disabled the brakes. The engine was then rolled back into the plant yard by the crew without its mission having been accomplished. There is no evidence that Russell was present on this occasion.

compensatory damages, plus $100,000 punitive damages. On petition for certiorari, we upheld the state court's jurisdiction and affirmed its judgment. We assumed that the conduct of the union constituted a violation of § 8 (b)(1)(A) of the Federal Act. Nevertheless, we held that the Federal Act did not expressly or impliedly deprive the employer of its common-law right of action in tort for damages.

This case is similar to *Laburnum* in many respects. In each, a state court awarded compensatory and punitive damages against a union for conduct which was a tort and also assumed to be an unfair labor practice. The situations are comparable except that, in the instant case, the Board is authorized, under § 10 (c) of the Federal Act, to award back pay to employees under certain circumstances. We assume, for the purpose of argument, that the Board would have had authority to award back pay to Russell.[5] Petitioners assert that the possibility of partial relief distinguishes the instant case from *Laburnum*. It is our view that Congress has not made such a distinction and that it has not, in either case, deprived a victim of the

---

[5] The Board has held that it can award back pay where a union has wrongfully caused a termination in the employee status, but not in a case such as this when a union merely interferes with access to work by one who remains at all times an employee. *In re United Furniture Workers of America, CIO,* 84 N. L. R. B. 563, 565. That view was acknowledged in *Progressive Mine Workers* v. *Labor Board,* 187 F. 2d 298, 306–307, and has been adhered to by the Board in subsequent cases. *E. g., Local 983,* 115 N. L. R. B. 1123. Petitioners contend that the Board's above interpretation of its own power conflicts with the rationale of *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, and *Virginia Electric Co.* v. *Labor Board,* 319 U. S. 533. See also, *In re United Mine Workers,* 92 N. L. R. B. 916, 920 (dissenting opinion); *United Electrical, Radio and Machine Workers,* 95 N. L. R. B. 391, 392, n. 3. As the decision of this question is not essential in the instant case, we do not pass upon it.

kind of conduct here involved of common-law rights of action for all damages suffered.

Section 10 (c) of the Federal Act, upon which petitioners must rely, gives limited authority to the Board to award back pay to employees. The material provisions are the following:

> "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him . . . ." 61 Stat. 147, 29 U. S. C. § 160 (c).

If an award of damages by a state court for conduct such as is involved in the present case is not otherwise prohibited by the Federal Acts, it certainly is not prohibited by the provisions of § 10 (c). This section is far from being an express grant of exclusive jurisdiction superseding common-law actions, by either an employer or an employee, to recover damages caused by the tortious conduct of a union. To make an award, the Board must first be convinced that the award would "effectuate the policies" of the Act. "The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act." *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 198. The power to order affirmative relief under

§ 10 (c) is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices. Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct. *United Workers* v. *Laburnum Corp.*, 347 U. S. 656, 666–667. In *Virginia Electric Co.* v. *Labor Board,* 319 U. S. 533, 543, in speaking of the Board's power to grant affirmative relief, we said:

> "The instant reimbursement order [which directs reimbursement by an employer of dues checked off for a dominated union] is not a redress for a private wrong. Like a back pay order, it does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices. In this, both these types of monetary awards somewhat resemble compensation for private injury, but it must be constantly remembered that both are remedies created by statute—the one explicitly and the other implicitly in the concept of effectuation of the policies of the Act—which are designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private, rights. Cf. *Agwilines, Inc.* v. *Labor Board,* 87 F. 2d 146, 150–51; *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177. For this reason it is erroneous to characterize this reimbursement order as penal or as the adjudication of a mass tort. It is equally wrong to fetter the Board's discretion by compelling it to observe conventional common law or chancery principles in fashioning such an order, or to force it to inquire into the amount of damages actually sustained. Whether and to what extent such matters should be considered is a complex problem for the Board to decide in the light of its administrative experience and knowledge."

In *Laburnum,* in distinguishing *Garner* v. *Teamsters Union,* 346 U. S. 485, we said:

> "To the extent that Congress prescribed preventive procedure against unfair labor practices, that case recognized that the Act excluded conflicting state procedure to the same end. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived." 347 U. S., at 665.

In this case there is a possibility that both the Board and the state courts have jurisdiction to award lost pay. However, that possibility does not create the kind of "conflict" of remedies referred to in *Laburnum.* Our cases which hold that state jurisdiction is pre-empted are distinguishable. In them we have been concerned lest one forum would enjoin, as illegal, conduct which the other forum would find legal, or that the state courts would restrict the exercise of rights guaranteed by the Federal Acts.[6]

---

[6] See, *e. g., San Diego Council* v. *Garmon,* 353 U. S. 26 (involving state injunction of peaceful picketing); *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.,* 353 U. S. 20, 23 (same); *United Mine Workers* v. *Arkansas Oak Flooring Co.,* 351 U. S. 62, 75 (same); *Garner* v. *Teamsters Union,* 346 U. S. 485, 498–500 (same); *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, 475–476, 479–481 (involving state injunction of a strike and peaceful picketing); *Bus Employees* v. *Wisconsin Board,* 340 U. S. 383, 394–395, 398–399 (involving state statute restricting right to strike of, and compelling arbitration by, public utility employees); *Automobile Workers* v. *O'Brien,* 339 U. S. 454,

In the instant case, there would be no "conflict" even if one forum awarded back pay and the other did not. There is nothing inconsistent in holding that an employee may recover lost wages as damages in a tort action under state law, and also holding that the award of such damages is not necessary to effectuate the purposes of the Federal Act.

In order to effectuate the policies of the Act, Congress has allowed the Board, in its discretion, to award back pay. Such awards may incidentally provide some compensatory relief to victims of unfair labor practices. This does not mean that Congress necessarily intended this discretionary relief to constitute an exclusive pattern of money damages for private injuries. Nor do we think that the Alabama tort remedy, as applied in this case, altered rights and duties affirmatively established by Congress.

To the extent that a back-pay award may provide relief for victims of an unfair labor practice, it is a partial alternative to a suit in the state courts for loss of earnings. If the employee's common-law rights of action against a union tortfeasor are to be cut off, that would in effect grant to unions a substantial immunity from the consequences of mass picketing or coercion such as was employed during the strike in the present case.

The situation may be illustrated by supposing, in the instant case, that Russell's car had been turned over resulting in damage to the car and personal injury to him. Under state law presumably he could have recovered for

---

456–459 (involving state statute restricting right to strike by requiring, as a condition precedent, a strike vote resulting in an affirmative majority); *La Crosse Telephone Corp.* v. *Wisconsin Board,* 336 U. S. 18, 24–26 (involving state certification of the appropriate unit for collective bargaining); *Bethlehem Steel Co.* v. *New York Board,* 330 U. S. 767, 773–776 (same); *Hill* v. *Florida ex rel. Watson,* 325 U. S. 538, 541–543 (involving state statute restricting eligibility to be a labor representative).

medical expenses, pain and suffering and property damages. Such items of recovery are beyond the scope of present Board remedial orders. Following the reasoning adopted by us in the *Laburnum* case, we believe that state jurisdiction to award damages for these items is not pre-empted. Cf. *International Assn. of Machinists* v. *Gonzales, ante,* p. 617, decided this day. Nor can we see any difference, significant for present purposes, between tort damages to recover medical expenses and tort damages to recover lost wages. We conclude that an employee's right to recover, in the state courts, *all* damages caused him by this kind of tortious conduct cannot fairly be said to be pre-empted without a clearer declaration of congressional policy than we find here. Of course, Russell could not collect duplicate compensation for lost pay from the state courts and the Board.

Punitive damages constitute a well-settled form of relief under the law of Alabama when there is a willful and malicious wrong. *Penney* v. *Warren,* 217 Ala. 120, 115 So. 16. To the extent that such relief is penal in its nature, it is all the more clearly not granted to the Board by the Federal Acts. *Republic Steel Corp.* v. *Labor Board,* 311 U. S. 7, 10–12. The power to impose punitive sanctions is within the jurisdiction of the state courts but not within that of the Board. In *Laburnum* we approved a judgment that included $100,000 in punitive damages. For the exercise of the police power of a State over such a case as this, see also, *Youngdahl* v. *Rainfair, Inc.,* 355 U. S. 131; *Auto Workers* v. *Wisconsin Board,* 351 U. S. 266, 274, n. 12.

Accordingly, the judgment of the Supreme Court of Alabama is

Affirmed.

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

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE DOUGLAS joins, dissenting.

The issue in this case is whether the Taft-Hartley Act has pre-empted a State's power to assess compensatory and punitive damages against a union for denying a worker access to a plant during an economic strike—conduct that the Federal Act subjects to correction as an unfair labor practice under § 8 (b)(1)(A). If Congress had specifically provided that the States were without power to award damages under such circumstances, or if it had expressly sanctioned such redress in the state courts, our course of action would be clear. Because Congress did not in specific words make its will manifest, *International Union* v. *Wisconsin Employment Relations Board,* 336 U. S. 245, 252, we must be guided by what is consistent with the scheme of regulation that Congress has established.

It is clear from the legislative history of the Taft-Hartley Act that in subjecting certain conduct to regulation as an unfair labor practice Congress had no intention of impairing a State's traditional powers to punish or in some instances prevent that same conduct when it was offensive to what a leading case termed "such traditionally local matters as public safety and order and the use of streets and highways." *Allen-Bradley Local* v. *Wisconsin Board,* 315 U. S. 740, 749. Both proponents and critics of the measure conceded that certain unfair labor practices would include acts "constituting violation of the law of the State," [1] "illegal under State law," [2] "punishable under State and local police law," [3] or acts of such nature that "the main remedy for such conditions is prosecution under State law and better local law enforce-

[1] 93 Cong. Rec. 4024.

[2] S. Rep. No. 105 on S. 1126, Supp. Views, 80th Cong., 1st Sess. 50.

[3] 93 Cong. Rec. 4019.

ment." [4] It was this role of state law that the lawmakers referred to when they conceded that there would be "two remedies" [5] for a violent unfair labor practice. For example, when Senator Taft was explaining to the Senate the import of the § 8 (b)(1)(A) unfair labor practice, he responded in this manner to a suggestion that it would "result in duplication of some of the State laws":

> "I may say further that one of the arguments has suggested that in case this provision covered violence it duplicated State law. I wish to point out that the provisions agreed to by the committee covering unfair labor practices on the part of labor unions also might duplicate to some extent that State law. Secondary boycotts, jurisdictional strikes, and so forth, *may involve some violation of State law respecting violence which may be criminal,* and so to some extent the measure may be duplicating the remedy existing under State law. But that, in my opinion, is no valid argument." [6] (Emphasis added.)

This frequent reference to a State's continuing power to prescribe criminal punishments for conduct defined as an unfair labor practice by the Federal Act is in sharp contrast to the absence of any reference to a State's power to award damages for that conduct.

In the absence of a reliable indication of congressional intent, the Court should be guided by principles that lead to a result consistent with the legislative will. It is clear that the States may not take action that fetters the exercise of rights protected by the Federal Act, *Hill* v. *Florida,* 325 U. S. 538, or constitutes a counterpart to its regulatory scheme, *International Union of United Automobile*

---

[4] 93 Cong. Rec. 4432.

[5] *E. g.,* 93 Cong. Rec. 4024.

[6] 93 Cong. Rec. 4437.

Workers v. *O'Brien,* 339 U. S. 454, or duplicates its remedies, *Garner* v. *Teamsters Union,* 346 U. S. 485. The Court must determine whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz,* 312 U. S. 52, 67. If the state action would frustrate the policies expressed or implied in the Federal Act, then it must fall. The state action here—a judgment requiring a certified bargaining representative to pay punitive and compensatory damages to a nonstriker who lost wages when striking union members denied him access to the plant—must be tested against that standard.

Petitioners do not deny the State's power to award damages against individuals or against a union for physical injuries inflicted in the course of conduct regulated under the Federal Act.[7] The majority's illustration involving facts of that sort is therefore beside the point. But the power to award damages for personal injuries does not necessarily imply a like power for other forms of monetary loss. The unprovoked infliction of personal injuries during a period of labor unrest is neither to be expected nor to be justified, but economic loss inevitably attends work stoppages. Furthermore, damages for personal injuries may be assessed without regard to the merits of the labor controversy, but in order to determine the cause and fix the responsibility for economic loss a court must consider the whole background and status of the dispute. As a consequence, precedents or examples involving personal injuries are inapposite when the problem is whether a state court may award damages for

[7] See *Hall* v. *Walters,* 226 S. C. 430, 85 S. E. 2d 729, cert. denied, 349 U. S. 953; *McDaniel* v. *Textile Workers,* 36 Tenn. App. 236, 254 S. W. 2d 1.

458778 O—58——45

economic loss sustained from conduct regulated by the Federal Act.

The majority assumes for the purpose of argument that the Board had authority to compensate for the loss of wages involved here. If so, then the remedy the state court has afforded duplicates the remedy provided in the Federal Act and is subject to the objections voiced in my dissent in *International Association of Machinists* v. *Gonzales, ante,* p. 617, decided this day. But I find it unnecessary to rely upon any particular construction of the Board's remedial authority under § 10 (c) of the Act. In my view, this is a case in which the State is without power to assess damages whether or not like relief is available under the Federal Act. Even if we assume that the Board had no authority to award respondent back pay in the circumstances of this case, the existence of such a gap in the remedial scheme of federal legislation is no license for the States to fashion correctives. *Guss* v. *Utah Labor Relations Board,* 353 U. S. 1. The Federal Act represents an attempt to balance the competing interests of employee, union and management. By providing additional remedies the States may upset that balance as effectively as by frustrating or duplicating existing ones.

State-court damage awards such as those in the instant case should be reversed because of the impact they will have on the purposes and objectives of the Federal Act. The first objection is the want of uniformity this introduces into labor regulation. Unquestionably the Federal Act sought to create a uniform scheme of national labor regulation. By approving a state-court damage award for conduct regulated by the Taft-Hartley Act, the majority assures that the consequences of violating the Federal Act will vary from State to State with the availability and constituent elements of a given right of action

and the procedures and rules of evidence essential to its vindication. The matter of punitive damages is an example, though by no means the only one. Several States have outlawed or severely restricted such recoveries.[8] Those States where the recovery is still available entertain wide differences of opinion on the end sought to be served by the exaction and the conditions and terms on which it is to be imposed.[9]

The multitude of tribunals that take part in imposing damages also has an unfavorable effect upon the uniformity the Act sought to achieve. Especially is this so when the plaintiff is seeking punitive or other damages for which the measure of recovery is vague or nonexistent. Differing attitudes toward labor organizations will inevitably be given expression in verdicts returned by jurors in various localities. The provincialism this will engender in labor regulation is in direct opposition to the care Congress took in providing a single body of nationwide jurisdiction to administer its code of labor regulation. Because of these inescapable differences in the content and application of the various state laws, the majority's decision assures that the consequences of engaging in an unfair labor practice will vary from State to State. That is inconsistent with a basic purpose of the Federal Act.

---

[8] Louisiana, Massachusetts, Nebraska, and Washington allow no such recovery. Indiana forbids it when the conduct is also punishable criminally. Connecticut limits the recovery to the expenses of litigation. McCormick, Damages, § 78. Note, 70 Harv. L. Rev. 517.

[9] Some States regard the damages as extra compensation for injured feelings. In most jurisdictions the recovery is calculated to punish and deter rather than compensate, though some States permit the jury to consider the plaintiff's costs of litigation. In most state courts a principal must answer if the wrongful conduct was within the general scope of the agent's authority. This list of differences is not exhaustive. McCormick, §§ 78–85. Note, 70 Harv. L. Rev. 517.

The scant attention the majority pays to the large proportion of punitive damages in plaintiff's judgment [10] cannot disguise the serious problem posed by that recovery.[11] The element of deterrence inherent in the imposition or availability of punitive damages for conduct that is an unfair labor practice ordinarily makes such a recovery repugnant to the Federal Act. The prospect of such liability on the part of a union for the action of its members in the course of concerted activities will inevitably influence the conduct of labor disputes. There is a very real prospect of staggering punitive damages accumulated through successive actions by parties injured by members who have succumbed to the emotion that frequently accompanies concerted activities during labor unrest. This threat could render even those activities protected by the Federal Act too risky to undertake. Must we assume that the employer who resorts to a lockout is also subject to a succession of punitive recoveries at the hands of his employees? By its deterrent effect the imposition or availability of punitive damages serves a regulatory purpose paralleling that of the Federal Act. It is precisely such an influence on the sensitive area of labor

---

[10] Plaintiff's wages were approximately $100 per week and he was out of work five weeks. Therefore, about $9,500 of his $10,000 verdict represents punitive damages and damages for "mental pain and anguish."

[11] *Republic Steel Corp.* v. *N. L. R. B.*, 311 U. S. 7, is not authority for the majority's holding on punitive damages. That case held that the Board overstepped the remedial authority conferred by § 10 (c) of the Wagner Act when it required an employer to reimburse the Work Projects Administration for wages paid wrongfully discharged employees subsequently employed on WPA projects. The Court said this payment was in the nature of a penalty and concluded that the Act conferred no authority on the Board to exact such a penalty. There was no question of pre-emption and no discussion directed at whether an award of punitive damages by a *State* would be consistent with the Federal Act.

relations that the pre-emption doctrines are designed to avoid.

There are other vices in the punitive recovery. A principal purpose of the Wagner and Taft-Hartley Acts is to promote industrial peace.[12] Consistent with that aim Congress created tribunals, procedures and remedies calculated to bring labor disputes to a speedy conclusion. Because the availability of a state damage action discourages resort to the curative features of the pertinent federal labor law, it conflicts with the aims of that legislation. In a case such as the present one, for example, the plaintiff is unlikely to seek a cease-and-desist order, which would quickly terminate the § 8 (b)(1)(A) unfair labor practice, if he is assured compensatory damages and has the prospect of a lucrative punitive recovery as well.

In Alabama, as in many other jurisdictions, the theory of punitive damages is at variance with the curative aims of the Federal Act. The jury in this case was instructed that if it found that the defendant was "actuated by ill-will" it might award "smart money" (punitive damages) "for the purpose of making the defendant smart . . . ." [13] The parties to labor controversies have enough devices for making one another "smart" without this Court putting its stamp of approval upon another. I can conceive of nothing more disruptive of congenial labor relations than arming employee, union and management with the potential for "smarting" one another with exemplary damages. Even without the punitive element, a damage action has an unfavorable effect on the climate of labor relations. Each new step in the proceedings rekindles the animosity. Until final judgment the action is a constant source of friction between the parties. In the present case, for example, it has been

---

[12] 29 U. S. C. §§ 141, 151.

[13] R. 632.

nearly six years since the complaint was filed. The numerous other actions awaiting outcome of this case portend more years of bitterness before the courts can conclude what a Board cease-and-desist order might have settled in a week. As the dissent warned in *United Constr. Workers* v. *Laburnum Constr. Corp.*, 347 U. S. 656, 671, a state-court damage action for conduct that constitutes an unfair labor practice "drags on and on in the courts, keeping old wounds open, and robbing the administrative remedy of the healing effects it was intended to have."

The majority places its principal reliance upon *United Constr. Workers* v. *Laburnum Constr. Corp., supra.* I joined in that decision, but my understanding of the case differs from that of the majority here. That case was an action by an employer against a stranger union for damages for interference with contractual relations. While engaged in construction work on certain mining properties the plaintiff employer had used AFL laborers pursuant to its collective bargaining contract. A field representative of the United Construction Workers, an affiliate of the United Mine Workers, informed plaintiff's foreman that he was working in "Mine Workers territory," and demanded that his union be recognized as the sole bargaining agent for the employees. Otherwise, he threatened, the United Construction Workers would "close down" all of the work. At the time of this ultimatum not a single worker in Laburnum's employ belonged to the stranger union. Plaintiff refused. A few days later the union representative appeared at the job site with a "rough, boisterous crowd" variously estimated from 40 to 150 men. Some were drunk. Some carried guns and knives. Plaintiff's employees were informed that they would have to join the United Construction Workers or "we will kick you out of here." A few workers yielded to the mob. Those who refused were

subjected to a course of threats and intimidation until they were afraid to proceed with their work. As a consequence, the employer was compelled to discontinue his work on the contract and it was lost. The employer sued the United Construction Workers for the profits lost by this interference, recovering compensatory and punitive damages.[14] This Court affirmed.

There are at least three crucial differences between this case and *Laburnum*. *First,* in this case the plaintiff is seeking damages for an interference with his right to work during a strike. Since the right to refrain from concerted activities is protected by § 7 of the Act, a § 8 (b)(1)(A) unfair labor practice is inherent in the wrong of which plaintiff complains, and the Federal Act offers machinery to correct it. The § 8 (b)(1)(A) unfair labor practice in *Laburnum,* on the other hand, was involved only fortuitously. Damages were awarded for interference with the contractual relationship between the employer and the parties for whom the construction work was being performed. The means defendants chose to effect that interference happened to constitute an unfair labor practice, but the same tort might have been committed by a variety of means in no way offensive to the Federal Act. *Laburnum* simply holds that a tortfeasor should not be allowed to immunize himself from liability for a wrong having no relation to federal law simply because the means he adopts to effect the wrong transgress a comprehensive code of federal regulation. The availability of state-court damage relief may discourage the employer from invoking the remedies of the Federal Act on behalf of his employees.[15]

---

[14] 194 Va. 872, 75 S. E. 2d 694.

[15] It is clear that the employer in *Laburnum* could have invoked the investigative and preventive machinery of the Board. An unfair labor practice charge may be filed by "any person." 29 CFR, 1955 Cum. Supp., § 102.9. *Local Union No. 25* v. *New York, New Haven & H. R. Co.*, 350 U. S. 155, 160.

But that effect may be tolerated since the employer's interest is at most derivative, and there will be nothing to dissuade the employees, who are more directly concerned, from using the federal machinery to correct the interference with their protected activity.

Second, the defendant in this case is the certified bargaining agent of employees at the plant where plaintiff is employed, and the wrong involved was committed in the course of picketing incident to an economic strike to enforce wage demands. Thus, the controversy grows out of what might be called an ordinary labor dispute. Continued relations may be expected between the parties to this litigation. The defendant in *Laburnum,* on the other hand, was a total stranger to the employer's collective bargaining contract, and could claim the membership of not a single worker. There was no prospect of a continuing relationship between the parties to the suit, and no need for concern over the climate of labor relations that an action might impair. The defendant was attempting to coerce Laburnum's employees, either by direct threats or employer pressures, to join its ranks. Such predatory forays are disfavored when undertaken by peaceful picketing, and even more so when unions engage in the crude violence used in *Laburnum.*

Finally, the effect of punitive damages in cases such as the present one is entirely different from that which results from the recovery sanctioned in *Laburnum.* Since the wrong in *Laburnum* was committed against an employer, the damages exacted there were probably the extent of the defendant's liability for that particular conduct. Where it is employees who have been wronged, however, there may be dozens of actions for the same conduct, each with its own demand for punitive damages. In the instant case, for example, Russell is only one of thirty employees who have filed suits against the union for the same conduct, all of them claiming sub-

stantial punitive damages.[16] Whatever the law in other States, Alabama seems to hold to the view that evidence of a previous punitive recovery is inadmissible as a defense in a subsequent action claiming punitive damages for the

---

[16] Petitioner has supplied the Court with the following list of those cases. All are held in abeyance pending decision of the instant case. Unless otherwise noted each action is in the Circuit Court of Morgan County, Alabama. The amount shown is the total damages asked, which is composed of a relatively insubstantial loss-of-wages claim and a balance of punitive damages. Petitioners' Appendices, pp. 7a–9a.

1. *Burl McLemore* v. *United Automobile, Aircraft and Agricultural Implement Workers of America, AFL–CIO, et al.*, #6150, $50,000. Verdict and judgment of $8,000. New trial granted because of improper argument of plaintiff's counsel. 264 Ala. 538, 88 So. 2d 170.

2. *James W. Thompson* v. *Same*, #6151, $50,000. Appeal from $10,000 verdict and judgment pending in Supreme Court of Alabama.

3. *N. A. Palmer* v. *Same*, #6152, $50,000. Appeal from $18,450 verdict and judgment pending in Supreme Court of Alabama.

4. *Lloyd E. McAbee* v. *Same*, #6153, $50,000.

5. *Tommie F. Breeding* v. *Same*, #6154, $50,000.

6. *David G. Puckett* v. *Same*, #6155, $50,000.

7. *Comer T. Junkins* v. *Same*, #6156, $50,000.

8. *Joseph E. Richardson* v. *Same*, #6157, $50,000.

9. *Cois E. Woodard* v. *Same*, #6158, $50,000.

10. *Millard E. Green* v. *Same*, #6159, $50,000.

11. *James C. Hughes* v. *Same*, #6160, $50,000.

12. *James C. Dillehay* v. *Same*, #6161, $50,000.

13. *James T. Kirby* v. *Same*, #6162, $50,000.

14. *Cloyce Frost* v. *Same*, #6163, $50,000.

15. *E. L. Thompson, Jr.* v. *Same*, #6164, $50,000.

16. *J. A. Glasscock, Jr.* v. *Same*, #6165, $50,000.

17. *Hoyt T. Penn* v. *Same*, #6166, $50,000.

18. *Spencer Weinman* v. *Same*, #6167, $50,000.

19. *Joseph J. Hightower* v. *Same*, #6168, $50,000.

20. *A. A. Kilpatrick* v. *Same*, #6169, $50,000.

21. *Charles E. Kirk* v. *Same*, #6170, $50,000.

22. *Richard W. Penn* v. *Same*, #6171, $50,000.

23. *Robert C. Russell* v. *Same*, #6172, $50,000.

[*Footnote 16 continued on page 658*]

same conduct.[17] Thus, the defendant union may be held for a whole series of punitive as well as compensatory recoveries. The damages claimed in the pending actions total $1,500,000, and to the prospect of liability for a fraction of that amount may be added the certainty of large legal expenses entailed in defending the suits. By reason of vicarious liability for its members' ill-advised conduct on the picket lines, the union is to be subjected to a series of judgments that may and probably will reduce it to bankruptcy, or at the very least deprive it of the means necessary to perform its role as bargaining agent of the employees it represents. To approve that risk is to exact a result *Laburnum* does not require.

---

24. *T. H. Abercrombie* v. *Same,* #6173, $50,000.
25. *James H. Tanner* v. *Same,* #6174, $50,000.
26. *Charles E. Carroll* v. *Same,* #6175, $50,000.
27. *Ordell T. Garvey* v. *Same,* #6176, $50,000.
28. *A. R. Barran* v. *Same,* #6177, $50,000.
29. *Russell L. Woodard* v. *Same,* #6178, $50,000.

[17] *Alabama Power Co.* v. *Goodwin,* 210 Ala. 657, 99 So. 158. That was an action by a passenger against a streetcar company for injuries sustained in a collision. As a defense to a count for punitive damages, the defendant sought to show that punitive damages had already been awarded against it in another suit growing out of the same collision. The court held that the evidence was properly excluded, for "in its civil aspects the single act or omission forms as many distinct and unrelated wrongs as there are individuals injured by it." 210 Ala., at 658–659, 99 So., at 160. While conceding the logical relevancy of a previous recovery, the court felt that the rule of exclusion was the better rule since it would prevent the introduction of such collateral issues as whether and to what extent punitive damages had been included in a previous verdict. This rule of exclusion was applied in *Southern R. Co.* v. *Sherrill,* 232 Ala. 184, 167 So. 731. Cf. McCormick, Damages, § 82, and 2 Sutherland, Damages (4th ed. 1916), § 402, discussing the majority rule that evidence of prior criminal punishment is inadmissible in an action for punitive damages for the same misfeasance.

From the foregoing I conclude that the *Laburnum* case, to which the majority attributes such extravagant proportions, is not controlling here. In my judgment, the effect of allowing the state courts to award compensation and fix penalties for this and similar conduct will upset the pattern of rights and remedies established by Congress and will frustrate the very policies the Federal Act seeks to implement. The prospect of that result impels me to dissent.

NOWAK *v.* UNITED STATES.

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

No. 72. Argued January 28, 1958.—Decided May 26, 1958.

Petitioner was brought to the United States from Poland in 1913 at the age of 10 years and was admitted to citizenship in 1938. In 1952, the Government sued under § 338 (a) of the Nationality Act of 1940 to set aside the naturalization decree on the ground that it had been obtained fraudulently and illegally. The District Court granted the relief sought, and the Court of Appeals affirmed. *Held:* The judgment is reversed, because the Government has failed to prove its charges by the "clear, unequivocal, and convincing evidence" which is required in denaturalization cases. *Schneiderman* v. *United States*, 320 U. S. 118. Pp. 661–668.

1. An affidavit showing "good cause," filed with the complaint by a responsible official of the Immigration and Naturalization Service, who swore that the allegations were based upon facts disclosed by official records of the Service to which he had had access, satisfied the purpose of § 338 (a) to protect those proceeded against from ill-considered action. P. 662.

2. The finding of fraudulent procurement of citizenship, based on petitioner's answers to a question in a preliminary naturalization form filed in 1937, could not be sustained. The Government claimed that the question required petitioner to disclose that he was a member of the Communist Party; but the question was so ambiguous that it may have been understood by him as relating solely to membership in anarchistic organizations. Pp. 663–665.

3. Though the Government proved that petitioner was a member of the Communist Party for five years preceding his naturalization, it failed to prove sufficiently that he was not "attached to the principles of the Constitution," because it did not prove by "clear, unequivocal, and convincing" evidence that he knew that the Party advocated the violent overthrow of the Government. Pp. 665–668.

238 F. 2d 282, reversed and cause remanded.

Ernest Goodman argued the cause for petitioner. With him on the brief was *George W. Crockett, Jr.*

J. F. Bishop argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *Carl H. Imlay.*

Briefs of *amici curiae* were filed by *Osmond K. Fraenkel* for the National Lawyers Guild, and *Frank J. Donner, Arthur Kinoy* and *Marshall Perlin* for Begun et al.

MR. JUSTICE HARLAN delivered the opinion of the Court.

In 1913, at the age of 10 years, petitioner was brought to the United States as an immigrant from Poland. In June 1938 the United States District Court for the Eastern District of Michigan entered its order admitting him to citizenship. More than 14 years later, in December 1952, the United States brought this suit under § 338 (a) of the Nationality Act of 1940 [1] to set aside the naturalization decree, alleging that Nowak had obtained his citizenship both fraudulently and illegally. The Government filed with its complaint an "affidavit showing good cause," as required by § 338 (a). After a trial the District Court granted the relief requested by the United States on the grounds that Nowak (1) fraudulently obtained citizenship by making a false answer to a question in his Preliminary Form for Petition for Naturalization, filed in July 1937; and (2) illegally obtained citizenship, in that for a period of five years preceding his

[1] 54 Stat. 1137, 1158:

"It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings . . . for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured."

naturalization he had not been "attached to the principles of the Constitution of the United States . . . ," as required by § 4 of the Nationality Act of 1906,[2] under which he was naturalized. 133 F. Supp. 191. The Court of Appeals affirmed, 238 F. 2d 282, and we granted certiorari. 353 U. S. 922. For reasons given hereafter we decide that the judgment below must be reversed.

1. *"Good Cause" Affidavit.*—Petitioner, relying on *United States* v. *Zucca,* 351 U. S. 91, contends that the District Court lacked jurisdiction over this proceeding because the Government's affidavit of "good cause" was defective, in that it was not made by one having personal knowledge of the matters contained therein. This contention must be rejected. The affiant was an attorney of the Immigration and Naturalization Service who swore that the allegations made in his affidavit were based upon facts disclosed by official records of the Naturalization Service to which he had had access. In substance the affidavit set forth the same matters upon which the District Court's later decree of denaturalization was based, and showed with adequate particularity the grounds on which the Government's suit rested. Sworn to as it was by a responsible official of the Naturalization Service, we consider that the affidavit satisfied the purpose of § 338 (a) to protect those proceeded against from ill-considered action. See *United States* v. *Zucca, supra,* at 99–100.

---

[2] Paragraph 4 of § 4 of the Act, 34 Stat. 596, 598, as amended, 8 U. S. C. (1934 ed.) § 382, provides that no alien may be admitted to citizenship unless immediately preceding his application he has resided continuously within the United States for at least five years and that during this period "he has behaved as a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

2. *Fraudulent Procurement.*—The finding of fraud here was based on Nowak's answer to Question 28 in the above-mentioned preliminary naturalization form, which read:

> "28. Are you a believer in anarchy? . . . Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country? . . ."

Nowak placed "No" after each part of the question. The courts below ruled that he should have answered "Yes" to the second part because in 1937, when the form was executed, (1) Nowak was a member of the Communist Party; (2) the Party taught "the overthrow of existing government"; and (3) Nowak was aware of this Party teaching. Accordingly the charge of fraudulent procurement was sustained.

Where citizenship is at stake the Government carries the heavy burden of proving its case by " 'clear, unequivocal, and convincing' evidence which does not leave 'the issue in doubt' . . . ." *Schneiderman* v. *United States,* 320 U. S. 118, 158. "Especially is this so when the attack is made long after the time when the certificate of citizenship was granted and the citizen has meanwhile met his obligations and has committed no act of lawlessness." *Id.,* at 122–123. See also *Baumgartner* v. *United States,* 322 U. S. 665, 675. And in a case such as this it becomes our duty to scrutinize the record with the utmost care. Cf. *Dennis* v. *United States,* 341 U. S. 494, 516; *Yates* v. *United States,* 354 U. S. 298, 328.

Applying the strict standard required of the Government by *Schneiderman,* we rule that the charge of fraud was not proved: first, Question 28 on its face was not sufficiently clear to warrant the firm conclusion that when Nowak answered it in 1937 he should have known that it

called for disclosure of membership in nonanarchistic organizations advocating violent overthrow of government and, more particularly, membership in the Communist Party; second, even if the question should have been taken as calling for disclosure of membership in such organizations, as the Government claims, the evidence, as we decide below in connection with the charge of illegal procurement, was insufficient to establish that Nowak knew that the Communist Party engaged in such illegal advocacy. We deal with the first of these grounds here.

No claim is made that Nowak's answer to the first part of Question 28 was untruthful. The issue is whether, as Nowak claims, the second part of the question could reasonably have been read by him as inquiring *solely* about membership in an anarchistic organization, or whether, as the Government contends, it unambiguously called for disclosure of membership in an organization which advocates *either* anarchy or overthrow of existing government.

We think that Nowak could reasonably have interpreted Question 28 as a two-pronged inquiry relating simply to anarchy. Its first part refers solely to anarchy. Its second part, which is in direct series with the first, begins with "anarchy," and then refers to "overthrow." It is true that the two terms are used in the disjunctive, but, having regard to the maxim *ejusdem generis,* we do not think that the Government's burden can be satisfied simply by parsing the second sentence of the question according to strict rules of syntax. For the two references to "anarchy" make it not implausible to read the question in its totality as inquiring solely about anarchy. Especially is this so when it is borne in mind that Nowak answered the question in 1937, during a period when communism was much less in the public consciousness than has been the case in more recent years, and when,

accordingly, there was less reason for individuals to believe that government questionnaires were seeking information relating to Communist Party membership.[3] The fact that the Nationality Act of 1906, under which this preliminary naturalization form was issued, prohibited anarchists, but *not* Communists, from becoming American citizens, see 34 Stat. 596, 597, 598, accentuates the highly doubtful meaning of the question. We hold the second part of Question 28 too ambiguous to sustain the fraudulent procurement charge based on petitioner's answer to it.

3. *Illegal Procurement.*—As in the *Schneiderman* case, the Government here undertook to prove that Nowak, during the five years preceding his naturalization, was not "attached" to the principles of the Constitution by showing that he had been a member of the Communist Party with knowledge that the Party advocated the overthrow of the Government by force and violence. We believe that the Government has adequately proved that Nowak was a member of the Party during the pertinent five-year period. But even assuming that the evidence of the illegal advocacy of the Party was sufficient, see *Yates* v. *United States, supra,* at 319–322, and that, despite the doubts expressed in *Schneiderman* v. *United States, supra,* at 136, 154, lack of "attachment" could be

[3] No evidence was introduced tending to show that Nowak actually understood Question 28 as calling for disclosure of his membership in the Communist Party. The Government argues that the requisite understanding of the question should be imputed to Nowak, "an important functionary in the Party, and an intelligent man," because of the fact that for some period prior to 1937 the deportation and exclusion statutes applied to aliens "who are anarchists; aliens who believe in or advocate the overthrow by force or violence of the Government of the United States or of all forms of law." Act of October 16, 1918, 40 Stat. 1012. The gap in the Government's proof cannot be filled in such tenuous fashion, especially in view of the citizenship provisions of the Nationality Act of 1906 referred to in the text.

458778 O—58——46

proved by this method, we nevertheless hold that the Government cannot prevail on this record. For we are of the opinion that it has not been established that Nowak knew of the Party's illegal advocacy.

The fact that Nowak was an active member and functionary in the Party does not of itself suffice to establish this vital link in the Government's chain of proof. See generally *Schneiderman* v. *United States, supra;* cf. *Yates* v. *United States, supra,* at 329–330. Nor is the Government's burden satisfied on the crucial issue of Nowak's awareness of the illegal aspects of the Party's program by the evidence of his attendance at "closed" Party meetings, or by the disputed evidence as to his alleged concealment of Party membership. Virtually the only testimony at the trial bearing directly on Nowak's state of mind related to three statements attributed to him by former members of the Communist Party. One testified that at the meeting at which Nowak joined the Party in 1935 he stated that it would be necessary to "destroy" capitalism in order to set up a workers' government. A second testified that about 1937 Nowak stated at a Party meeting that the Party could not rely entirely on the ballot to gain its objectives, "but that it would eventually resolve to bullets." And a third testified that in the summer of 1937, while lecturing at a Party school, Nowak said that if the Party could not gain control of labor unions through elections, "then it may be necessary to use violence to get it," and that "the goal of all this activity was to extend the Soviet system around the face of the earth."

For a number of reasons we cannot regard these fragmentary episodes as providing reliable support for the Government's case. On their face each of the statements attributed to Nowak was equivocal. Read in context, they can be taken as merely the expression of opinions or predictions about future events, rather than as advocacy

of violent action for the overthrow of government. See *Schneiderman* v. *United States, supra,* at 157–158; cf. *Yates* v. *United States, supra,* at 319–322. The record reveals that in two of these instances Nowak was not even addressing himself to political action, but rather to Party activity designed to strengthen the American labor movement, in which he was a union organizer. At no point does the record show that Nowak himself ever advocated action for violent overthrow, or that he understood that the Party advocated action to that end. In addition, the record leaves us with the distinct impression that the testimony as to these episodes was itself quite uncertain, given as it was from 17 to 19 years after the event. Indeed, some of the testimony was elicited only after persistent prodding by counsel for the Government.[4]

[4] The testimony of witness Eager provides an example of this: After it was established that in 1937 Eager was a member of the same Communist Party cell as Nowak, which was composed of members of the United Auto Workers, and that they attended several Party meetings together, Eager was asked what Nowak said at those meetings. Eager's reply was, "He gave an outline of what Party members should do in the plant, and that we would have to be a little more aggressive if we expected to get anywhere at that time. . . . And he said we couldn't depend entirely on ballots in this country; it was only by a militant Communist leadership in the shops, stores and factories and mines that we could expect to have a Soviet America." (Transcript, pp. 315–316.) During the course of his direct examination Eager was asked several more times about statements Nowak may have made relating to communism either at Party meetings or in private conversation. His answers were always of two types. Sometimes he substantially repeated his first account; for example, "[Nowak] said the Party policy was that members of the Party in the various unions should take an aggressive and militant leadership of the union." (Transcript, p. 321.) Or else he pleaded that he was not able to remember what Nowak said; for example, "I can't recall the exact words he said at that meeting, it is so long ago." (Transcript, p. 322.) After direct examination ended, and after a lengthy cross-examination, counsel for the Government returned to the theme on redirect and asked Eager about

Under the strict standard of proof by which this case must be judged, the record shows at best from the Government's standpoint that Nowak was an active member and functionary of the Communist Party. But this proof does not suffice to make out the Government's case, for Congress in the Nationality Act of 1940 did not make membership or holding office in the Communist Party a ground for loss of citizenship. We conclude that the Government has failed to prove its charges of fraud and lack of "attachment" against this petitioner by the "clear, unequivocal, and convincing" evidence which is required in denaturalization cases. We therefore need not consider any of the other contentions pressed by petitioner.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

---

any statements of Nowak concerning "the role that the Communist Party should play in that union." Eager replied, "Only to the extent that he stated we should be militant and aggressive and take a leadership in our plants." (Transcript, p. 375.) A little later Eager was asked substantially the same question. After objection by Nowak's counsel on the ground that the matter had been gone into "ten times on direct examination," the District Court recognized that the question had previously been asked, but permitted the witness to answer. Eager said, "Well, I think that I have answered that question four or five times." When asked at that point if he could add anything, Eager only then submitted the answer so heavily relied on by the Government here, "The only thing I can recall him saying one night, at a meeting, that was slightly different, I guess, and yet the same question of militancy and all that, and there was political action, the question was brought up at the meeting and he told us at that time that we couldn't depend too much on the ballot to gain our objectives but that it would eventually resolve to bullets, and it was only by the same militancy of the workers in the plants that we, as leaders, would be able to establish a Soviet America." (Transcript, p. 379.)

MR. JUSTICE BURTON, MR. JUSTICE CLARK, and MR. JUSTICE WHITTAKER, dissenting.*

We join the Court in concluding that the "good cause" affidavits were sufficient. However, under the circumstances of these cases we believe that each petitioner fully understood the thrust of Question 28 as to association with or membership in any organization which teaches or advocates the overthrow of the Government. Further, we believe that the facts amply support the conclusion of both the trial court and the Court of Appeals that neither petitioner "behaved as a person . . . attached to the principles of the Constitution of the United States . . . ." We cannot join in overturning these findings of two courts, and therefore would affirm the judgments.

---

*[NOTE: This opinion applies also to No. 76, *Maisenberg* v. *United States, post,* p. 670.]

MAISENBERG *v.* UNITED STATES.

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

No. 76. Argued January 28, 1958.—Decided May 26, 1958.

Petitioner was brought to the United States in 1912 at the age of 11 and was admitted to citizenship in 1938. In 1953, the Government sued under § 340 (a) of the Immigration and Nationality Act of 1952 to set aside the naturalization decree on the ground that it had been obtained by "concealment of a material fact [and] willful misrepresentation." The District Court granted the relief sought, and the Court of Appeals affirmed. *Held:* The judgment is reversed, because the Government has failed to prove its charges by the "clear, unequivocal, and convincing evidence" which is required in denaturalization cases. *Schneiderman* v. *United States,* 320 U. S. 118. Pp. 671–673.

1. The Government's timely filed affidavit of "good cause" was sufficient. *Nowak* v. *United States, ante,* p. 660. P. 672.

2. A finding of misrepresentation cannot be predicated on petitioner's answer to an ambiguous question in a preliminary naturalization form. *Nowak* v. *United States, ante,* p. 660. P. 672.

3. Though the Government proved that petitioner was a member of the Communist Party for five years preceding her naturalization, it failed to prove sufficiently that she was not "attached to the principles of the Constitution," because it did not prove by "clear, unequivocal, and convincing evidence" that she knew that the Party advocated the violent overthrow of the Government. Pp. 672–673.

238 F. 2d 282, reversed and cause remanded.

Ernest Goodman argued the cause for petitioner. With him on the brief was *George W. Crockett, Jr.*

J. F. Bishop argued the cause for the United States. On the brief were *Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *Carl H. Imlay.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

This is a companion case to No. 72, *Nowak* v. *United States,* decided today, *ante,* p. 660. Maisenberg was brought to this country from Russia in 1912, at the age of 11. She was admitted to citizenship in the United States District Court for the Eastern District of Michigan in January 1938. In March 1953, in the same court, the United States brought this suit under § 340 (a) of the Immigration and Nationality Act of 1952 [1] to set aside the naturalization decree, alleging in its complaint that Maisenberg's citizenship was obtained "by concealment of a material fact [and] willful misrepresentation." After a trial the District Court, in an unreported opinion, granted the relief requested by the Government. The Court of Appeals affirmed, 238 F. 2d 282, and we granted certiorari. 353 U. S. 922.

Although the findings of the District Court do not clearly disclose the grounds for decision, Maisenberg seems to have been denaturalized because she was found to have made misrepresentations in (1) answering falsely "No" to the second part of Question 28 in her Preliminary Form for Petition for Naturalization, filed in June 1937; [2] and (2) stating that for a period of five years preceding her naturalization she had been "at-

---

[1] 66 Stat. 260, 8 U. S. C. § 1451 (a):

"It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings . . . for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation . . . ."

[2] As in the form completed by Nowak, Question 28 read:

"28. Are you a believer in anarchy? . . . Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country? . . ."

tached to the principles of the Constitution of the United States . . . ." The District Court also sustained the sufficiency of the Government's affidavit of "good cause," which was not signed by an individual having personal knowledge of the facts on which the proceedings were based, but by an attorney of the Immigration and Naturalization Service who relied on official records of the Service.

For the reasons stated in *Nowak* v. *United States, supra,* we hold that (1) the Government's timely filed affidavit of good cause was sufficient; and (2) a finding of misrepresentation cannot be predicated on Maisenberg's negative answer to the second part of Question 28.

We also are of opinion that the Government has failed to prove by "clear, unequivocal, and convincing" evidence, *Schneiderman* v. *United States,* 320 U. S. 118, 125, 158, that Maisenberg was not "attached to the principles of the Constitution." [3] As in *Nowak,* the Goverment has attempted to prove its case indirectly by showing that Maisenberg was a member of the Communist Party during the five years preceding her naturalization and that she knew that the Party was illegally advocating the violent overthrow of the United States. We think that the Government has adequately proved that Maisenberg was a member of the Party during the pertinent five-year period. But, even making the same assumptions on behalf of the Government that were made in *Nowak*—that it was adequately shown that the Party in 1938 advocated violent action for the overthrow of the Government and that lack of "attachment" could be

[3] In view of our decision that, as an objective matter, petitioner has not been shown to have lacked attachment to the principles of the Constitution in 1938, we need not reach the further question under the 1952 Act whether the Government has adequately proved that petitioner misrepresented her attachment or concealed a lack of attachment. See note 1, *supra.*

proved by this method—the Government still cannot prevail. For we do not believe that it has carried the burden of proving that Maisenberg was aware of that alleged tenet of the Party.

Apart from introducing evidence that Maisenberg was an active member and functionary of the Communist Party, and that she had attended various "closed" Party meetings, the Government presented several witnesses who testified to a number of sporadic statements by Maisenberg (or by others in her presence) between 1930 and 1937 which are claimed to show that she was aware of the purpose of the Party "to overthrow the government by force" and to establish "the dictatorship of the proletariat." For much the same reasons given in *Nowak*, we regard this evidence as inadequate to establish the Government's case. In each of the several episodes described by the witnesses the statements attributed to Maisenberg can well be taken as merely the expression of abstract predictory opinions; all of them were of a highly equivocal nature; and the faltering character of much of this testimony as to events of many years before casts the gravest doubt upon its reliability. There is no evidence in the record that Maisenberg herself ever advocated revolutionary action or that she was aware that the Party proposed to take such action. Cf. *Yates* v. *United States*, 354 U. S. 298, 319–322. As we said in *Nowak*, such proof falls short of the "clear, unequivocal, and convincing" evidence needed to support a decree of denaturalization. Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

[For dissenting opinion of MR. JUSTICE BURTON, MR. JUSTICE CLARK and MR. JUSTICE WHITTAKER, see *ante*, p. 669.]

ELLIS *v.* UNITED STATES.

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

No. 293, Misc. Decided May 26, 1958.

The Court of Appeals denied petitioner leave to appeal *in forma pauperis* from his conviction for housebreaking and larceny. The Solicitor General concedes, and after examining the record this Court agrees, that the issue presented—probable cause to arrest—is not one that "can necessarily be characterized as frivolous." *Held:* The judgment is vacated and the cause is remanded for reconsideration in the light of this opinion. Pp. 674–675.

101 U. S. App. D. C. 386, 249 F. 2d 478, judgment vacated and cause remanded.

Kingdon Gould, Jr. for petitioner.

Solicitor General Rankin, Acting Assistant Attorney General McLean and *Beatrice Rosenberg* for the United States.

PER CURIAM.

The petition for writ of certiorari is granted, as is leave to proceed *in forma pauperis.*

The Court of Appeals denied petitioner leave to appeal *in forma pauperis* a conviction for housebreaking and larceny. 101 U. S. App. D. C. 386, 249 F. 2d 478. The Solicitor General concedes that leave to appeal should have been allowed unless petitioner's contentions on the merits were frivolous. The only statutory requirement for the allowance of an indigent's appeal is the applicant's "good faith." 28 U. S. C. § 1915. In the absence of some evident improper motive, the applicant's good faith is established by the presentation of any issue that is not plainly frivolous. *Farley* v. *United States,* 354 U. S. 521. The good-faith test must not be converted

into a requirement of a preliminary showing of any particular degree of merit. Unless the issues raised are so frivolous that the appeal would be dismissed in the case of a nonindigent litigant, Fed. Rules Crim. Proc. 39 (a), the request of an indigent for leave to appeal *in forma pauperis* must be allowed.

Normally, allowance of an appeal should not be denied until an indigent has had adequate representation by counsel. *Johnson* v. *United States,* 352 U. S. 565. In this case, it appears that the two attorneys appointed by the Court of Appeals, performed essentially the role of *amici curiae.* But representation in the role of an advocate is required. If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account. If the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied. In this case, the Solicitor General concedes, and after examining the record we agree, that the issue presented—probable cause to arrest—is not one that "can necessarily be characterized as frivolous." Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded for reconsideration in light of this opinion.

AMLIN ET AL., DOING BUSINESS AS AMLIN CARTAGE, ET AL. *v.* VERBEEM, DOING BUSINESS AS PETERS CARTAGE, ET AL.

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

No. 881. Decided May 26, 1958.

154 F. Supp. 431, affirmed.

George H. Cholack for appellants.

Wilhelmina Boersma and *Wilber M. Brucker, Jr.* for appellees.

PER CURIAM.

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

Syllabus.

UNITED STATES *v.* PROCTER & GAMBLE CO. ET AL.

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

No. 51. Argued April 28, 1958.—Decided June 2, 1958.

Following a federal grand jury investigation of possible criminal violations of the Sherman Act, in which no indictment was returned, the Government brought a civil suit under § 4 of the Act to enjoin alleged violations of §§ 1 and 2 by appellees. The Government was using the grand jury transcript to prepare the civil case for trial, and appellees moved for discovery and production of the transcript, in order that they might have the same privilege. The District Court ruled that appellees had shown "good cause," as required by Rule 34 of the Federal Rules of Civil Procedure, and granted the motion. Being unwilling to produce the transcript, the Government moved that the order be amended to provide that, if production of the transcript were not made, the Court would dismiss the complaint. The order was so amended; the Government persisted in its refusal to produce the transcript; and the District Court dismissed the complaint. The Government appealed to this Court. *Held:*

1. The rule that a plaintiff who has voluntarily dismissed his complaint may not appeal from the order of dismissal has no application here, since the Government's motion to amend the original order was designed only to expedite review of that order. Pp. 680–681.

2. Appellees failed to show "good cause," as required by Rule 34, for the *wholesale* discovery and production of a transcript of the grand jury's proceedings, which pursuant to a long-established policy must normally be kept secret, when they did not show that the criminal procedure had been subverted to elicit evidence in a civil case. Pp. 681–684.

Reversed.

Robert A. Bicks argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman* and *W. Louise Florencourt.*

Kenneth C. Royall argued the cause for the Procter & Gamble Co., appellee. With him on the brief were *Charles Sawyer, Richard W. Barrett, Frederick W. R. Pride* and *H. Allen Lochner.*

Mathias F. Correa argued the cause for the Colgate-Palmolive Co., appellee. With him on the brief were *Jerrold G. Van Cise* and *James B. Henry, Jr.*

Abe Fortas argued the cause for the Lever Brothers Co., appellee. With him on the brief were *William L. McGovern* and *Abe Krash.*

James T. Welch and *Shelby Fitze* filed a brief for the Association of American Soap & Glycerine Producers, Inc., appellee.

Mr. Justice Douglas delivered the opinion of the Court.

This is a civil suit brought under § 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 4, to enjoin alleged violations of § 1 and § 2 of the Act. The civil suit was filed on the heels of a grand jury investigation in which no indictment was returned. The Government is using the grand jury transcript to prepare the civil case for trial; and appellees, who are defendants in that suit, desire the same privilege. They moved for discovery and production of the minutes under the Rules of Civil Procedure.[1] The District Court granted the motion, ruling that appellees had shown "good cause" as required by Rule 34.[2] It rested on the ground that the Govern-

[1] Appellee, Colgate-Palmolive Co., moved under Rule 6 (e) of the Rules of Criminal Procedure, note 5, *infra.*

[2] Rule 34 provides in part:

"Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30 (b), the court in which an action is pending may (1) order any

ment was using the transcript in preparation for trial, that it would be useful to appellees in their preparation, that only in this way could appellees get the information. These reasons, the court held, outweighed the reasons behind the policy for maintaining secrecy of the grand jury proceedings. 19 F. R. D. 122, 128.

The District Court entered orders directing the Government to produce the transcript in 30 days and to permit appellees to inspect and copy it. The Government, adamant in its refusal to obey, filed a motion in the District Court requesting that those orders be amended to provide that, if production were not made, the court would dismiss the complaint. Alternatively, the Government moved the District Court to stay the order pending the filing of an appeal and an application for extraordinary writ. Appellees did not oppose the motion; and the District Court entered an amended order providing that, unless the Government released the transcript by August 24, 1956, "the Court will enter an order dismissing the complaint." [3] As the Government per-

---

party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, . . . not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b) and which are in his possession, custody, or control . . . ."

[3] Rule 37 (b)(2) provides:

"If any party . . . refuses to obey . . . an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing . . . , the court may make such orders in regard to the refusal as are just, and among others the following:

"(i) An order that . . . the contents of the paper . . . or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

"(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from

sisted in its refusal, the District Court entered judgment of dismissal. The case is here by way of appeal, 32 Stat. 823, as amended, 62 Stat. 869, 989, 15 U. S. C. § 29. We postponed the question of jurisdiction to argument on the merits. 352 U. S. 997.

First. The orders of dismissal were final orders, ending the case.[4] See *United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793.

Appellees urge that this appeal may not be maintained because dismissal of the complaint was solicited by the Government. They invoke the familiar rule that a plaintiff who has voluntarily dismissed his complaint may not sue out a writ of error. See *Evans* v. *Phillips*, 4 Wheat. 73; *United States* v. *Babbitt*, 104 U. S. 767. The rule has no application here. The Government at all times opposed the production orders. It might of course have tested their validity in other ways, for example, by the route of civil contempt. Yet it is understandable why a more conventional way of getting review of the adverse ruling might be sought and any unseemly conflict with the District Court avoided. When

---

introducing in evidence designated documents or things or items of testimony . . . ;

"(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

"(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders . . . ."

[4] Rule 41 (b) provides in part:

"Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

While Rule 41 (b) covers motions to dismiss made by defendants, the portion quoted shows that it is not restricted to that situation.

the Government proposed dismissal for failure to obey, it had lost on the merits and was only seeking an expeditious review. This case is therefore like *Thomsen* v. *Cayser,* 243 U. S. 66, where the losing party got the lower court to dismiss the complaint rather than remand for a new trial, so that it could get review in this Court. The court, in denying the motion to dismiss, said

> "The plaintiffs did not consent to a judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they might come to this court without further delay." *Id.,* at 83.

Second. On the merits we have concluded that "good cause," as used in Rule 34, was not established. The Government as a litigant is, of course, subject to the rules of discovery. At the same time, we start with a long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts.[5] See *United States* v. *Johnson,* 319 U. S. 503, 513; *Costello* v. *United States,* 350 U. S. 359, 362. The reasons are varied.[6] One

---

[5] Rule 6 (e) of the Rules of Criminal Procedure provides in part:

"Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule."

[6] In *United States* v. *Rose,* 215 F. 2d 617, 628–629, those reasons were summarized as follows:

"(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or

is to encourage all witnesses to step forward and testify freely without fear of retaliation. The witnesses in antitrust suits may be employees or even officers of potential defendants, or their customers, their competitors, their suppliers. The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow. This "indispensable secrecy of grand jury proceedings," *United States* v. *Johnson, supra,* at 513, must not be broken except where there is a compelling necessity. There are instances when that need will outweigh the countervailing policy. But they must be shown with particularity.

No such showing was made here. The relevancy and usefulness of the testimony sought were, of course, sufficiently established. If the grand jury transcript were made available, discovery through depositions, which might involve delay and substantial costs, would be avoided. Yet these showings fall short of proof that without the transcript a defense would be greatly prejudiced or that without reference to it an injustice would be done. Modern instruments of discovery serve a useful purpose, as we noted in *Hickman* v. *Taylor,* 329 U. S. 495. They together with pretrial procedures make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent. *Id.,* at 501. Only strong public policies weigh against disclosure. They were present in *Hickman*

---

their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

v. *Taylor, supra,* for there the information sought was in the trial notes of the opposing lawyer. They are present here because of the policy of secrecy of grand jury proceedings. We do not reach in this case problems concerning the use of the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like.[7] Those are cases of particularized need where the secrecy of the proceedings is lifted discretely and limitedly. We only hold that no compelling necessity has been shown for the *wholesale* discovery and production of a grand jury transcript under Rule 34. We hold that a much more particularized, more discrete showing of need is necessary to establish "good cause." The court made no such particularized finding of need in case of any one witness. It ordered that the entire transcript be delivered over to the appellees. It undoubtedly was influenced by the fact that this type of case is complex, long drawn out, and expensive to prosecute and defend. It also seemed to have been influenced by the fact that the prosecution was using criminal procedures to elicit evidence in a civil case. If the prosecution were using that device, it would be flouting the policy of the law. For in these Sherman Act cases Congress has guarded against *in camera* proceedings by providing that "the taking of depositions . . . shall be open to the public" and that no order excluding the public shall be valid. 37 Stat. 731, 15 U. S. C. § 30.

We cannot condemn the Government for any such practice in this case. There is no finding that the grand jury proceeding was used as a short cut to goals otherwise barred or more difficult to reach. It is true that no indictment was returned in the present case. But that is no reflection on the integrity of the prosecution. For all

[7] See, *e. g., United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 234. Cf. *Jencks* v. *United States,* 353 U. S. 657.

we know, the trails that looked fresh at the start faded along the way. What seemed at the beginning to be a case with a criminal cast apparently took on a different character as the events and transactions were disclosed. The fact that a criminal case failed does not mean that the evidence obtained could not be used in a civil case. It is only when the criminal procedure is subverted that "good cause" for *wholesale* discovery and production of a grand jury transcript would be warranted. No such showing was made here.

Reversed.

MR. JUSTICE WHITTAKER, concurring.

Believing that appellees did not make a sufficient showing of such exceptional and particularized need for the grand jury minutes as justified wholesale invasion of their secrecy in the circumstances of this case, I concur in the Court's decision, but desire to add a word.

Although a "no true bill" was voted by the grand jury in this case—and, hence, the Government's attorneys, agents and investigators were then through with the grand jury proceedings, if they were conducted for lawful purposes—the Government admits that it has used the grand jury minutes and transcripts in its preparation, and that it intends to use them in its prosecution, of this civil case. Appellees suggest, principally on the basis that no indictment was prepared, presented to or asked of the grand jury, that the Government's purpose in conducting the grand jury investigation was to obtain, *ex parte,* direct or derivative evidence for its use in this civil suit which then was contemplated. But the District Court made no finding of such a fact. However, it is obvious that such could be, and probably has often been, the real purpose of grand jury investigations in like cases. The grand jury minutes and transcripts are not the property of the Government's attorneys, agents or

investigators, nor are they entitled to possession of them in such a case. Instead those documents are records of the court. And it seems clear that where, as here, a "no true bill" has been voted, their secrecy, which the law wisely provides, may be as fully violated by disclosure to and use by the government counsel, agents and investigators as by the defendants' counsel in such a civil suit.

In order to maintain the secrecy of grand jury proceedings; to eliminate the temptation to conduct grand jury investigations as a means of *ex parte* procurement of direct or derivative evidence for use in a contemplated civil suit; and to eliminate, so far as possible, fundamental unfairness and inequality by permitting the Government's attorneys, agents and investigators to possess and use such materials while denying like possession and use by attorneys for the defendants in such a case, I would adopt a rule requiring that the grand jury minutes and transcripts and all copies thereof and memoranda made therefrom, in cases where a "no true bill" has been voted, be promptly upon return sealed and impounded with the clerk of the court, subject to inspection by any party to such a civil suit only upon order of the court made, after notice and hearing, upon a showing of such exceptional and particularized need as is necessary to establish "good cause," in the circumstances, under Rule 34. Surely such an order may still be made by the trial court in this case.

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

The Court reverses the judgment below without so much as adverting to what seems to me the real and only question in the case: Did the District Court *abuse its discretion* by ordering the Government to furnish the appellees with the transcript of the grand jury proceedings?

I do not believe this question can be avoided or obscured by casting the issue in terms of whether the appellees made an adequate showing of "good cause" under Rule 34 for the discovery which they sought and gained. What constitutes "good cause" under Rule 34 necessarily turns on the facts and circumstances of each particular case, and in the last analysis rests within the sound discretion of the trial court. 4 Moore's Federal Practice (2d ed. 1950) § 34.08.

Viewing the matter in this light, I do not think it can be said that the lower court was guilty of an abuse of discretion. A cursory statement of the setting in which appellees were accorded access to the grand jury transcript should suffice to make this clear. By any standards this antitrust litigation was of great magnitude and complexity. In 1956, when discovery was ordered, the litigation had been pending for over three years, and despite the assiduous efforts of the court to bring the issues within manageable compass, the case seems still to have been far removed from a posture where trial was in sight. The discovery order was the subject of elaborate briefing and oral argument, during the course of which the court found itself handicapped by the refusal of the Government to indicate the exact use it had made, and intended to make, of the grand jury transcript in conection with its preparation and trial of the case.[1]

---

[1] The following is taken from the District Court's opinion:
". . . during the oral argument of these motions the court asked Mr. McDowell, plaintiff's attorney, the following questions:
" 'Mr. McDowell, do you object to submitting a detailed affidavit stating exactly (a) what use, if any, plaintiff has made in the past of the grand jury transcripts while preparing for the trial of this case; (b) what use, if any, plaintiff intends to make of the transcripts during its future preparation for the trial; (c) what use, if any, plaintiff intends to make of the transcripts during the trial.'
"He wished to confer with his superiors in the Department of Justice

In granting discovery the District Court wrote a reasoned opinion in which it found: (1) that the Government had filed its complaint in this civil suit following an eighteen-month grand jury investigation, which had ended some four years before the discovery order without an indictment being returned; [2] (2) that the Government had made continuing use of the grand jury transcript in its preparation of the civil case; (3) that "the ends of justice" required that appellees be given reciprocal access to such transcript in aid of the preparation of their defense; [3] and (4) that disclosure would not in the circumstances violate the traditional reasons for safeguarding the secrecy of grand jury proceedings.[4]

---

before deciding if he would answer the questions. The court awaited candid answers—but in vain. For Mr. McDowell wrote:

" 'The questions which you put to me at the hearing on December 12th relating to the use by the government of transcripts of grand jury testimony have been given serious consideration within the Department of Justice. I am instructed respectfully to inform you that we do not wish to add to the statement which I made at the hearing.'

"His 'statement' at the hearing did not answer the questions. Because the plaintiff arbitrarily has refused to answer the court's questions relating to any use of these transcripts, the court has been denied helpful information and as a result has been forced to seek its answers elsewhere."

[2] In response to questions put at oral argument, government counsel informed us that the Government had not requested the grand jury to return an indictment.

[3] In the Appendix to its opinion, which reviews some of the prior proceedings, the District Court refers to the following comment made by it at an earlier stage of the case:

" 'One of my concerns is that since plaintiff has been preparing its case for probably three years, or longer, how long must we wait for defendants to prepare their case? The sooner defendants are informed of plaintiff's factual contentions, the sooner defense preparation can commence—and not before, obviously.' "

[4] See *United States* v. *Rose*, 215 F. 2d 617, 628–629, quoted from in footnote 6 of the Court's opinion.

The following quotation from the District Court's opinion reveals its alert and sensitive concern over unnecessary disclosure of grand jury proceedings:

> "I realize there is a strong caveat against the needless intrusion upon the indispensable secrecy of grand jury proceedings. The reasons therefor were indelibly impressed upon me when I served as Assistant Prosecutor of my home county for ten years where I spent the greater part of the time presenting cases to the grand jury. I realize further that a strong and positive showing should be required of persons seeking to break the seal of secrecy, which never should be done except in extreme instances to prevent clear injustice or an abuse of judicial processes. Which policy should be served here to bring about justice—the policy requiring secrecy, or the policy permitting disclosure for discovery purposes only in the interest of justice? I believe the requirement of secrecy in this case can be safely waived and the minutes of the grand jury divulged within the limits prescribed by the law, and that the failure to do so would be an abuse of discretion and not in the furtherance of justice. Under Rule 6 (e) of the Federal Rules of Criminal Procedure our courts have, by way of interpretation, extended their jurisdiction so as to remove 'the veil of secrecy' around grand jury proceedings where, in the court's discretion, the furtherance of justice requires it. If it can be done on the criminal side, I can see no compelling reason why it cannot be safely done on the civil side in this case. I would not grant these motions if I thought they were prejudicial to the public interest, useless or unnecessary, would not reveal the information sought, or defendants already possessed all the necessary information or could obtain it by pursuing a different remedy."

The findings of the District Court as to what the procedural situation in this complicated case fairly required, made as they were by a judge who had been in charge of this case from the beginning, should not be disturbed by this Court any more lightly than findings made after a trial on the merits. Cf. *United States* v. *Yellow Cab Co.*, 338 U. S. 338; *United States* v. *Oregon State Medical Society*, 343 U. S. 326.

The Court recognizes that had the Government's grand jury investigation been *instituted* solely in aid of a civil suit—that is without any thought of obtaining an indictment—the appellees would then have been entitled to see the entire grand jury transcript. Although it may be true that no finding has been made here of such misuse of the grand jury process, I am unable to see why the case where a grand jury investigation has aborted and the Government thereafter uses the transcript solely in aid of its civil case should be treated differently. The only distinction relates to the Government's motive in instituting the grand jury proceedings. For in both instances the effect on the litigation is precisely the same, and in both instances the Government's conduct disrespects the policy underlying 37 Stat. 731, 15 U. S. C. § 30,[5] requiring the testimony of witnesses in government Sherman Act equity suits to be taken in public. In neither type of case should the Court undertake to lay down a fixed rule concerning disclosure of grand jury transcripts, but instead should leave the matter to the sound discretion of the

---

[5] "[In] the taking of depositions of witnesses for use in any suit in equity brought by the United States under the [Sherman Act], and in the hearings before any examiner or special master appointed to take testimony therein, the proceedings shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceedings shall be valid or enforceable."

trial judge, to be dealt with by him in light of the particular circumstances of each case.

I fully subscribe to the view that the strong public policy of preserving the secrecy of grand jury proceedings should prevent the general disclosure of a grand jury transcript except in the rarest cases. But the inflexible rule announced today, which allows that policy to be overcome *only* in instances where it can be shown that the Government has "subverted" the grand jury process in the manner suggested by the Court, seems to me an unwise and unnecessary curbing of trial judges in the efficient and fair handling of the difficult problems presented by a unique type of litigation. See the Prettyman Report on Procedure in Anti-Trust and other Protracted Cases, 13 F. R. D. 62, which has been adopted by the Judicial Conference of the United States. This is particularly so in cases like the one before us, where the grand jury's functions have long since ended. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233–234; 8 Wigmore, Evidence (3d ed. 1940), § 2362. Here as elsewhere in the realm of discretionary power appellate review should be the safeguard against abuse in particular instances, rather than the *a priori* imposition of rigid restrictions upon trial judges which leave them powerless to act in appropriate cases. Under the facts shown by this record, I am unable to say that the District Court abused its discretion in ordering the grand jury transcript to be made available to the appellees.

BONETTI *v.* ROGERS, ATTORNEY GENERAL, ET AL.

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

No. 94. Argued April 7, 1958.—Decided June 2, 1958.

Petitioner, an alien, was admitted to the United States for permanent residence in 1923. He was a member of the Communist Party from 1932 through 1936. He then left the Party and never rejoined it. In 1937 he went abroad, abandoning all rights of residence in the United States. In 1938 he was readmitted to the United States "for permanent residence as a quota immigrant." He has since resided in the United States except for a one-day visit to Mexico in 1939. In 1951, proceedings were instituted to deport him under §§ 1 and 4 (a) of the Anarchist Act of October 16, 1918, as amended by § 22 of the Internal Security Act of 1950, as an alien who "was at the time of entering the United States, or has been at any time thereafter," a member of the Communist Party. *Held:* Since petitioner's claim of right to remain in the United States is based upon his entry in 1938 and he was not then and has not since been a member of the Communist Party, he is not deportable under §§ 1 and 4 (a). Pp. 692–700.

(a) Since petitioner claims no right under his entry in 1923 and the Government does not by the deportation proceeding seek to annul any right acquired under that entry, the date of his entry in 1938 constituted his "time of entering the United States," within the meaning of § 4 (a). Pp. 696–697.

(b) *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, distinguished. Pp. 697–698.

99 U. S. App. D. C. 386, 240 F. 2d 624, reversed.

Joseph Forer argued the cause for petitioner. With him on the brief was *David Rein.*

Roger Fisher argued the cause for respondents. With him on a brief was *Solicitor General Rankin. Beatrice Rosenberg* was also on a brief for respondents.

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

This is a deportation case. It presents a narrow and vexing problem of statutory construction. The principal question here is which, if less than all, of several entries into this country by the alien petitioner was "the time of entering the United States," within the meaning of § 4 (a) of the Anarchist Act of October 16, 1918,[1] as amended by § 22 of the Internal Security Act of 1950. 64 Stat. 1008.

The facts are clear and undisputed. Petitioner, an alien who was born in France of Italian parentage, was admitted to the United States for permanent residence on November 1, 1923, at the age of 15. He became a member of the Communist Party of the United States at Los Angeles in 1932 and remained a member to the end of 1936, when he voluntarily ceased paying dues and left the Party. He never rejoined it. On June 28, 1937, he departed the United States—abandoning all rights of residence here—and went to Spain to fight with the Spanish Republican Army.[2] He fought in that army for one year, was wounded in action and suffered the loss of his left foot. On September 19, 1938, he came to the United States as a new or "quota immigrant," and applied for admission for permanent residence. He was detained at Ellis Island. A hearing was held by a Board of Special Inquiry on the issue of his admissibility. At that hearing he freely admitted that he had been a member of the Communist Party of the United States at Los

[1] 40 Stat. 1012, as amended, 41 Stat. 1008, 54 Stat. 673, 8 U. S. C. § 137.

[2] He stated that he did so because he felt that Franco was a tool of Mussolini and Hitler, and if the Rome-Berlin Axis was not stopped "they would go on from country to country until the World War would start."

Angeles, California, from 1932 to 1936, and had voluntarily left the United States on June 28, 1937, to go to Spain and fight in the Spanish Republican Army. The Board ordered him excluded, but its order was reversed on an administrative appeal, and on October 8, 1938, he was admitted to the United States "for permanent residence as a quota immigrant." He has since continuously resided in the United States (California), except for a one-day visit to Tijuana, Mexico, in September 1939. "[A]t the time of entering the United States" on October 8, 1938, he was not, and has not since been, a member of the Communist Party.

In October 1951, proceedings were instituted to deport him under §§ 1 and 4 (a) of the Anarchist Act of October 16, 1918, as amended by § 22 of the Internal Security Act of 1950, as an "alien who had been a member of the Communist Party of the United States after entry into the United States." After a hearing, disclosing the facts above recited, the hearing officer ordered him deported, and the Board of Immigration Appeals affirmed.

Petitioner then brought this action in the United States District Court for the District of Columbia against respondent, praying that the order of deportation be set aside. Respondent moved for summary judgment. The district judge sustained the motion and dismissed the complaint. On appeal the Court of Appeals, finding that after petitioner's first admission for permanent residence on November 1, 1923, he admittedly had been a member of the Communist Party of the United States from 1932 through 1936, affirmed the judgment. 99 U. S. App. D. C. 386, 240 F. 2d 624. We granted certiorari. 355 U. S. 901.

The parties agree that petitioner's past Communist Party membership did not make him excludable "at the time of entering the United States" on October 8, 1938,

nor when, after his one-day visit to Mexico, he re-entered in September 1939.[3]

Section 1 of the Anarchist Act of October 16, 1918,[4] as amended by § 22 of the Internal Security Act of 1950,[5] deals with the subject of *exclusion of aliens from admission* and provides, in pertinent part, as follows:

> "[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:
>
> "(1) . . . ;
>
> "(2) Aliens who, at any time, shall be or shall have been, members of any of the following *classes:*
>
> "(A) . . . ;
>
> "(B) . . . ;
>
> "(C) Aliens who *are* members of . . . the Communist Party of the United States . . . .
>
> . . . .
>
> "(H) . . . ." (Emphasis added.)

Section 4 (a) of the Anarchist Act of October 16, 1918, as amended by § 22 of the Internal Security Act of 1950, deals with the subject *of deportation* and, in pertinent part, provides:

> "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,

---

[3] The statutory provision for exclusion from admission solely by reason of membership in the Communist Party was first enacted in the Internal Security Act of 1950 (64 Stat. 1006), and therefore, petitioner was not excludable from admission, on the ground of past membership in the Communist Party, at the time he entered the United States on October 8, 1938, or at the time he re-entered, after a one-day visit to Tijuana, Mexico, in September 1939.

[4] See note 1.

[5] 64 Stat. 1008.

> 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." [6] (Emphasis added.)

The sense of the two amended sections, as applied to this case, is this: Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of the Communist Party of the United States 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.

Petitioner contends that it was his entry of October 8, 1938, made after the administrative adjudication of that date that he was admissible "as a quota immigrant for permanent residence"—not his entry of November 1, 1923—that constitutes "the time of entering the United States," within the meaning of § 4 (a); and inasmuch as he was not then, and has not since been, a member of the Communist Party he is not deportable under that section. Respondent, on the other hand, contends that § 4 (a) applies to *any* "entry into the United States" by petitioner, including that of November 1, 1923, and that inasmuch as he was a member of the Communist Party of the United States from 1932 to 1936 before departing from, and abandoning all rights to reside in, the United States on June 28, 1937, he is deportable under that sec-

---

[6] Although both §§ 1 and 4 (a) were repealed by § 403 (a) (16) of the Immigration and Nationality Act of June 27, 1952 (66 Stat. 163, 279), those sections nevertheless apply to this case under the saving clause (§ 405 (a)) of the 1952 Act, since the order of deportation involved here was issued prior to the effective date of the 1952 Act.

tion as an alien who has been, after entering the United States, a member of the Communist Party.

To decide the question presented it is necessary to examine and construe the statutes involved. It seems plain that the reference in § 4 (a) to the "classes of aliens enumerated in § 1 (2)" incorporates only the classes enumerated in subsections (A) through (H),[7] and that the only one of those classes which is applicable here is class "(C)," namely, "Aliens who *are* members of . . . the Communist Party of the United States." (Emphasis added.) There being no question about the fact that petitioner was not a member of the Communist Party at the time of entering the United States on October 8, 1938, or at any time thereafter, the question is whether that entry—as affected, if at all, by his re-entry as a returning resident alien after his one-day trip to Mexico in September 1939—or the one of November 1, 1923, constituted "the time of [his] entering the United States," within the meaning of § 4 (a), as amended by § 22 of the Internal Security Act of 1950. If it was the latter he is deportable, but if the former he is not.

It is obvious that Congress in enacting these statutes did not contemplate the novel factual situation that confronts us, and that these statutes are, to say the least, ambiguous upon the question we must now decide. Our study of the problem, in the light of the facts of this case, has brought us to these conclusions: The first phrase of § 4 (a)—"Any alien who was *at the time* of entering the United States"—necessarily refers to "the time" of petitioner's adjudicated lawful admission, as affected, if at

---

[7] Cf. *Berrebi* v. *Crossman,* 208 F. 2d 498, and *Klig* v. *Brownell* (dissenting opinion), 100 U. S. App. D. C. 294, 299–300, 244 F. 2d 742, 747–748 (certiorari granted, 355 U. S. 809; judgment of the Court of Appeals vacated and case remanded to the District Court with directions to dismiss the cause as moot, *sub nom. Klig* v. *Rogers,* 355 U. S. 605).

all, by his re-entry as a returning resident alien after his one-day trip to Mexico in September 1939, under which he claims the right to remain. The next phrase—"or has been at any time thereafter"—necessarily refers *to all times subsequent* to such lawful admission. Thus the two phrases, when read together, refer to the particular time the alien was lawfully permitted to make the entry under which he claims the status and right of lawful presence that is sought to be annulled by his deportation, and to any time subsequent thereto. Inasmuch as petitioner claims no right of lawful presence under his entry of November 1, 1923, and respondent does not by the deportation order here seek to annul any right of presence acquired under that entry, we must hold that petitioner's entry of October 8, 1938—as affected, if at all, by his returning from Mexico in September 1939—constituted "the time of entering the United States," within the meaning of § 4 (a). Since petitioner was not a member of the Communist Party "at the time of entering the United States" on October 8, 1938, and has not been a member "at any time thereafter," including, of course, the time of his returning entry from Mexico in September 1939, he is not deportable under § 4 (a), as amended by § 22 of the Internal Security Act of 1950.

In a different context this Court has said that the word *entry* "includes any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one." *United States ex rel. Volpe* v. *Smith,* 289 U. S. 422, 425.[8] While that holding is quite correct, it is not here apposite or controlling, for the question here is not whether petitioner's coming to the United States in 1923 constituted an *entry.* Admittedly

[8] Cf. *Lewis* v. *Frick,* 233 U. S. 291; *United States ex rel. Claussen* v. *Day,* 279 U. S. 398; *United States ex rel. Stapf* v. *Corsi,* 287 U. S. 129.

it did. Rather, our question is whether it was *that entry,* or the adjudicated lawful entry of October 8, 1938, as affected, if at all, by petitioner's re-entry as a returning resident alien in September 1939, which constituted the time of petitioner's entry upon which his present status depends. In the novel circumstances here we think it evident that it could not be his entry of November 1, 1923, since petitioner had abandoned all rights of residence under that entry. *Volpe* did not involve any question of abandonment.

Of course, if petitioner had become a member of the Communist Party *after* the entry of October 8, 1938, or the re-entry of September 1939, he would have been deportable under § 4 (a). *Galvan* v. *Press,* 347 U. S. 522. But it is admitted that he was not a member of that party at those times or "at any time thereafter." Likewise, if he had applied for entry after June 27, 1952, he would be excludable under § 212 (a)(28)(C)(iv) of the Immigration and Nationality Act of 1952. 66 Stat. 182, 8 U. S. C. § 1182 (a)(28)(C)(iv).

The Government argues that the construction which we adopt would enable a resident alien, who after lawfully entering the United States for permanent residence became a member of the Communist Party, to avoid deportation for that cause simply by quitting the party and thereafter stepping across the border and returning. While a resident alien who leaves the country for any period, however brief, does make a new entry on his return, he is then subject nevertheless to all current exclusionary laws, one of which, at present, excludes from admission any alien who has ever been a member of the Communist Party. Section 212 (a)(28)(C)(iv) of the Immigration and Nationality Act of 1952, *supra.* If he enters when excludable, he is deportable, even though he would not have been subject to deportation if he had

not left the country.[9] Hence, our construction of the statutes here involved does not enable an alien resident to evade the deportation laws by leaving the country and returning after a brief period, for if at the time of his return he is within an excluded class he would be excludable, or, if he nevertheless enters, he would be deportable. It is admitted that when petitioner returned from Mexico after his one-day trip in September 1939 he was not excludable under then current exclusionary laws. That entry, being lawful, can only support our conclusion in this case.

Though §§ 1 and 4 (a) of the Anarchist Act of 1918, as amended by the Internal Security Act of 1950, are quite ambiguous in their application to the question here presented, we believe that our interpretation of them is the only fair and reasonable construction that their cloudy provisions will permit under the rare and novel facts of this case. "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts . . . against the imposition of a harsher punishment." *Bell* v. *United States,* 349 U. S. 81, 83. And we cannot "assume that Congress meant to trench on [an alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Fong Haw Tan* v. *Phelan,* 333 U. S. 6, 10. Cf. *Barber* v.

[9] *Shaughnessy* v. *United States ex rel. Mezei,* 345 U. S. 206; *United States ex rel. Volpe* v. *Smith,* 289 U. S. 422; *United States ex rel. Stapf* v. *Corsi,* 287 U. S. 129; *United States ex rel. Claussen* v. *Day,* 279 U. S. 398; *Lapina* v. *Williams,* 232 U. S. 78; *Lewis* v. *Frick,* 233 U. S. 291; *Chae Chan Ping* v. *United States,* 130 U. S. 581.

Gonzales, 347 U. S. 637, 642–643; *Delgadillo* v. *Carmichael,* 332 U. S. 388, 391.

As applied to the circumstances of this case, we hold that the phrase in § 4 (a), "Any alien who was at the time of entering the United States, or has been at any time thereafter," refers to the time the alien was lawfully permitted to make the entry and re-entry under which he acquired the status and right of lawful presence that is sought to be annulled by his deportation. Petitioner's entry of October 8, 1938, as affected, if at all, by his subsequent entry in September 1939 as a returning resident alien, constituted "the time of entering the United States" within the meaning of § 4 (a). Inasmuch as petitioner was not on October 8, 1938, or at any time thereafter—including September 1939—a member of the Communist Party, he is not deportable under §§ 1 and 4 (a) of the Anarchist Act of October 16, 1918, as amended by § 22 of the Internal Security Act of 1950, and the judgment must be reversed for that reason.

Reversed.

MR. JUSTICE CLARK, with whom MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN concur, dissenting.

Petitioner entered the United States in 1923, being admitted for permanent residence at that time. From 1932 to 1936 he was a member of the Communist Party. In 1937 he voluntarily left the country to fight in the Spanish Civil War. A year later, in 1938, he returned and again was admitted. At that time our law did not exclude members or past members of the Communist Party.

In 1950 the Congress passed the Internal Security Act, § 22 of which required the Attorney General to deport all aliens who were Communist Party members "at the time of entering the United States, or . . . at any time there-

after." 64 Stat. 1008. As early as the Alien Registration Act of 1940, 54 Stat. 670, 673, the Congress had provided, as explained by the Senate Committee on the Judiciary, "that any alien who has been a member of [a proscribed class] at any time after his admission to the United States (for no matter how short a time or how far in the past so long as it was after the date of entry), shall be deported." S. Rep. No. 1796, 76th Cong., 3d Sess. 3. In enacting § 22 of the Act of 1950, the Congress stated, "The purpose . . . is to strengthen the provisions of existing law with respect to the exclusion and deportation of subversive aliens." S. Rep. No. 2230, 81st Cong., 2d Sess. 5. This report further declared, "[T]he conclusion is inescapable that . . . the Communist movement in the United States is an alien movement . . . . The severance of this connection and the destruction of the life line of communism becomes . . . an immigration problem." *Id.*, at 16. Additional classes of aliens were made deportable "at any time after entry, whether or not membership in the class has ceased." *Id.*, at 23. The construction of the section as applying to membership after *any* entry—including the first as well as the last—seems to be demanded by this legislative history. See also 84 Cong. Rec. 10448–10449 (remarks of Representative Hobbs), 86 Cong. Rec. 8343 (remarks of Senator Connally). That the Act applies retroactively to all aliens regardless of the time of their entry is admitted. See *Galvan* v. *Press,* 347 U. S. 522 (1954). The simple test, therefore, is whether the alien was at any time a member of the Communist Party upon or after coming to the United States, regardless of how many entries he may have made. Petitioner was a Party member subsequent to his arrival in 1923, so the language "at any time thereafter" clearly makes the section applicable to him.

But today the Court, in effect, writes the word "last" into the statute. The result is that an alien who has been a member of the Communist Party in the United States is deportable only if "at the time of *last* entering the United States, or . . . at any time thereafter," he was a member. This cripples the effectiveness of the Act, permitting aliens to escape deportation solely because they happen to leave and then re-enter the country. It is conceded by the Court that had petitioner remained here he would have been deportable. Hence, the construction of the Court restricts the literal sense of the 1950 Act to aliens who have continuously remained in the United States.

This innovation is contrary to decades of uninterrupted administrative interpretation and practice, and also to prior cases of this Court. The Immigration and Naturalization Service has always construed "entry" as meaning any coming of an alien from a foreign country to the United States.[1] The Congress recognized this interpretation when considering the Immigration and Nationality Act of 1952. H. R. Rep. No. 1365, 82d Cong., 2d Sess. 32; S. Rep. No. 1137, 82d Cong., 2d Sess. 4.[2] The Court, however, side-steps this authority by saying that "the novel circumstances here" preclude our consideration of the 1923 entry because "petitioner had abandoned all rights of residence under that entry." But that is not the question. True, petitioner makes no claim under the

---

[1] For a comprehensive review of administrative action with regard to re-entry of resident aliens, see Lowenstein, The Alien and the Immigration Law, 206–213.

[2] Although the Act of 1952 is not directly involved here, it is significant that the meaning of "entry" was codified in § 101 (a)(13) as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession . . . ." 66 Stat. 167, 8 U. S. C. § 1101 (a)(13).

1923 entry, and the 1938 admission is not dependent on the former but was a regular "quota immigrant" entry. Nevertheless, petitioner is an alien who entered and "thereafter" was a member of the Communist Party while in the United States. Any number of additional entries—in 1938 or otherwise—cannot wipe out that fact.

In *United States ex rel. Volpe* v. *Smith,* 289 U. S. 422 (1933), the question was whether an alien's criminal conviction had occurred "prior to entry" within the meaning of § 19 of the Immigration Act of 1917. 39 Stat. 889. The alien contended that "entry" should be construed as meaning, in effect, "first entry," but the argument was rejected. The Court said, "An examination of the Immigration Act of 1917, we think, reveals nothing sufficient to indicate that Congress did not intend the word 'entry' . . . should have its ordinary meaning." 289 U. S., at 425. See also *United States ex rel. Claussen* v. *Day,* 279 U. S. 398 (1929). Petitioner here makes the converse argument that the word "entering" should be modified to read "last entering." I would not so amend the statute in disregard of the long and uniform judicial, legislative, and administrative history whereby "entry" has acquired a definitive, technical gloss, to wit, its ordinary meaning and nothing more or less. Therefore, I would affirm the judgment of the Court of Appeals.

HILL *v.* UNITED STATES.

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

No. 287, Misc. Decided June 2, 1958.

Certiorari and leave to proceed *in forma pauperis* granted; judgment vacated and case remanded for consideration in light of cases cited.

Reported below: See 101 U. S. App. D. C. 313, 248 F. 2d 635.

Howard Adler, Jr. for petitioner.

Solicitor General Rankin, Acting Assistant Attorney General McLean 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 of the United States Court of Appeals for the District of Columbia Circuit is vacated and the case is remanded to that court for consideration in light of *Ellis* v. *United States,* 356 U. S. 674, decided May 26, 1958, and also in light of *Farley* v. *United States,* 354 U. S. 521; and *Johnson* v. *United States,* 352 U. S. 565.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 704 and 901 were purposely omitted, in order to make it possible to publish the *per curiam* decisions and orders in the current advance sheets or "preliminary prints" of the United States Reports with *permanent* page numbers, thus making the official citations available immediately.

ORDERS FROM MARCH 10 THROUGH JUNE 2, 1958.

MARCH 10, 1958.

Miscellaneous Orders.

The Clerk is authorized to transfer to the National Archives the manuscript records and miscellaneous papers filed in cases docketed in this Court up to the year 1860.

No. 304, Misc. KAPSALIS *v.* UNITED STATES; and
No. 408, Misc. MCGUINN *v.* PEGELOW, SUPERINTENDENT, DISTRICT OF COLUMBIA REFORMATORY. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted. (*See also Misc. Nos. 41, 186 and 223, ante, pp. 24, 25, 26.*)

No. 714. HINKLE, ADMINISTRATRIX, ET AL. *v.* NEW ENGLAND MUTUAL LIFE INSURANCE CO. OF BOSTON, MASSACHUSETTS. C. A. 8th Cir. Certiorari granted. *Leland S. Forrest* for petitioners. *Phineas M. Henry* for respondent. Reported below: 248 F. 2d 879.

Certiorari Denied.

No. 740. APPELBAUM, DOING BUSINESS AS PENGUIN FROZEN FOODS, *v.* REFRIGERADORA DEL NOROESTE, S. A. C. A. 7th Cir. Certiorari denied. *Stanford Clinton, Robert A. Sprecher* and *Frank A. Karaba* for petitioner. *Louis A. Kohn, Miles G. Seeley* and *Robert L. Stern* for respondent. Reported below: 248 F. 2d 858.

No. 747. TAYLOR, TRUSTEE IN BANKRUPTCY, *v.* ENGRAM. C. A. 5th Cir. Certiorari denied. *T. T. Molnar* for petitioner. Reported below: 249.F. 2d 441.

No. 664. MANUEL RODRIGUEZ TRADING CORP. ET AL. *v.* UNITED STATES; and

No. 767. UNITED STATES *v.* MANUEL RODRIGUEZ TRADING CORP. ET AL. Court of Claims. Certiorari denied. *Paul D. Page, Jr.* for petitioners in No. 664 and respondents in No. 767. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Robert S. Green* for the United States. Reported below: 139 Ct. Cl. 564, 153 F. Supp. 442.

No. 745. DAUGETTE ET AL. *v.* PATTERSON, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *William S. Pritchard* and *Winston B. McCall* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Robert N. Anderson* and *Sheldon I. Fink* for respondent. Reported below: 250 F. 2d 753.

No. 746. GIDEON *v.* GIDEON. District Court of Appeal of California, Second Appellate District. Certiorari denied. Reported below: 153 Cal. App. 2d 541, 314 P. 2d 1011.

No. 748. HANDY CAFE, INC., *v.* JUSTICES OF THE SUPERIOR COURT OF MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied. *Angus M. MacNeil* for petitioner. Reported below: 248 F. 2d 485.

No. 758. HOLLYWOOD CIRCLE, INC., *v.* DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Robert M. Maslow* for petitioner. *Edmund G. Brown,* Attorney General of California, *Eimo G. Funke,* Assistant Attorney General, and *Edward M. Belasco* for respondents. Reported below: 153 Cal. App. 2d 523, 314 P. 2d 1007.

No. 749. Garden Homes, Inc., *v.* Mason, Commissioner, Federal Housing Administration. C. A. 1st Cir. Certiorari denied. *Angus M. MacNeil* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for respondent. Reported below: 249 F. 2d 71.

No. 769. Phillips *v.* Phillips. District Court of Appeal of California, Third Appellate District. Certiorari denied. *Philip Adams* for petitioner. *Moses Lasky* for respondent. Reported below: 152 Cal. App. 2d 582, 313 P. 2d 630.

No. 305, Misc. Van Slyke *v.* New York. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Reported below: 3 App. Div. 2d 809, 160 N. Y. S. 2d 834.

No. 325, Misc. Wood *v.* Tucker, Warden. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 330, Misc. Baxter *v.* Washington. Supreme Court of Washington. Certiorari denied.

No. 335, Misc. Dickson *v.* Ragen, Warden. Supreme Court of Illinois. Certiorari denied.

No. 338, Misc. Flint *v.* West Virginia et al. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 339, Misc. Stefanich *v.* Uffelman, Superintendent, Illinois Security Hospital, et al. Supreme Court of Illinois. Certiorari denied.

No. 392, Misc. Hudson *v.* North Carolina. Supreme Court of North Carolina. Certiorari denied.

No. 389, Misc. JENNINGS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 11 Ill. 2d 610, 144 N. E. 2d 612.

No. 402, Misc. JENDREJK *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. Reported below: 152 Cal. App. 2d 462, 313 P. 2d 881.

No. 403, Misc. GARCIA *v.* MARTIN, WARDEN. Appellate Divison of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Reported below: 4 App. Div. 2d 854, 166 N. Y. S. 2d 1009.

No. 404, Misc. DONALDSON *v.* FLORIDA. Supreme Court of Florida. Certiorari denied.

No. 405, Misc. SOMERVILLE *v.* TUCKER, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 410, Misc. GAMBINO *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 12 Ill. 2d 29, 145 N. E. 2d 42.

No. 415, Misc. NEWBERRY *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 416, Misc. GIOVENGO *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 418, Misc. FERNANDEZ *v.* CULVER, STATE PRISON CUSTODIAN. Supreme Court of Florida. Certiorari denied. Reported below: 98 So. 2d 487.

No. 419, Misc. MORGAN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 422, Misc. MCFREDERICK *v.* FLORIDA. Supreme Court of Florida. Certiorari denied.

No. 426, Misc. CURTIS *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 427, Misc. KLETTER ET UX. *v.* CITY OF MIAMI BEACH. Supreme Court of Florida. Certiorari denied.

No. 428, Misc. CUTSHAW *v.* OHIO. Court of Appeals of Madison County, Ohio. Certiorari denied.

Rehearing Denied.

No. 77. MOOG INDUSTRIES, INC., *v.* FEDERAL TRADE COMMISSION, 355 U. S. 411; and

No. 101. E. EDELMANN & CO. *v.* FEDERAL TRADE COMMISSION, 355 U. S. 941. Petitions for rehearing denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of these applications.

No. 148, Misc. SMITH *v.* STEELE ET AL., 355 U. S. 933. Rehearing denied.

MARCH 17, 1958.

Miscellaneous Orders.

No. 420, Misc. WHITE *v.* RANDOLPH, WARDEN, ET AL.;

No. 424, Misc. LANTZ *v.* LOONEY, WARDEN; and

No. 431, Misc. ALLEN *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. ——. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. *v.* ILLINOIS ET AL. The application for supersedeas presented to MR. JUSTICE CLARK and by him referred to the Court is denied. *Edwin R. Eckersall, Edwin O. Schiewe, R. K. Merrill* and *J. P. Reedy* for applicant. *Latham Castle,* Attorney General, and *H. R. Begley,* Special Assistant Attorney General, for the State of Illinois et al., and *S. Ashley Guthrie* and *Francis D. Fisher* for the Milwaukee Road Commuters' Association, respondents.

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

The public interest, justice between the litigants, and the protection of our own appellate jurisdiction seem to me to require that petitioner's application for a supersedeas in this case be granted. The dispute underlying the application involves intrastate commuter fares on petitioner's Chicago suburban service. The Interstate Commerce Commission, in proceedings under § 13 (4) of the Interstate Commerce Act, 24 Stat. 383, as amended, 41 Stat. 484, 49 U. S. C. § 13 (4), found that existing intrastate fares caused undue discrimination against interstate commerce, and in order to remove such discrimination prescribed fares higher than those authorized by the state commission. The District Court set aside the order, enjoined its enforcement, and remanded the case to the Commission. 146 F. Supp. 195. On appeal to this Court, we found that the Commission's order lacked "findings which reflect the commuter service deficit in the totality of intrastate revenues . . . ." *Chicago, M., St. P. & P. R. Co.* v. *Illinois,* 355 U. S. 300, 308. The District Court's judgment was modified to provide for a remand to the Commission for proceedings not inconsistent with the opinion of this Court.

It was noted in the opinion that the injunction of the District Court had been "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." 355 U. S., at 302, n. 2. In the District Court petitioner moved for a stay of that court's original decree requiring refund of the excess fares, pending the further proceedings before the Commission contemplated by the judgment of this Court. On February 28, 1958, the motion was denied, and petitioner was ordered to begin distributing the impounded fund immediately. A notice of appeal from this order was filed on March 3, 1958, and the District Court denied a stay of its order pending a determination of the appeal.

It can hardly be denied that the contention raised by petitioner's appeal from the order of February 28 is substantial: that if after further proceedings before the Commission a valid order is entered to the same effect as the order earlier set aside, petitioner will be entitled to the impounded funds. Reliance on *Atlantic Coast Line R. Co.* v. *Florida,* 295 U. S. 301, gives force to the argument that such is present law. In that case the order of the Commission raising the intrastate rates was set aside "solely upon the ground that the facts supporting the conclusion were not embodied in the findings." 295 U. S., at 311. After the want of proper findings had been remedied and a new order sustained on appeal, the carrier was allowed to retain the monies collected under the first order of the Commission. "The final result of the litigation," as the Court summed it up in *United States* v. *Morgan,* 307 U. S. 183, 195, "was that the railroads were permitted to collect and retain the higher rates for a period during which there was no lawful order of the Commission superseding the state commission rates."

458778 O—58——49

If it is conceded, as it must be, that it is not frivolous to suppose that petitioner may ultimately be entitled to the impounded fund, can it be doubted that the District Court, or this Court if the District Court has failed to act, is bound, in the absence of serious injury to the interests of others, to exercise equitable control over the fund to the end that petitioner's claim, if it is rightful, will not be rendered nugatory before it can be enforced? Such control has been exercised before by this Court. In *United States* v. *Morgan, supra,* a case presenting considerations very similar to those raised by petitioner's appeal, the Court stayed and superseded a District Court order requiring distribution of a fund after this Court had set aside an order of the Secretary of Agriculture and before further proceedings could be had before him.

Our first judgment in this case could no doubt have provided for protection of the fund pending the eventual outcome of the proceedings before the Commission. The broad power on review of the judgments of lower courts to "remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances," 28 U. S. C. § 2106, would have encompassed such a result. See also *Addison* v. *Holly Hill Fruit Products, Inc.,* 322 U. S. 607, 619–623. And the exercise of this equitable power is no less appropriate at the present stage of the proceedings when it has become necessary for the protection of petitioner's rights on appeal.

The fact that petitioner agreed to the order providing that the fund would be distributed if the District Court's judgment was affirmed is no barrier to the just disposition of the application now before us. In the first place, it is not at all clear that by their agreement the parties contemplated distribution of the fund in the circumstances that in fact came to pass. Although as a verbal matter

it is arguable that the judgment of the District Court was "affirmed," our judgment was based on grounds substantially different from those of the District Court. The judgment of this Court by no means finally determined the legality of the intrastate fares. It looked to further proceedings before the Commission that may well result in a valid order finding the fares discriminatory. Moreover, petitioner could not, by its agreement, bargain away the rights of the public, or relieve the court from its obligation to frame a decree that would implement the policy of the Federal Act protecting the revenues of interstate carriers. No more can such an agreement relieve this Court of its duty to do substantial justice, insofar as that is within the power of a court, between the contending interests in the litigation.

When the fund in this case is distributed, as a result of the inaction of this Court, that fund is irrecoverable, and whatever public interest may ultimately be shown in the retention of the fund by the carrier as a public agency is conclusively defeated, quite apart from its merits. The fact that if the fund is not immediately distributed some of the commuters may through carelessness lose their coupons or through indifference fail to claim refunds even if ultimately they should be allowed is scarcely a comparable equity in favor of distributing the whole fund at once. If the commuters have retained their coupons this long, it is unlikely that they will throw them away during the few additional months necessary for a just disposition of the fund.

And no great delay need necessarily be involved. The Commission has assured the parties that further proceedings on the remand will be promptly had, and petitioner has informed the Court that hearings will be held on or about March 24. We can easily condition the stay on effective measures for expedition. Moreover, disposition

of petitioner's appeal from the order of February 28 need not await the ultimate outcome of the Commission hearings. If after a consideration of the appeal the Court should conclude that a second order by the Commission could in no event give petitioner a right to the impounded fund, then of course it would be promptly distributed. But if, after a careful consideration of the questions raised by the appeal, we concluded that a second, valid order by the Commission would entitle petitioner to the fund, justice would require "the court to await the outcome of the proceedings in order that it may discharge the duty which it owes to the litigants and the public by avoiding unlawful disposition of the fund in the meantime, and ultimately distributing it to those found to be entitled to it." *United States* v. *Morgan,* 307 U. S. 183, 198. I think that the Court, by refusing to grant a supersedeas, rejects a common-sense and equitable disposition of the case.

No. 69. SAFEWAY STORES, INC., *v.* VANCE, TRUSTEE IN BANKRUPTCY, 355 U. S. 389. Motion of petitioner for modification of opinion denied. Petition for rehearing of respondent denied. *John B. Tittmann* for petitioner. *Robert J. Nordhaus* and *Sam Dazzo* for respondent.

No. 309, Misc. MCCRAW *v.* WOODRUFF, WARDEN. Motion for leave to file petition for writ of habeas corpus and other relief denied.

Probable Jurisdiction Noted.

No. 650. INTERNATIONAL BOXING CLUB OF NEW YORK, INC., ET AL. *v.* UNITED STATES. Appeal from the United States District Court for the Southern District of New York. Probable jurisdiction noted. *Kenneth C. Royall* and *John F. Caskey* for the Madison Square Gar-

den Corporation et al., and *Charles Sawyer* for the International Boxing Club, Inc., of Illinois, et al., appellants. *Solicitor General Rankin, Assistant Attorney General Hansen* and *Charles H. Weston* for the United States. Reported below: 150 F. Supp. 397.

Certiorari Granted. (*See also No. 799, ante, p. 41.*)

No. 703. Folsom, Secretary of Health, Education, and Welfare, *v.* Florida Citrus Exchange et al. C. A. 5th Cir. Certiorari granted. *Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *William W. Goodrich* for petitioner. *J. Hardin Peterson* for the Florida Citrus Exchange et al., and *Morris E. White* for Schell, respondents. Reported below: 246 F. 2d 850.

No. 763. Williams, State Revenue Commissioner, *v.* Stockham Valves & Fittings, Inc. Supreme Court of Georgia. Certiorari granted. *Eugene Cook,* Attorney General of Georgia, and *Ben F. Johnson, Broadus B. Zellars* and *Hugh Gibert,* Deputy Assistant Attorneys General, for petitioner. *William K. Meadow* for respondent. Reported below: 213 Ga. 713, 101 S. E. 2d 197.

No. 394, Misc. Lee *v.* Madigan, Warden. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted. *Robert Edward Hannon, Carl L. Rhoads* and *Charles Upton Shreve* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for respondent. Reported below: 248 F. 2d 783.

Certiorari Denied. (*See also No. 225, Misc., ante, p. 42.*)

No. 697. SOUTH CAROLINA GENERATING CO. *v.* FEDERAL POWER COMMISSION ET AL.;

No. 762. GEORGIA POWER CO. *v.* FEDERAL POWER COMMISSION ET AL.; and

No. 782. SOUTH CAROLINA PUBLIC SERVICE COMMISSION *v.* FEDERAL POWER COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. *W. C. McLain, D. W. Robinson, Arthur M. Williams, Jr., T. Justin Moore, George D. Gibson* and *John W. Riely* for petitioner in No. 697. *William C. Chanler* for petitioner in No. 762. *T. C. Callison,* Attorney General of South Carolina, and *Irvine F. Belser,* Assistant Attorney General, for petitioner in No. 782. *Solicitor General Rankin, Paul A. Sweeney, Willard W. Gatchell, Howard E. Wahrenbrock* and *Theodore French* for the Federal Power Commission, respondent. With them on the briefs was *Assistant Attorney General Doub* for the Federal Power Commission, respondent in Nos. 762 and 782. Reported below: 249 F. 2d 755.

No. 743. NEVIL C. WITHROW CO. *v.* W. R. GRIMSHAW CO. ET AL. C. A. 8th Cir. Certiorari denied. *Cooper Jacoway* for petitioner. *Remington Rogers* for respondents. Reported below: 248 F. 2d 896.

No. 750. WATT *v.* TEXAS STATE BOARD OF MEDICAL EXAMINERS. Court of Civil Appeals of Texas, Fifth Supreme Judicial District. Certiorari denied. *James H. Martin* for petitioner. Reported below: 303 S. W. 2d 884.

No. 434, Misc. HALL *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 214 Md. 652, 136 A. 2d 380.

No. 755. Goldstein et al. *v.* United States. C. A. 1st Cir. Certiorari denied. *Paul T. Smith* for petitioners. *Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 250 F. 2d 909.

No. 760. Forster, Assignee, *v.* Sauber, District Director of Internal Revenue. C. A. 7th Cir. Certiorari denied. *Charles L. Byron* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Melva M. Graney* and *Fred E. Youngman* for respondent. Reported below: 249 F. 2d 379.

No. 764. Eisinger et ux. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. Petitioners *pro se. Solicitor General Rankin, Assistant Attorney General Rice* and *I. Henry Kutz* for respondent. Reported below: 250 F. 2d 303.

No. 772. Marzec *v.* United States. C. A. 7th Cir. Certiorari denied. *Ellis N. Slack* and *Joseph A. Struett* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph F. Goetten* for the United States. Reported below: 249 F. 2d 941.

No. 783. Speed et al. *v.* City of Tallahassee, Florida. Circuit Court of Florida, Second Judicial Circuit. Certiorari denied. *Thurgood Marshall* and *Constance Baker Motley* for petitioners. *Leo L. Foster* for respondent.

No. 344, Misc. Gonzalez *v.* United States. C. A. 1st Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for the United States. Reported below: 247 F. 2d 489.

No. 190, Misc. SYKES *v.* CHAIRMAN AND MEMBERS OF THE DISTRICT OF COLUMBIA PAROLE BOARD ET AL. 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 *Robert G. Maysack* for respondents.

No. 374, Misc. BLACKFORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *A. L. Wirin* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 247 F. 2d 745.

No. 381, Misc. HAYES *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: 102 U. S. App. D. C. 1, 249 F. 2d 516.

No. 425, Misc. MARLETTE *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: 249 F. 2d 95.

No. 433, Misc. MCCONNELL *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 435, Misc. PALMER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 249 F. 2d 8.

No. 437, Misc. GALLOWAY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

Rehearing Denied. (*See also No. 69, ante, p. 910.*)

No. 673. MINNESOTA MINING & MANUFACTURING CO. *v.* SEARS, ROEBUCK & CO. ET AL., 355 U. S. 932;

No. 675. MILLER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, 355 U. S. 939; and

No. 332, Misc. ATKINS *v.* ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, 355 U. S. 936. Petitions for rehearing denied.

No. 195. NICHOLS ET AL. *v.* ALKER ET AL., 355 U. S. 820. Motion for leave to file petition for rehearing denied.

MARCH 31, 1958.

Miscellaneous Orders.

No. 44. PEREZ *v.* BROWNELL, ATTORNEY GENERAL. Certiorari, 352 U. S. 908, to the United States Court of Appeals for the Ninth 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. *Charles A. Horsky* for movant-petitioner. Reported below: 235 F. 2d 364. [Case decided the same day. See *ante*, p. 44.]

No. 441, Misc. SHELTON *v.* RANDOLPH, WARDEN;

No. 442, Misc. MCDONALD *v.* UNITED STATES ATTORNEY GENERAL;

No. 472, Misc. ORTEGA *v.* RAGEN, WARDEN; and

No. 473, Misc. ANDERSON *v.* DOWD, WARDEN, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 465, Misc. FLOWERS *v.* KLINGBIEL, CHIEF JUSTICE OF THE ILLINOIS SUPREME COURT. Motion for leave to file petition for writ of mandamus denied.

No. 509. CITY OF TACOMA *v.* TAXPAYERS OF TACOMA, WASHINGTON, ET AL. Certiorari, 355 U. S. 888, to the Supreme Court of Washington. The motion of the Solicitor General for leave to participate in oral argument, as *amicus curiae,* is granted and one-half hour is allowed for that purpose. *Solicitor General Rankin* for the Federal Power Commission, movant. Reported below: 49 Wash. 2d 781, 307 P. 2d 567.

No. 251. PANAMA CANAL CO. *v.* GRACE LINE, INC., ET AL.; and

No. 252. GRACE LINE, INC., ET AL. *v.* PANAMA CANAL CO. Certiorari, 355 U. S. 810, to the United States Court of Appeals for the Second Circuit. The motions for leave to file briefs of AFL–CIO Maritime Committee and Intercoastal Steamship Freight Association, as *amici curiae,* are denied. Reported below: 243 F. 2d 844.

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 First Methodist Church of San Leandro and First Unitarian Church of Berkeley, as *amici curiae,* is granted. The motion for leave to participate in oral argument, as *amici curiae,* is denied. THE CHIEF JUSTICE took no part in the consideration or decision of these motions. *Stanley A. Weigel* and *Frank B. Frederick* for movants. Reported below: 48 Cal. 2d 419, 899, 311 P. 2d 508, 540.

No. 443, Misc. BRINK *v.* HEINZE, 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. 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. The motion of the Solicitor General for leave to participate in oral argument, as *amicus curiae,* is granted and one-half hour is allowed for that purpose. *Solicitor General Rankin* for the United States, movant. Reported below: 47 Cal. 2d 597, 681, 695, 699, 306 P. 2d 824, 886, 894, 875.

Probable Jurisdiction Noted.

No. 754. UNITED STATES *v.* A & P TRUCKING CO. ET AL. Appeal from the United States District Court for the District of New Jersey. Probable jurisdiction noted. *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for the United States. *August W. Heckman* and *Anthony J. Cioffi* for appellees.

Certiorari Granted.

No. 802. MITCHELL, SECRETARY OF LABOR, *v.* LUBLIN, MCGAUGHY & ASSOCIATES ET AL. C. A. 4th Cir. Certiorari granted. *Solicitor General Rankin, Stuart Rothman* and *Bessie Margolin* for petitioner. *Thomas H. Willcox* for respondents. Reported below: 250 F. 2d 253.

Certiorari Denied. (*See also No. 766, ante, p. 225 and No. 443, Misc., supra.*)

No. 744. CREASY *v.* OHIO POWER CO. C. A. 6th Cir. Certiorari denied. *Bernard S. Glick* for petitioner. *John W. Christensen* for respondent. Reported below: 248 F. 2d 745.

No. 765. EDDY *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se*. *Paul L. Adams,* Attorney General of Michigan, *Samuel J. Torina,* Solicitor General, and *Samuel Brezner* for respondent. Reported below: 349 Mich. 637, 85 N. W. 2d 117.

No. 770. KAHN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Charles H. Carr* and *George E. Danielson* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for the United States. Reported below: 251 F. 2d 160.

No. 779. MATTHEWS *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. *Wayne E. Ripley* for petitioner. Reported below: 99 So. 2d 568.

No. 781. SELECT THEATRES CORP. *v.* JOHNSON, COLLECTOR OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Victor R. Wolder* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *Grant W. Wiprud* for respondent. Reported below: 249 F. 2d 655.

No. 784. UNITED STATES EX REL. GOLDSTEIN, ALIAS GOLD, ET AL. *v.* LOHMAN, SHERIFF. C. A. 7th Cir. Certiorari denied. *Henry H. Koven* for petitioners. Reported below: 251 F. 2d 259.

No. 785. UNITED STATES *v.* TWIN CITY POWER CO. ET AL. C. A. 4th Cir. Certiorari denied. *Solicitor General Rankin, Assistant Attorney General Morton, Ralph S. Spritzer, Roger P. Marquis* and *Harold S. Harrison* for the United States. *Dean Acheson, Robert L. Randall* and *David W. Robinson* for respondents. Reported below: 248 F. 2d 108.

No. 786. KAYE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Zelma Shapiro* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Foley* and *Beatrice Rosenberg* for the United States. Reported below: 251 F. 2d 87.

No. 788. JONES ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Irvine E. Ungerman, Manuel Grabel* and *Maynard I. Ungerman* for petitioners. *Solicitor General Rankin, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 251 F. 2d 288.

No. 789. CHA'O LI CHI *v.* MURFF, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. *Edward J. Ennis* and *Benjamin Gim* for petitioner. *Solicitor General Rankin* and *Beatrice Rosenberg* for respondent. Reported below: 250 F. 2d 854.

No. 791. MILLER *v.* CUTHILL ET AL. C. A. 7th Cir. Certiorari denied. *Benjamin Wham* and *Owen W. Crumpacker* for petitioner. *Lester Asher* for Cuthill, and *Harry T. Ice* for the Ortman-Miller Machine Co., respondents. Reported below: 249 F. 2d 43.

No. 793. SARKIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Bernard J. Mellman* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 250 F. 2d 514.

No. 795. ROBERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Truman M. Hobbs* for petitioner. *Solicitor General Rankin* and *Beatrice Rosenberg* for the United States. Reported below: 249 F. 2d 737.

No. 776. HOSHOUR ET AL. *v.* APODACA, RECEIVER, ET AL. Supreme Court of Colorado. Certiorari denied. *Francis P. O'Neill* for petitioners. Reported below: 136 Colo. 320, 316 P. 2d 1054.

No. 792. MADSEN *v.* OVERHOLSER, SUPERINTENDENT, SAINT ELIZABETHS HOSPITAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Joseph S. Robinson* and *Dayton M. Harrington* for petitioner. *Solicitor General Rankin, Assistant Attorney General White* and *Harold H. Greene* for respondent. Reported below: 102 U. S. App. D. C. 146, 251 F. 2d 387.

No. 794. DISTRICT OF COLUMBIA *v.* SCULL ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Chester H. Gray, Milton D. Korman* and *Hubert B. Pair* for petitioner. *Joseph D. Bulman* and *Sidney M. Goldstein* for respondents. Reported below: 102 U. S. App. D. C. 104, 250 F. 2d 767.

No. 796. MACK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Albert E. Jenner, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph F. Goetten* for the United States. Reported below: 249 F. 2d 321.

No. 798. BELL *v.* BUCKEYE UNION CASUALTY CO. C. A. 7th Cir. Certiorari denied. *Richard W. Galiher* for petitioner. *Benjamin G. Cox* and *Ernest J. Zwerner* for respondent. Reported below: 249 F. 2d 211.

No. 805. COLLIER *v.* MILLER ET AL. Supreme Court of Appeals of Virginia. Certiorari denied. *Louis B. Fine* for petitioner. *William R. C. Cocke* for respondents.

No. 738. CAUDLE *v.* UNITED STATES; and

No. 739. CONNELLY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion the petitions should be granted. MR. JUSTICE CLARK and MR. JUSTICE WHITTAKER took no part in the consideration or decision of these applications. *C. Arthur Anderson* and *John J. Hooker* for petitioner in No. 738. *Jacob M. Lashly, John H. Lashly, Paul B. Rava* and *Alan Y. Cole* for petitioner in No. 739. *Solicitor General Rankin, Roger Fisher* and *Carl H. Imlay* for the United States. Reported below: 249 F. 2d 576.

No. 33, Misc. AYCOCK *v.* FLORIDA ET AL. Supreme Court of Florida. Certiorari denied. Petitioner *pro se*. *Richard W. Ervin,* Attorney General of Florida, and *David U. Tumin,* Assistant Attorney General, for respondents.

No. 249, Misc. KANTER *v.* RECORDER'S COURT, DETROIT, MICHIGAN, ET AL. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se*. *Paul L. Adams,* Attorney General of Michigan, and *Samuel J. Torina,* Solicitor General, for respondents.

No. 276, Misc. GAWRON *v.* SUPREME COURT OF ILLINOIS ET AL. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *Latham Castle,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondents.

No. 407, Misc. WOODS *v.* HEINZE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 249 F. 2d 614.

No. 429, Misc. DUBOIS *v.* TEXAS ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 412, Misc. BROWN *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.

No. 432, Misc. DEWAN ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioners *pro se. Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 248 F. 2d 812.

No. 436, Misc. NICHOLS *v.* MCGEE, DIRECTOR, CALIFORNIA STATE DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 438, Misc. EINIEDER *v.* OAKLAND CIRCUIT COURT. Supreme Court of Michigan. Certiorari denied.

No. 439, Misc. DONALDSON *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: 248 F. 2d 364.

No. 440, Misc. SKINNER *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 444, Misc. GOULD *v.* FLOETE, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Rankin* for respondents.

No. 447, Misc. CAMPBELL *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Reported below: 307 S. W. 2d 486.

No. 445, Misc. LOUVIER *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Woodrow Seals* for petitioner. Reported below: 164 Tex. Cr. R. —, 305 S. W. 2d 574.

No. 446, Misc. JONES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Fred R. Wright* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for the United States. Reported below: 248 F. 2d 772.

No. 448, Misc. MACK *v.* OHIO ET AL. Court of Appeals of Franklin County, Ohio. Certiorari denied.

No. 450, Misc. COLEMAN *v.* SMYTH, SUPERINTENDENT, VIRGINIA PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 451, Misc. BRADY *v.* FLORIDA. Supreme Court of Florida. Certiorari denied.

No. 452, Misc. KING *v.* MCNEILL, SUPERINTENDENT, MATTEAWAN STATE HOSPITAL. Supreme Court of New York, Dutchess County. Certiorari denied.

No. 453, Misc. MCGANN *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: 249 F. 2d 431.

No. 454, Misc. JORDAN *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 458, Misc. SILEO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 3 N. Y. 2d 916, 145 N. E. 2d 875.

458778 O—58——50

No. 459, Misc. WEEMS *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 *Felicia Dubrovsky* for the United States. Reported below: 102 U. S. App. D. C. 12, 249 F. 2d 527.

No. 460, Misc. BOVE *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 462, Misc. HULL *v.* BANNAN, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 463, Misc. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *J. B. Hodges* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for the United States. Reported below: 249 F. 2d 306.

No. 467, Misc. WHALEN *v.* KRUEGER, WARDEN, ET AL. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 468, Misc. HOLT *v.* PEPERSACK, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 249 F. 2d 653.

No. 469, Misc. UNITED STATES EX REL. GENTNER *v.* MARTIN, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 249 F. 2d 894.

No. 470, Misc. GRAY *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 214 Md. 642, 136 A. 2d 246.

No. 464, Misc. MEACHAM *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 471, Misc. ARCIERI *v.* ALVIS, WARDEN. Supreme Court of Ohio. Certiorari denied. Reported below: 167 Ohio St. 37, 146 N. E. 2d 123.

Rehearing Denied.

No. 387, Misc. FAULKNER *v.* ILLINOIS, 355 U. S. 965; and

No. 549, Misc. JEFFERSON *v.* TEETS, WARDEN, 355 U. S. 967. Petitions for rehearing denied.

No. 411, October Term, 1951. MADSEN *v.* KINSELLA, WARDEN, 343 U. S. 341. Motion for leave to file petition for rehearing denied.

APRIL 4, 1958.

Dismissal Under Rule 60.

No. 842. UNITED STATES *v.* SOCONY MOBIL OIL CO., INC. On appeal from the United States District Court for the District of Massachusetts. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Solicitor General Rankin* for the United States, and *Conrad W. Oberdorfer* for appellee, were on the stipulation. With *Mr. Oberdorfer* on a motion to dismiss or affirm were *John L. Hall* and *Henry C. Moses* for appellee. Reported below: See 252 F. 2d 420.

APRIL 7, 1958.

Miscellaneous Orders.

No. 23. PUBLIC UTILITIES COMMISSION OF CALIFORNIA *v.* UNITED STATES, 355 U. S. 534. Petition of appellant for rehearing and clarification of the opinion denied. *Everett C. McKeage* and *J. Thomason Phelps* for appellant.

No. ——. CUTTING *v.* UNITED STATES TREASURY DEPARTMENT ET AL.; and

No. ——. CUTTING *v.* UNITED STATES ET AL. Appeals from the United States District Court for the District of Colorado. The motions to dismiss are granted and the appeals are dismissed under Rule 14 (2) of the Rules of this Court. Appellant *pro se*. *Solicitor General Rankin* for the United States et al., appellees.

Probable Jurisdiction Noted.

No. 778. UPHAUS *v.* WYMAN, ATTORNEY GENERAL OF NEW HAMPSHIRE. Appeal from the Supreme Court of New Hampshire. Probable jurisdiction noted. *Royal W. France* and *Leonard B. Boudin* for appellant. *Louis C. Wyman,* Attorney General of New Hampshire, for appellee. Reported below: 101 N. H. 139, 136 A. 2d 221.

Certiorari Granted. (*See also No. 54, ante, p. 258; Nos. 378, 450 and 494, ante, p. 256; and No. 771, ante, p. 257.*)

No. 356. BROWN *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *J. Bertram Wegman* for petitioner. *Solicitor General Rankin, Warren Olney, III,* then Assistant Attorney General, *Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 247 F. 2d 332.

No. 833. TERRITORY OF ALASKA *v.* AMERICAN CAN CO. ET AL. C. A. 9th Cir. Certiorari granted. MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *J. Gerald Williams,* Attorney General of Alaska, and *David J. Pree,* Assistant Attorney General, for petitioner. *W. C. Arnold, H. L. Faulkner* and *R. E. Robertson* for respondents. Reported below: 246 F. 2d 493.

Certiorari Denied.

No. 797. NEUBAUER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Sidney M. Glazer* for petitioner. *Solicitor General Rankin* and *Beatrice Rosenberg* for the United States. Reported below: 250 F. 2d 838.

No. 801. G. W. THOMAS DRAYAGE & RIGGING CO., INC., ET AL. *v.* INDUSTRIAL INDEMNITY CO. ET AL. Supreme Court of California. Certiorari denied. *Robert W. Kenny* and *Frank B. Belcher* for petitioners. *Max Thelen* and *Robert L. Bridges* for respondents. Reported below: 49 Cal. 2d 255, 316 P. 2d 966.

No. 804. BOUZIDEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Hayden C. Covington* for petitioner. *Solicitor General Rankin, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 251 F. 2d 728.

No. 807. EICHBERG & CO., INC., *v.* VAN ORMAN FORT WAYNE CORP. C. A. 7th Cir. Certiorari denied. *George B. Warburton* for petitioner. Reported below: 248 F. 2d 758.

No. 808. SCHWEBEL *v.* ORRICK ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Chester T. Lane* and *Alexander B. Hawes* for petitioner. *Solicitor General Rankin, Thomas G. Meeker* and *David Ferber* for respondents. Reported below: 102 U. S. App. D. C. 210, 251 F. 2d 919.

No. 829. BRADFORD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* and *Beatrice Rosenberg* for the United States.

No. 809. TOMLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Wallace Miller, Jr.* for petitioner. *Solicitor General Rankin* and *Beatrice Rosenberg* for the United States. Reported below: 250 F. 2d 549.

No. 817. LOO, TRUSTEE, *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *J. Garner Anthony* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Melva M. Graney* for the United States. Reported below: 248 F. 2d 765.

Rehearing Denied. (*See also No. 23, supra.*)

No. 700. DEAN ET AL. *v.* JELSMA, 355 U. S. 954;

No. 701. BENDIX AVIATION CORP. *v.* INDIANA DEPARTMENT OF STATE REVENUE, INDIANA REVENUE BOARD, INDIANA GROSS INCOME TAX DIVISION, 355 U. S. 607;

No. 202, Misc. BARNES *v.* NATIONAL BROADCASTING CO., INC., ET AL., 355 U. S. 604; and

No. 226, Misc. BARNES *v.* COLUMBIA BROADCASTING SYSTEM, INC., 355 U. S. 608. Petitions for rehearing denied.

Dismissal Under Rule 60.

No. 806. BOWDEN CONCRETE PRODUCTS, INC., ET AL. *v.* BESSER COMPANY. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Caruthers Ewing* and *Irving W. Coleman* for petitioners. *Carl R. Henry* for respondent. Reported below: 249 F. 2d 52.

APRIL 14, 1958.

Miscellaneous Order.

No. 11, Original. UNITED STATES *v.* LOUISIANA ET AL. In this case a total of thirteen hours is allowed for oral argument. The United States is allotted a total of six

hours and a half and the defendant States a total of six hours and a half. The brief of the United States shall be filed on or before May 15; the briefs of the defendant States on or before August 15 and any rebuttal brief by the United States on or before September 15. Other briefs may only be filed by leave of Court. THE CHIEF JUSTICE and MR. JUSTICE CLARK took no part in the consideration or decision of these matters. *Solicitor General Rankin* for the United States. *Jack P. F. Gremillion,* Attorney General, for the State of Louisiana, *Will Wilson,* Attorney General, for the State of Texas, *Joe T. Patterson,* Attorney General, for the State of Mississippi, *John Patterson,* Attorney General, for the State of Alabama, and *Richard W. Ervin,* Attorney General, and *Fred M. Burns,* Assistant Attorney General, for the State of Florida, defendants. For previous orders see 350 U. S. 990; 351 U. S. 946, 978; 352 U. S. 812, 885, 921, 979; 353 U. S. 903, 928, 980; 354 U. S. 515; 355 U. S. 859, 876, 945.

Probable Jurisdiction Noted.

No. 810. RAILWAY EXPRESS AGENCY, INC., *v.* VIRGINIA. Appeal from the Supreme Court of Appeals of Virginia. Probable jurisdiction noted. *Robert J. Fletcher, Thomas B. Gay, William H. Waldrop, Jr.* and *H. Merrill Pasco* for appellant. *Albertis S. Harrison, Jr.,* Attorney General of Virginia, and *Frederick T. Gray,* Special Assistant Attorney General, for appellee. Reported below: 199 Va. 589, 100 S. E. 2d 785.

Certiorari Granted. (*See also No. 200, Misc., ante, p. 271.*)

No. 787. BARENBLATT *v.* UNITED STATES. The petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit and motion

to use the record in *Barenblatt* v. *United States,* No. 742, October Term, 1956 [354 U. S. 930], are granted. MR. JUSTICE BURTON took no part in the consideration or decision of this application and motion. *Edward J. Ennis, Osmond K. Fraenkel, Barent Ten Eyck* and *David Scribner* for petitioner. *Solicitor General Rankin, Assistant Attorney General Tompkins, Philip R. Monahan* and *Doris H. Spangenburg* for the United States. Reported below: 102 U. S. App. D. C. 217, 252 F. 2d 129.

No. 811. WILLIAMS ET UX. *v.* LEE, DOING BUSINESS AS GANADO TRADING POST. Supreme Court of Arizona. Certiorari granted. The Solicitor General is invited to file a brief setting forth the views of the United States. *Norman M. Littell, Frederick Bernays Wiener* and *Laurence Davis* for petitioners. Reported below: 83 Ariz. 241, 319 P. 2d 998.

Certiorari Denied.

No. 219. EDWARDS *v.* DOCTORS HOSPITAL, INC., ET AL. C. A. 2d Cir. Certiorari denied. *Irving Lemov* for petitioner. *Oscar A. Thompson* and *Patrick E. Gibbons* for Doctors Hospital, Inc., respondent. Reported below: 242 F. 2d 888.

No. 814. CHANDLER *v.* BROWN ET AL. Supreme Court of Texas and the Court of Civil Appeals of Texas, Eighth Supreme Judicial District. Certiorari denied. *T. S. Christopher* for petitioner. *Davis Scarborough* for Brown, and *Boyd Laughlin* for Davis et al., respondents. Reported below: See 301 S. W. 2d 720.

No. 818. BLUMENFELD *v.* HARRIS ET AL., DOING BUSINESS AS HARRIS BROTHERS. Court of Appeals of New York. Certiorari denied. *Frederick Posses* for petitioner. Reported below: 3 N. Y. 2d 905, 145 N. E. 2d 871.

No. 813. Ohio Power Co. *v.* United States. Court of Claims. Certiorari denied. *J. Marvin Haynes, N. Barr Miller, F. Eberhart Haynes, Oscar L. Tyree* and *Joseph H. Sheppard* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott* for the United States. Reported below: 140 Ct. Cl. —, 157 F. Supp. 158.

No. 820. Lyles *v.* United States. C. A. 5th Cir. Certiorari denied. *Coy Ulice Spawn* for petitioner. *Solicitor General Rankin* and *Beatrice Rosenberg* for the United States. Reported below: 249 F. 2d 744.

No. 822. Woolley *v.* Eastern Air Lines, Inc., et al. C. A. 5th Cir. Certiorari denied. *William Gresham Ward* for petitioner. *E. Smythe Gambrell* and *W. Glen Harlan* for the Eastern Air Lines, Inc., et al., respondents. Reported below: 250 F. 2d 86.

No. 823. Fall, District Court Judge, et al. *v.* Johnstone. Supreme Court of Montana. Certiorari denied. *E. G. Toomey* for petitioners. *Myles J. Thomas* for respondent. Reported below: — Mont. —, 319 P. 2d 957.

No. 827. General Truck Drivers, Chauffeurs, Warehousemen & Helpers, Local 270, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL–CIO, et al. *v.* National Labor Relations Board. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Herbert S. Thatcher* and *L. N. D. Wells, Jr.* for petitioners. *Solicitor General Rankin, Jerome D. Fenton, Thomas J. McDermott* and *Dominick L. Manoli* for respondent. Reported below: 102 U. S. App. D. C. 238, 252 F. 2d 619.

No. 824. Elliott et al. *v.* Metropolitan Casualty Insurance Co. of New York et al. C. A. 10th Cir. Certiorari denied. Petitioners *pro se*. *Donald N. Clausen, Herbert W. Hirsh* and *Norman A. Miller* for respondents. Reported below: 250 F. 2d 680.

No. 831. Sperry Gyroscope Co., Division of Sperry Rand Corp., *v.* Engineers Association. C. A. 2d Cir. Certiorari denied. *Emanuel L. Gordon* for petitioner. *Bernard Dunau* for respondent. Reported below: 251 F. 2d 133.

No. 832. United States ex rel. Cantisani *v.* Holton, District Director, Immigration and Naturalization Service. C. A. 7th Cir. Certiorari denied. *John J. O'Brien* for petitioner. *Solicitor General Rankin* and *Beatrice Rosenberg* for respondent. Reported below: 248 F. 2d 737.

No. 834. Ginsburg *v.* Stern et al. C. A. 3d Cir. Certiorari denied. *Paul Ginsburg* for petitioner. *Thomas D. McBride,* Attorney General of Pennsylvania, and *Lois G. Forer,* Deputy Attorney General, for respondents. Reported below: 251 F. 2d 49.

No. 836. Hobbs *v.* Wisconsin Power & Light Co. et al. C. A. 7th Cir. Certiorari denied. *H. F. McNenny, F. O. Richey* and *B. D. Watts* for petitioner. *Edward A. Haight* and *Frank Zugelter* for respondents. Reported below: 250 F. 2d 100.

No. 844. Cedar Creek Oil & Gas Co. et al. *v.* Fidelity Gas Co. et al. C. A. 9th Cir. Certiorari denied. *Forrest H. Anderson* and *Leif Erickson* for petitioners. *Cale Crowley, John C. Benson* and *Rodger L. Nordbye* for respondents. Reported below: 249 F. 2d 277.

No. 839. MILMAR ESTATE, INC., ET AL. *v.* MARCUS. C. A. 3d Cir. Certiorari denied. *Leon M. Rosen* for Milmar Estate, Inc., *Abraham Chazin* for Bierman et al., and *Abraham J. Multer* for Kevelson, petitioners. *Maurice Schapira* for respondent. Reported below: See 246 F. 2d 200.

No. 848. SPANOS *v.* CARTER, TRUSTEE. C. A. 8th Cir. Certiorari denied. *Terence M. O'Brien* for petitioner. Respondent *pro se*. Reported below: 250 F. 2d 814.

No. 800. BLACK DIAMOND STEAMSHIP CORP. *v.* AMERICAN SMELTING & REFINING CO. ET AL.; and

No. 815. SKIBS A/S JOLUND *v.* AMERICAN SMELTING & REFINING CO. ET AL. Motions for leave to file briefs of Norges Rederforbund and Koninklijke Nederlandsche Reedersvereeniging, as *amici curiae*, granted. Petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit denied. *Daniel L. Stonebridge* and *Wilbur E. Dow, Jr.* for petitioner in No. 800. *Warner Pyne* and *Dudley C. Smith* for petitioner in No. 815. *Henry N. Longley* and *John W. R. Zisgen* for respondents. *Eugene Underwood, Harold M. Kennedy* and *Hervey C. Allen* for Norges Rederforbund (Norwegian Shipowners' Association), and *Charles S. Haight* for Koninklijke Nederlandsche Reedersvereeniging (Royal Netherlands Shipowners Association), movants. Reported below: 250 F. 2d 777.

No. 199, Misc. PARKER *v.* NEBRASKA. Supreme Court of Nebraska. Certiorari denied. *Eugene D. O'Sullivan, Sr.* for petitioner. *Clarence S. Beck*, Attorney General of Nebraska, and *Homer G. Hamilton*, Assistant Attorney General, for respondent. Reported below: 164 Neb. 614, 83 N. W. 2d 347.

Rehearing Denied.

No. 16. ANDREW G. NELSON, INC., *v.* UNITED STATES ET AL., 355 U. S. 554;

No. 95. HOOVER MOTOR EXPRESS CO., INC., *v.* UNITED STATES, *ante*, p. 38;

No. 97. UNITED STATES *v.* R. F. BALL CONSTRUCTION CO., INC., ET AL., 355 U. S. 587;

No. 688. MILOM *v.* NEW YORK CENTRAL RAILROAD CO., 355 U. S. 953;

No. 712. STONE ET AL. *v.* MCFARLIN ET AL., 355 U. S. 955; and

No. 720. COWLITZ TRIBE OF INDIANS *v.* CITY OF TACOMA, 355 U. S. 955. Petitions for rehearing denied.

No. 90. COLUMBIA BROADCASTING SYSTEM, INC., ET AL. *v.* LOEW'S INC. ET AL., *ante*, p. 43. Rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

APRIL 28, 1958.

Miscellaneous Orders.

No. 18. CITY OF DETROIT ET AL. *v.* MURRAY CORPORATION OF AMERICA ET AL.; and

No. 36. CITY OF DETROIT ET AL. *v.* MURRAY CORPORATION OF AMERICA ET AL., 355 U. S. 489. The appellants in No. 18 and the petitioners in No. 36 are requested to file responses to the petitions for rehearings filed by the Murray Corporation and the Solicitor General within 15 days.

No. 343. AMERICAN MOTORS CORP. ET AL. *v.* CITY OF KENOSHA, *ante*, p. 21. The City of Kenosha is requested to file a response to the petition for rehearing in this case within 15 days.

No. 568, Misc. COONS *v.* MICHIGAN CORRECTIONS DEPARTMENT ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 584, Misc. KINSEY ET AL. *v.* SIMONS, CHIEF JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied. *George E. Brand* and *George E. Brand, Jr.* for petitioners. *Richard Ford* for Knapp et al., respondents.

No. 583, Misc. KINSEY ET AL. *v.* KNAPP ET AL. Motion for leave to file petition for writ of certiorari denied. *George E. Brand* and *George E. Brand, Jr.* for petitioners. *Richard Ford* for Knapp et al., respondents.

No. 336, Misc. SMOTHERMAN *v.* MICHIGAN;
No. 349, Misc. BRINK *v.* HEINZE, WARDEN, ET AL.;
No. 352, Misc. MCDANIEL *v.* CALIFORNIA;
No. 483, Misc. MEDLEY *v.* STEINER, WARDEN;
No. 500, Misc. BRYANT *v.* SMYTH, SUPERINTENDENT, VIRGINIA PENITENTIARY;
No. 510, Misc. LEE *v.* BURFORD, WARDEN;
No. 516, Misc. NEDD *v.* MURPHY, WARDEN;
No. 555, Misc. WELLS *v.* FAY, WARDEN; and
No. 586, Misc. COPELAND *v.* SMYTH, SUPERINTENDENT, VIRGINIA PENITENTIARY. Motions for leave to file petitions for writs of habeas corpus denied.

No. 490, Misc. TAYLOR *v.* TINSLEY, WARDEN;
No. 518, Misc. BELL *v.* MARYLAND; and
No. 535, Misc. COSTELLO *v.* KLINGER, SUPERINTENDENT, DEPARTMENT OF CORRECTIONS, CALIFORNIA MEN'S COLONY. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writ of certiorari, certiorari is denied.

Certiorari Granted. (*See No. 619, ante, p. 335, and No. 847, ante, p. 341.*)

Certiorari Denied. (*See also No. 821, ante, p. 340; No. 497, Misc., ante, p. 339; and Misc. Nos. 490, 518, 535 and 583, supra.*)

No. 761. NATIONAL THEATRES CORP. *v.* BERTHA BUILDING CORP.; and

No. 840. GUMBINER THEATRICAL ENTERPRISES, INC., *v.* NATIONAL THEATRES CORP. C. A. 2d Cir. Certiorari denied. *Frederick W. R. Pride* and *John F. Caskey* for the National Theatres Corporation. *Boris Kostelanetz* and *Eugene Gressman* for petitioner in No. 840 and respondent in No. 761. *James M. Landis* was also on the petition in No. 840. Reported below: 248 F. 2d 833.

No. 768. ROGERS *v.* WHITE METAL ROLLING & STAMPING CORP. C. A. 2d Cir. Certiorari denied. *John J. Hunt* for petitioner. *Francis A. Smith, Jr.* for respondent. Reported below: 249 F. 2d 262.

No. 777. SMALLER *v.* LEACH ET AL. Supreme Court of Colorado. Certiorari denied. *Francis P. O'Neill* for petitioner. Respondents *pro se.* Reported below: 136 Colo. 297, 316 P. 2d 1030.

No. 830. CAPITOL COAL CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Nathan Frankel* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Lee A. Jackson* for respondent. Reported below: 250 F. 2d 361.

No. 837. KINSEY ET AL. *v.* KNAPP ET AL. C. A. 6th Cir. Certiorari denied. *George E. Brand* and *George E. Brand, Jr.* for petitioners. *Richard Ford* for Knapp et al., respondents. Reported below: 249 F. 2d 797.

No. 835. Brotherhood of Railroad Trainmen *v.* Smith et al. C. A. 6th Cir. Certiorari denied. *Gerhard Van Arkel, Henry Kaiser* and *Wayland K. Sullivan* for petitioner. *V. C. Shuttleworth, Harry E. Wilmarth* and *Joseph A. Segal* for Smith et al., respondents. Reported below: 251 F. 2d 282.

No. 843. Gaitan et al. *v.* United States. C. A. 10th Cir. Certiorari denied. *Francis P. O'Neill* for petitioners. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 252 F. 2d 256.

No. 845. Weyerhaeuser Steamship Co. *v.* Yanow. C. A. 9th Cir. Certiorari denied. *Lasher B. Gallagher* for petitioner. *Ben Anderson* for respondent. Reported below: 250 F. 2d 74.

No. 870. Shaw Construction Co. *v.* Stark et al. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Maurice J. Hindin* for petitioner. *Claude B. Cumming* for respondents. Reported below: 155 Cal. App. 2d 206, 317 P. 2d 182.

No. 849. Cuiksa et al. *v.* City of Mansfield et al. C. A. 6th Cir. Certiorari denied. *Leo F. Lightner* for petitioners. *Fred O. Burkhalter* and *Lydon H. Beam* for respondents. Reported below: 250 F. 2d 700.

No. 850. Pompei Winery, Inc., *v.* Ohio Board of Liquor Control. Supreme Court of Ohio. Certiorari denied. *Frank V. Opaskar* and *Anthony R. Fiorette* for petitioner. *William Saxbe,* Attorney General of Ohio, and *S. Noel Melvin,* Assistant Attorney General, for respondent. Reported below: 167 Ohio St. 61, 146 N. E. 2d 430.

458778 O—58——51

No. 846. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *George S. McCarthy* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 250 F. 2d 745.

No. 851. LUCAS ET UX. *v.* BOARD OF EQUALIZATION OF DOUGLAS COUNTY, NEBRASKA. Supreme Court of Nebraska. Certiorari denied. *Robert E. O'Connor* for petitioners. Reported below: 165 Neb. 315, 85 N. W. 2d 638.

No. 852. BANK OF NEVADA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Christopher M. Jenks* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *Sheldon I. Fink* for the United States. Reported below: 251 F. 2d 820.

No. 855. BLACKBURN *v.* MAYO, PRISON CUSTODIAN. C. A. 5th Cir. Certiorari denied. *Claude Pepper, Pat Whitaker* and *Tom Whitaker* for petitioner. *Richard W. Ervin,* Attorney General of Florida, and *George E. Owen,* Assistant Attorney General, for respondent. Reported below: 250 F. 2d 645.

No. 856. POOL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Irving I. Axelrad* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Alexander F. Prescott* and *Joseph Kovner* for respondent. Reported below: 251 F. 2d 233.

No. 858. LOCAL NO. 149, AMERICAN FEDERATION OF TECHNICAL ENGINEERS, AFL–CIO, *v.* GENERAL ELECTRIC CO. C. A. 1st Cir. Certiorari denied. *Herbert S. Thatcher* for petitioner. *Warren F. Farr* for respondent. Reported below: 250 F. 2d 922.

No. 859. Boston & Providence Railroad Corp. et al. *v.* New York, New Haven & Hartford Railroad Co. et al. C. A. 1st Cir. Certiorari denied. *Armistead B. Rood, Joseph B. Hyman, Cassius M. Clay* and *Sidney H. Willner* for petitioners. *James Garfield* for the New York, New Haven & Hartford Railroad Co., respondent. Reported below: 250 F. 2d 463.

No. 860. Robinson *v.* Stevens et al. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Charles F. Luce* for respondents. Reported below: 249 F. 2d 731.

No. 866. Prager, Executrix, et al. *v.* United States. C. A. 5th Cir. Certiorari denied. *Eugene T. Edwards* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for the United States. Reported below: 251 F. 2d 266.

No. 872. International Terminal Operating Co., Inc., Successor to the Jarka Corporation, *v.* Iino Kauin Kaisha, Ltd. C. A. 2d Cir. Certiorari denied. *Paul A. Crouch* for petitioner. *James B. Magnor* and *Vernon S. Jones* for respondent. Reported below: 251 F. 2d 928.

No. 876. Wills Lines, Inc., *v.* Tankport Terminals, Inc. C. A. 2d Cir. Certiorari denied. *Harry D. Graham* for petitioner. *Maurice A. Krisel* for respondent. Reported below: 251 F. 2d 306.

No. 307, Misc. Mummert *v.* Pennsylvania. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *James P. Coho* for petitioner.

No. 341, Misc. Shell *v.* Missouri et al. Supreme Court of Missouri. Certiorari denied.

No. 334, Misc. BILDERBACK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 246 F. 2d 138.

No. 348, Misc. JOHN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 360, Misc. CIHA *v.* ILLINOIS. Criminal Court of Cook County, Illinois. Certiorari denied. Petitioner *pro se*. *Latham Castle,* Attorney General of Illinois, for respondent.

No. 409, Misc. LITTERIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 478, Misc. PURSER *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 480, Misc. JONES *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 484, Misc. HARLEY *v.* ALVIS, WARDEN. Supreme Court of Ohio. Certiorari denied. *George Bailes* for petitioner. Reported below: 167 Ohio St. 48, 146 N. E. 2d 121.

No. 487, Misc. JACKSON *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 214 Md. 454, 135 A. 2d 638.

No. 492, Misc. JONES *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 214 Md. 656, 136 A. 2d 377.

No. 476, Misc. LEVY *v.* HAYWARD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for respondents. Reported below: 101 U. S. App. D. C. 232, 248 F. 2d 152.

No. 477, Misc. LEVY *v.* EVANS ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for respondents. Reported below: 101 U. S. App. D. C. 232, 248 F. 2d 152.

No. 485, Misc. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 493, Misc. COBAS *v.* CLAPP, WARDEN. Supreme Court of Idaho. Certiorari denied. Reported below: 79 Idaho 419, 319 P. 2d 475.

No. 495, Misc. PERRY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States. Reported below: 102 U. S. App. D. C. 315, 253 F. 2d 337.

No. 502, Misc. ALLEN *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied. Reported below: 51 Wash. 2d 894, 318 P. 2d 957.

No. 501, Misc. PENNSYLVANIA EX REL. SAUNDERS *v.* CAVELL, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied. *Louis C. Glasso* for petitioner. Reported below: 390 Pa. 458, 135 A. 2d 750.

No. 496, Misc. TERRY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 12 Ill. 2d 56, 145 N. E. 2d 37.

No. 503, Misc. DUNN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 250 F. 2d 548.

No. 504, Misc. WILLIAMS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 12 Ill. 2d 80, 145 N. E. 2d 29.

No. 506, Misc. JONES *v.* CAVELL, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 511, Misc. DONNER ET AL. *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 512, Misc. WILLIAMS *v.* PEPERSACK, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 250 F. 2d 86.

No. 519, Misc. BULSEK ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 248 F. 2d 543.

No. 521, Misc. KING *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 522, Misc. DODD *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 525, Misc. HODGE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 526, Misc. ROBINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 505, Misc. ACCARDO *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 *Felicia Dubrovsky* for the United States. Reported below: 102 U. S. App. D. C. 4, 249 F. 2d 519.

No. 507, Misc. THOMPSON *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 215 Md. 604, 136 A. 2d 909.

No. 509, Misc. FAZIO *v.* MCNEILL, SUPERINTENDENT, MATTEAWAN STATE HOSPITAL. Court of Appeals of New York. Certiorari denied. *Julius J. Eingoren* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Ruth Kessler Toch,* Assistant Attorney General, for respondent. Reported below: 3 N. Y. 2d 710.

No. 523, Misc. TATUM *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 Foley* and *Beatrice Rosenberg* for the United States. Reported below: 101 U. S. App. D. C. 373, 249 F. 2d 129.

No. 527, Misc. WILLIAMS *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 529, Misc. SULLIVAN *v.* HEINZE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 250 F. 2d 427.

No. 530, Misc. JACKSON *v.* PEPERSACK, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 215 Md. 597, 137 A. 2d 174.

No. 531, Misc. MILES *v.* CULVER, PRISON CUSTODIAN. Supreme Court of Florida. Certiorari denied.

No. 533, Misc. HOOTEN *v.* WASHINGTON STATE PAROLE BOARD ET AL. Supreme Court of Washington. Certiorari denied.

No. 534, Misc. HUMPHRIES *v.* PEPERSACK, WARDEN. C. A. 4th Cir. Certiorari denied Reported below: 250 F. 2d 575.

No. 536, Misc. PRICE *v.* PEPERSACK, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 215 Md. 627, 137 A. 2d 666.

No. 537, Misc. MACKIE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 538, Misc. BAKER *v.* DISTRICT OF COLUMBIA BOARD OF PAROLE ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 539, Misc. HARDY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 252 F. 2d 780.

No. 540, Misc. TYLER *v.* WARDEN, BALTIMORE CITY JAIL. Court of Appeals of Maryland. Certiorari denied. Reported below: 215 Md. 608, 137 A. 2d 205.

No. 541, Misc. RITCHIE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 542, Misc. LAMPE *v.* CLEMMER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 251 F. 2d 465.

No. 544, Misc. CHAPMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *John Paul Jones* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 247 F. 2d 879.

No. 545, Misc. WELSH *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 546, Misc. MCCREARY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Acting Assistant Attorney General Foley* and *Beatrice Rosenberg* for the United States. Reported below: 249 F. 2d 433.

No. 547, Misc. ASHMON *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Reported below: 391 Pa. 141, 137 A. 2d 236.

No. 548, Misc. BARKER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioners *pro se. Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 250 F. 2d 936.

No. 550, Misc. COLLINS *v.* KING, SUPERINTENDENT, CALIFORNIA MEDICAL FACILITY. Supreme Court of California. Certiorari denied.

No. 553, Misc. SCALES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 249 F. 2d 368.

No. 552, Misc. MADDOX *v.* ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 554, Misc. BILDERBACK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 249 F. 2d 271.

No. 557, Misc. MCNEAIR *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Reported below: 391 Pa. 119, 137 A. 2d 454.

No. 558, Misc. WALKER *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. *Herman L. Taylor, Samuel S. Mitchell* and *Arthur L. Lane* for petitioner. *George B. Patton,* Attorney General of North Carolina, and *Ralph Moody,* Assistant Attorney General, for respondent.

No. 559, Misc. SHIPMAN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 560, Misc. WILLIAMS *v.* MULCAHEY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari denied. *George W. Crockett, Jr.* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *Carl H. Imlay* for respondent. Reported below: 250 F. 2d 127.

No. 561, Misc. BROWNER *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 562, Misc. BERGAMIN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 563, Misc. SPANS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 566, Misc. LEE *v.* SMYTH, SUPERINTENDENT, VIRGINIA PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 567, Misc. HARRIS *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Reported below: 391 Pa. 132, 137 A. 2d 452.

No. 569, Misc. MORETTI *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 488, Misc. IRIZARRY y PUENTE *v.* PRESIDENT AND FELLOWS OF HARVARD COLLEGE ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this application. *J. Irizarry y Puente, pro se. Charles B. Rugg, Oscar M. Shaw* and *James Vorenberg* for respondents. Reported below: 248 F. 2d 799.

No. 578, Misc. IN RE PATTERSON. Motion to use record in No. 622, Misc., October Term, 1956, granted. Petition for writ of certiorari to the Supreme Court of Oregon denied. *C. Allan Hart, Jr.* and *R. W. Nahstoll* for petitioner. *Cleveland C. Cory, Hugh L. Biggs* and *Robert S. Miller* for the Oregon State Bar and the Public, respondent. Reported below: —— Ore. ——, 318 P. 2d 907.

Rehearing Denied.

No. 437, October Term, 1955. BOSTON & PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL., 350 U. S. 926. Motion for leave to file petition for rehearing denied.

No. 788, October Term, 1956. GINSBURG *v.* BLACK ET AL., 353 U. S. 911. Motion for leave to file second petition for rehearing, to supplement record, or in the alternative, motion to remand, denied.

No. 43. BROWN *v.* UNITED STATES, *ante,* p. 148. Petition for rehearing or clarification of opinion denied.

MAY 5, 1958.

Miscellaneous Orders.

No. 579, Misc. SEXTON ET AL. *v.* OHIO ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 575, Misc. CLARK *v.* WARDEN, MARYLAND HOUSE OF CORRECTION;

No. 593, Misc. SAUNDERS *v.* ADAMS, WARDEN; and

No. 680, Misc. KISOR *v.* OHIO ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted. (*See also No. 841, ante, p. 363.*)

No. 631, Misc. IRVIN *v.* DOWD, WARDEN. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit granted. *James D. Lopp* for petitioner. *Edwin K. Steers,* Attorney General of Indiana, for respondent. Reported below: 251 F. 2d 548.

Certiorari Denied.

No. 144. Iowa-Illinois Gas & Electric Co. *v.* Benson, Secretary of Agriculture, et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *E. Fontaine Broun, John H. Pickering* and *Henry T. Rathbun* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Melvin Richter* for respondents. Reported below: 101 U. S. App. D. C. 31, 247 F. 2d 22.

No. 812. Brown et al. *v.* Louisville & Nashville Railroad Co. C. A. 5th Cir. Certiorari denied. *Erle Pettus, Jr.* for petitioners. *James A. Simpson, White E. Gibson, Jr., Robert McD. Smith, H. G. Breetz, J. L. Lenihan* and *W. L. Grubbs* for respondent. Reported below: 252 F. 2d 149.

No. 825. Floyd et al. *v.* Complete Auto Transit, Inc. C. A. 5th Cir. Certiorari denied. *Henry Hammer, Henry H. Edens, J. H. Highsmith* and *Lamar W. Sizemore* for petitioners. *T. Baldwin Martin* for respondent. Reported below: 249 F. 2d 396.

No. 854. De Casaus *v.* United States. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 250 F. 2d 150.

No. 862. Cirillo *v.* United States. C. A. 3d Cir. Certiorari denied. *C. Francis Fisher* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph F. Goetten* for the United States. Reported below: 251 F. 2d 638.

No. 864. SPRIGGS *v.* PIONEER CARISSA GOLD MINES, INC., ET AL. C. A. 10th Cir. Certiorari denied. *John J. Spriggs, Sr., pro se,* and *John J. Spriggs, Jr.* for petitioner. Reported below: 251 F. 2d 61.

No. 869. GUIDO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Richard E. Gorman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 251 F. 2d 1.

No. 873. ESTER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Arthur G. Barnett* for petitioners. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *Harold S. Harrison* for the United States. Reported below: 250 F. 2d 139.

No. 878. SAPP ET AL. *v.* ATLANTIC COAST LINE RAILROAD CO. C. A. 5th Cir. Certiorari denied. *Henry Hammer, Henry H. Edens* and *James P. Mozingo, III,* for petitioners. *Norman C. Shepard* and *Frank G. Kurka* for respondent. Reported below: 248 F. 2d 889.

No. 879. ANDERSON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Paul Webb, Jr.* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Baum* for respondent. Reported below: 250 F. 2d 242.

No. 882. RENNEKAMP, DOING BUSINESS AS RADIO STATION WEMR, *v.* MITCHELL, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. *David R. Levin* and *Kenneth E. Rennekamp* for petitioner. *Solicitor General Rankin, Stuart Rothman* and *Bessie Margolin* for respondent. Reported below: 251 F. 2d 488.

No. 875. STOKES *v.* TRAVELERS INSURANCE CO. C. A. 5th Cir. Certiorari denied. *Neal P. Rutledge* for petitioner. Reported below: 249 F. 2d 155.

No. 883. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Charles W. Tessmer* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 251 F. 2d 819.

No. 888. STORER BROADCASTING CO. ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *George W. Yancey* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for the United States. Reported below: 251 F. 2d 268.

No. 890. BRENGLE *v.* NEWMAN, DOING BUSINESS AS NEWMAN KRAUSE CO. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Paul H. Schmidt* and *Benjamin E. Buente* for respondent. Reported below: 250 F. 2d 660.

No. 893. SHEPARD ET UX. *v.* CAL-NINE FARMS. C. A. 9th Cir. Certiorari denied. *Allan K. Perry* for petitioners. *Charles Averette Carson, III,* for respondent. Reported below: 252 F. 2d 884.

No. 904. E. V. PRENTICE MACHINERY CO. ET AL. *v.* ASSOCIATED PLYWOOD MILLS, INC. C. A. 9th Cir. Certiorari denied. *J. Pierre Kolisch* and *Moe M. Tonkon* for petitioners. *Manley B. Strayer* and *Cleveland C. Cory* for respondent. Reported below: 252 F. 2d 473.

No. 916. THE ELLEN S. BOUCHARD ET AL. *v.* CARGILL, INC. C. A. 2d Cir. Certiorari denied. *Roman Beck* for petitioners. *Horace T. Atkins* for respondent. Reported below: 251 F. 2d 845.

No. 925. MARQUEZ ET AL. *v.* AVILES. C. A. 1st Cir. Certiorari denied. *Bolívar Pagán* for petitioners. *Walter L. Newsom, Jr.* for respondent. Reported below: 252 F. 2d 715.

No. 865. SOCIALIST PARTY, USA, ET AL. *v.* JORDAN, SECRETARY OF STATE OF CALIFORNIA. Motion to dispense with printing of petition for writ of certiorari granted. Petition for writ of certiorari to the Supreme Court of California denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion and application. *A. L. Wirin* and *Fred Okrand* for petitioners. *Edmund G. Brown,* Attorney General of California, and *Delbert E. Wong,* Deputy Attorney General, for respondent. The American Civil Liberties Union of Southern California filed a brief, as *amicus curiae,* urging that the petition for writ of certiorari be granted. Reported below: 49 Cal. 2d 864, 318 P. 2d 479.

No. 551, Misc. MCGINTY *v.* BROWNELL ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Herbert J. Jacobi* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for respondents. Reported below: 101 U. S. App. D. C. 368, 249 F. 2d 124.

No. 581, Misc. COLLINS *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 Anderson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 102 U. S. App. D. C. 255, 252 F. 2d 636.

No. 498, Misc. SIMPSON *v.* CULVER, PRISON CUSTODIAN. Supreme Court of Florida. Certiorari denied.

No. 494, Misc. FRYER *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 *Robert G. Maysack* for the United States.

No. 499, Misc. TILGHMAN *v.* CULVER, PRISON CUSTODIAN. Supreme Court of Florida. Certiorari denied. Reported below: 99 So. 2d 282.

No. 528, Misc. DILDINE *v.* WILLSON, SUPERINTENDENT, WASHINGTON STATE REFORMATORY. Supreme Court of Washington. Certiorari denied.

No. 570, Misc. BAERCHUS *v.* MYERS, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 572, Misc. WILSON *v.* WAGG, DIRECTOR OF MENTAL HEALTH, ET AL. Supreme Court of Michigan. Certiorari denied. Reported below: 350 Mich. 465, 87 N. W. 2d 91.

No. 574, Misc. MAHURIN *v.* NASH, WARDEN, ET AL. Supreme Court of Missouri. Certiorari denied.

No. 576, Misc. FREY *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 580, Misc. BURNETT *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 582, Misc. COOK *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 215 Md. 628, 137 A. 2d 649.

No. 585, Misc. BOWERS *v.* STEINER, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 215 Md. 634, 137 A. 2d 645.

No. 587, Misc. AMSLEY *v.* STEINER, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 215 Md. 634, 137 A. 2d 645.

No. 589, Misc. HOUSE *v.* SWOPE, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 249 F. 2d 893.

No. 591, Misc. FAIR *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 594, Misc. CORONA ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 250 F. 2d 578.

No. 595, Misc. HARRISON *v.* SETTLE, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 598, Misc. REYNOLDS *v.* MARTIN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 602, Misc. BURGEE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 3 N. Y. 2d 1025, 147 N. E. 2d 745.

Rehearing Denied.

No. 766. CANTWELL *v.* CANTWELL, *ante,* p. 225;

No. 834. GINSBURG *v.* STERN ET AL., *ante,* p. 932; and

No. 463, Misc. BROWN *v.* UNITED STATES, *ante,* p. 924.

Petitions for rehearing denied.

MAY 19, 1958.

Miscellaneous Orders.

No. 13, Original. CALIFORNIA *v.* WASHINGTON. This case is set for argument on the motion for leave to file bill of complaint and answer. Two hours allowed for oral argument. *Edmund G. Brown,* Attorney General, *Wallace Howland,* Assistant Attorney General, and *Leonard M. Sperry, Jr.,* Deputy Attorney General, for the State of California, plaintiff. *John J. O'Connell,* Attorney General, and *Franklin K. Thorp,* Assistant Attorney General, for the State of Washington, defendant. *Louis J. Lefkowitz,* Attorney General, and *Paxton Blair,* Solicitor General, filed a brief for the State of New York, as *amicus curiae,* supporting the plaintiff.

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. Argued March 13, 1958. This case is restored to the calendar for reargument during the week of October 13, 1958. *Narciso Puente, Jr., Silas B. Axtell* and *Charles A. Ellis* for petitioner. *John L. Quinlan* and *John M. Aherne* for Compania Trasatlantica and Garcia & Diaz, Inc.; *Sidney A. Schwartz* and *William J. Kenney* for the Quin Lumber Co., Inc., and *John P. Smith* for the International Terminal Operating Co., respondents. Briefs of *amici curiae* urging affirmance were filed by *Lawrence Hunt* and *Daniel L. Stonebridge* for the Government of the United Kingdom of Great Britain and Northern Ireland, and for the Government of Denmark, and *James M. Estabrook* and *David P. H. Watson* for Skibsfartens Arbeidsgiverforening (Norwegian Shipping Federation) and Sveriges Redareforening (Swedish Shipowner's Association). Reported below: 244 F. 2d 409.

458778 O—58——52

No. 517, Misc. DAVIS *v.* ALVIS, SUPERINTENDENT, OHIO PENITENTIARY, ET AL.;

No. 626, Misc. JACKSON *v.* HEINZE, WARDEN;

No. 681, Misc. SHEPHERD *v.* ROGERS, ATTORNEY GENERAL, ET AL.; and

No. 689, Misc. NOVAK *v.* PINTO, SUPERINTENDENT, NEW JERSEY STATE PRISON FARM. Motions for leave to file petitions for writs of habeas corpus denied.

No. 449, Misc. TOPP *v.* FERLING, SUPERINTENDENT, MARYLAND STATE REFORMATORY FOR MALES. 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. 514, Misc. MOORE *v.* UNITED STATES. Petition for writ of certiorari and for other relief to the United States Court of Appeals for the Fifth Circuit denied. Petitioner *pro se.* *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for the United States. Reported below: 250 F. 2d 658.

Certiorari Granted. (*See also No. 828, ante, p. 576.*)

No. 905. BEACON THEATRES, INC., *v.* WESTOVER, U. S. DISTRICT JUDGE, ET AL. C. A. 9th Cir. Certiorari granted. *Elwood S. Kendrick* for petitioner. *Hudson B. Cox* for Westover, respondent. Reported below: 252 F. 2d 864.

No. 910. PEURIFOY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari granted. *Daniel R. Dixon* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Melva M. Graney* for respondent. Reported below: 254 F. 2d 483.

No. 885. United States Plywood Corp. *v.* City of Algoma. Supreme Court of Wisconsin. Certiorari granted. *Roger C. Minahan* for petitioner. Reported below: 2 Wis. 2d 567, 87 N. W. 2d 481.

Certiorari Denied. (*See also No. 863, ante, p. 582, and Misc. Nos. 449 and 514, supra.*)

No. 803. Natural Gas Pipeline Co. of America *v.* Harrington et al.; and

No. 901. Harrington et al. *v.* Natural Gas Pipeline Co. of America. C. A. 5th Cir. Certiorari denied. *Clarence H. Ross, Warren T. Spies* and *D. H. Culton* for petitioner in No. 803 and respondent in No. 901. *David T. Searls* and *Gene M. Woodfin* for petitioners in No. 901 and respondents in No. 803. Reported below: 246 F. 2d 915, 253 F. 2d 231.

No. 871. Finsky et al., doing business as Surplex Sales, *v.* Union Carbide & Carbon Corp., owners and operators of Division known as Haynes Stellite Co. C. A. 7th Cir. Certiorari denied. *Avrum N. Andalman* and *Harry G. Fins* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for respondent. Reported below: 249 F. 2d 449.

No. 886. Sterling Drug Inc. *v.* Farbenfabriken Bayer A. G. C. A. 3d Cir. Certiorari denied. *John T. Cahill, George S. Hills, Edward J. O'Mara* and *Robert G. Zeller* for petitioner. *Thurman Arnold, Milton V. Freeman* and *Edgar H. Brenner* for respondent. Reported below: 251 F. 2d 300.

No. 907. Texas Plastics, Inc., et al. *v.* Roto-Lith, Ltd., et al. C. A. 5th Cir. Certiorari denied. *R. Dean Moorhead* for petitioners. *James C. Abbott* for respondents. Reported below: 250 F. 2d 844.

No. 887. County School Board, Arlington, Virginia, et al. *v.* Thompson et al. C. A. 4th Cir. Certiorari denied. *Albertis S. Harrison, Jr.*, Attorney General of Virginia, *Henry T. Wickham*, Special Assistant to the Attorney General, *Frank L. Ball* and *James H. Simmonds* for petitioners. Reported below: 252 F. 2d 929.

No. 891. First National Bank of Elwood *v.* Bixby, Trustee in Bankruptcy. C. A. 7th Cir. Certiorari denied. *C. Severin Buschmann* for petitioner. *Charles B. Feibleman* for respondent. Reported below: 250 F. 2d 713.

No. 892. Berge *v.* National Bulk Carriers, Inc., et al. C. A. 2d Cir. Certiorari denied. *Frank Reiss* for petitioner. *John H. Dougherty* for the National Bulk Carriers, Inc., and *Patrick E. Gibbons* and *Louis P. Galli* for the Todd Shipyards Corporation, respondents. Reported below: 251 F. 2d 717.

No. 894. Kissinger *v.* United States. C. A. 3d Cir. Certiorari denied. *Andrew Wilson Green* for petitioner. *Solicitor General Rankin, Assistant Attorney General Hansen, Neil Brooks* and *Donald A. Campbell* for the United States. Reported below: 250 F. 2d 940.

No. 897. Pelton Steel Casting Co. *v.* Commissioner of Internal Revenue. C. A. 7th Cir. Certiorari denied. *Malcolm K. Whyte* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Robert N. Anderson* and *Elmer J. Kelsey* for respondent. Reported below: 251 F. 2d 278.

No. 508, Misc. Markham *v.* Ellis, General Manager, Texas Department of Corrections, et al. Court of Criminal Appeals of Texas. Certiorari denied.

No. 899. GULLEDGE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Wilton H. Wallace, Henry F. Lerch* and *R. G. de Quevedo* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *Joseph Kovner* for respondent. Reported below: 249 F. 2d 225.

No. 900. KANSAS CITY SOUTHERN RAILWAY CO. *v.* THOMAS. Court of Civil Appeals of Texas, Ninth Supreme Judicial District. Certiorari denied. *Major T. Bell* for petitioner. *Claude Allen* for respondent. Reported below: 305 S. W. 2d 642.

No. 911. FLORIDA ECONOMIC ADVISORY COUNCIL *v.* FEDERAL POWER COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Bryce Rea, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, Bernard Cedarbaum, Willard W. Gatchell, Howard E. Wahrenbrock* and *William W. Ross* for the Federal Power Commission, *Leon M. Payne* for the Coastal Transmission Corporation, *Theodore Rinehart, Norman E. Duke* and *Robert M. Scott* for the Houston Texas Gas & Oil Corporation, *Lewis W. Petteway, R. Y. Patterson, Jr.* and *Cecil A. Beasley, Jr.* for the Florida Railroad and Public Utilities Commission, and *Ford L. Thompson* and *Mr. Beasley* for the Florida Development Commission, respondents. Reported below: 102 U. S. App. D. C. 152, 251 F. 2d 643.

No. 912. NEW YORK CENTRAL RAILROAD CO. *v.* NEW PROCESS GEAR CORP. C. A. 2d Cir. Certiorari denied. *J. Edgar McDonald* and *Robert D. Brooks* for petitioner. *Harry Teichner* for respondent. Reported below: 250 F. 2d 569.

No. 917. ERWIN ET AL. *v.* GRANQUIST, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Warde H. Erwin, pro se,* and for Mary Lou Erwin, petitioners. *Solicitor General Rankin* for respondent. Reported below: 253 F. 2d 26.

No. 936. SOUND STEAMSHIP LINES, INC., *v.* GARDNER. C. A. 3d Cir. Certiorari denied. *Corydon B. Dunham* for petitioner. *Louis J. Merrell* for respondent. Reported below: 253 F. 2d 395.

No. 942. HOOVER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Rankin* for the United States. Reported below: 253 F. 2d 266.

No. 13, Misc. TURNER *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se.* *Latham Castle,* Attorney General of Illinois, for respondent.

No. 414, Misc. UNITED STATES EX REL. KOZICKY ET AL. *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied. *John V. Lindsay* for petitioners. *Louis J. Lefkowitz,* Attorney General of New York, and *Samuel A. Hirshowitz* and *Michael Freyberg,* Assistant Attorneys General, for respondent. Reported below: 248 F. 2d 520.

No. 461, Misc. MARTINEZ *v.* SOUTHERN UTE TRIBE OF THE SOUTHERN UTE RESERVATION ET AL. C. A. 10th Cir. Certiorari denied. *Bentley M. McMullin* for petitioner. *LaVerne H. McKelvey* and *R. Franklin McKelvey* for respondents. Reported below: 249 F. 2d 915.

No. 564, Misc. GOSSO *v.* GLADDEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 423, Misc. LYLES *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Robert T. S. Colby* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for the United States. Reported below: 103 U. S. App. D. C. —, 254 F. 2d 725.

No. 571, Misc. COOK *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 Anderson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 102 U. S. App. D. C. 140, 251 F. 2d 381.

No. 588, Misc. SPEARS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 592, Misc. GRAVELY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 251 F. 2d 360.

No. 600, Misc. HAMILTON *v.* PEPSI COLA BOTTLING CO. OF WASHINGTON, D. C. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Reported below: 102 U. S. App. D. C. 256, 252 F. 2d 637.

No. 603, Misc. BRISTER *v.* MISSISSIPPI. Supreme Court of Mississippi. Certiorari denied. Reported below: — Miss. —, 97 So. 2d 654.

No. 601, Misc. BRANDT *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 573, Misc. ANDERSON *v.* BRITTON, SHERIFF, ET AL. Supreme Court of Oregon. Certiorari denied. Reported below: 212 Ore. 1, 318 P. 2d 291.

No. 597, Misc. GOINS *v.* CAVELL, WARDEN. Court of Common Pleas of Allegheny County, Pennsylvania. Certiorari denied.

No. 599, Misc. VOLKELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 251 F. 2d 333.

No. 604, Misc. FRANK, ADMINISTRATRIX, *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Louis R. Harolds* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for the United States. Reported below: 250 F. 2d 178.

No. 605, Misc. RINGE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 607, Misc. ILLOVA *v.* MICHIGAN ET AL. Supreme Court of Michigan. Certiorari denied. Reported below: 351 Mich. 204, 88 N. W. 2d 589.

No. 608, Misc. UNITED STATES EX REL. ORTEGA *v.* LA BUY, U. S. DISTRICT JUDGE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 252 F. 2d 560.

No. 609, Misc. CHARIZIO *v.* FERGUSON, WARDEN. Supreme Court of Vermont. Certiorari denied. Reported below: 120 Vt. 208, 138 A. 2d 430.

No. 606, Misc. HARTFIELD *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 610, Misc. SAVOY *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. Court of Appeals of Maryland. Certiorari denied. Reported below: 216 Md. 616, 139 A. 2d 257.

No. 611, Misc. HEUSINGER *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Ruth Kessler Toch,* Assistant Attorney General, for respondent. Reported below: See 5 App. Div. 2d 758, 169 N. Y. S. 2d 389.

No. 613, Misc. HILLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 252 F. 2d 54.

No. 614, Misc. PERSONS *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 619, Misc. SMITH *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. Court of Appeals of Maryland. Certiorari denied. Reported below: 214 Md. 666, 136 A. 2d 381.

No. 621, Misc. BELL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 624, Misc. RUNION *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 3 N. Y. 2d 637, 148 N. E. 2d 165.

No. 625, Misc. WHITE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 627, Misc. PARKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 252 F. 2d 680.

No. 628, Misc. STEWART *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 642, Misc. WILLIAMS *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 684, Misc. HENDERSON *v.* RANDOLPH, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

Rehearing Denied.

No. 108. COMMISSIONER OF INTERNAL REVENUE ET AL. *v.* P. G. LAKE, INC., ET AL., *ante*, p. 260;

No. 804. BOUZIDEN *v.* UNITED STATES, *ante*, p. 927;

No. 832. UNITED STATES EX REL. CANTISANI *v.* HOLTON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, *ante*, p. 932; and

No. 444, Misc. GOULD *v.* FLOETE, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, ET AL., *ante*, p. 922. Petitions for rehearing denied.

No. 738. CAUDLE *v.* UNITED STATES; and

No. 739. CONNELLY *v.* UNITED STATES, *ante*, p. 921. Petitions for rehearing denied. MR. JUSTICE CLARK and MR. JUSTICE WHITTAKER took no part in the consideration or decision of these applications.

MAY 26, 1958.

Miscellaneous Orders.

No. 778. UPHAUS *v.* WYMAN, ATTORNEY GENERAL OF NEW HAMPSHIRE. Appeal from the Supreme Court of New Hampshire. (Probable jurisdiction noted, 356 U. S. 926.) The motion for leave to use the certified record in case No. 332, October Term, 1957 [*Uphaus* v. *Wyman*, 355 U. S. 16], as a part of the record in this case is granted. *Leonard B. Boudin* for movant-appellant. Reported below: 101 N. H. 139, 136 A. 2d 221.

No. 868. AQUA HOTEL CORP. ET AL. *v.* MCLAUGHLIN, TRUSTEE IN REORGANIZATION, ET AL. The motion to strike the brief of intervenor is denied. The motion to substitute Harry C. Levy, present Trustee in Bankruptcy of the Estate of the Aqua Hotel Corporation, as a party respondent in the place and stead of Sydney H. Kaye, removed, is granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. *Morris Lavine* for petitioners. *Calvin C. Magleby* for Levy, and *Thomas S. Tobin* for Weiler, respondents. Reported below: 251 F. 2d 138.

No. 481, Misc. SNYDER *v.* PEPERSACK, WARDEN; and No. 651, Misc. CHAPMAN *v.* COOK, SUPERINTENDENT, DEUEL VOCATIONAL INSTITUTION. Motions for leave to file petitions for writs of habeas corpus denied.

No. 520, Misc. SEAMER *v.* BURKE, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for certiorari, certiorari is denied. Petitioner *pro se*. *Stewart G. Honeck,* Attorney General of Wisconsin, for respondent.

Certiorari Granted. (*See also No. 293, Misc., ante, p. 674.*)

No. 927. Local 24, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL–CIO, et al. *v.* Oliver et al. Supreme Court of Ohio and the Court of Appeals of Ohio, Ninth Judicial District. Certiorari granted. *David Previant, Robert C. Knee* and *Bruce Laybourne* for petitioners. *Stanley Denlinger* for Oliver, and *E. W. Brouse* for A. C. E. Transportation Co., Inc., respondents. Reported below: 167 Ohio St. 299, 147 N. E. 2d 856.

No. 928. F. Strauss & Son, Inc., of Arkansas *v.* Commissioner of Internal Revenue. C. A. 8th Cir. Certiorari granted. *E. Chas. Eichenbaum* for petitioner. *Solicitor General Rankin* for respondent. Reported below: 251 F. 2d 724.

Certiorari Denied. (*See also No. 868 and Misc. No. 520, supra.*)

No. 895. Tatton *v.* Crolley et al., Members of Statutory Review Committee, Department of Agriculture. C. A. 5th Cir. Certiorari denied. *John C. White* for petitioner. *Solicitor General Rankin, Assistant Attorney General Hansen, Neil Brooks* and *Donald A. Campbell* for respondents. Reported below: 249 F. 2d 908.

No. 906. Lubini *v.* Rogers, Attorney General. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Jack Wasserman* and *David Carliner* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Carl H. Imlay* for respondent. Reported below: 102 U. S. App. D. C. 125, 251 F. 2d 28.

No. 908. Railway Express Agency, Inc., *v.* Railroad Retirement Board et al. C. A. 7th Cir. Certiorari denied. *Robert J. Fletcher* and *Francis M. Shea* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Morton Hollander, Lionel Kestenbaum, Myles F. Gibbons* and *Edward E. Reilly* for the Railroad Retirement Board, and *Lester P. Schoene* for the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employes et al., respondents. Reported below: 250 F. 2d 832.

No. 915. Dessi *v.* Pennsylvania Railroad Co. C. A. 3d Cir. Certiorari denied. *Joseph S. Lord, III,* and *Seymour I. Toll* for petitioner. *Philip Price* for respondent. Reported below: 251 F. 2d 149.

No. 919. California, Department of Mental Hygiene, *v.* Copus. Supreme Court of Texas. Certiorari denied. *Edmund G. Brown,* Attorney General of California, and *B. Abbott Goldbert, Elizabeth Palmer* and *Wiley W. Manuel,* Deputy Attorneys General, for petitioner. Reported below: 158 Tex. ——, 309 S. W. 2d 227.

No. 922. American Export Lines, Inc., et al. *v.* Hellenic Lines, Ltd., et al. C. A. 2d Cir. Certiorari denied. *Kenneth Gardner* and *James M. Estabrook* for petitioners. *Wilbur E. Dow, Jr.* and *Daniel L. Stonebridge* for respondents. Reported below: 253 F. 2d 473.

No. 923. Pressed Steel Car Co., Inc., *v.* United States. Court of Claims. Certiorari denied. *Earl F. Reed* and *William T. Hannan* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for the United States. Reported below: —— Ct. Cl. ——, 157 F. Supp. 950.

No. 914. GERNIE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jacob W. Friedman* for petitioners. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 252 F. 2d 664.

No. 924. MACFADDEN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Sydney A. Gutkin* and *Jerome R. Miller* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Robert N. Anderson* and *Sheldon I. Fink* for respondent. Reported below: 250 F. 2d 545.

No. 935. BOOMHOWER, INC., *v.* H. G. FISCHER & CO., INC., ET AL. C. A. 7th Cir. Certiorari denied. *Thaddeus G. Benton* for petitioner. *Russell B. Burt* for respondents. Reported below: 251 F. 2d 611.

No. 946. DULIEN STEEL PRODUCTS, INC., *v.* CONNELL. C. A. 5th Cir. Certiorari denied. *Irwin Geiger* and *Michael A. Schuchat* for petitioner. *Philip H. Mecom* for respondent. Reported below: 252 F. 2d 556.

No. 964. LOU JOHNSON CO., INC., ET AL. *v.* MOIST COLD REFRIGERATOR CO., INC. C. A. 9th Cir. Certiorari denied. *J. Pierre Kolisch, Frank H. Uriell, Charles L. Byron* and *William E. Lucas* for petitioners. *T. Roland Berner* and *Aaron Lewittes* for respondent. Reported below: 249 F. 2d 246.

No. 980. MORRISON, MAYOR OF NEW ORLEANS, ET AL. *v.* DAVIS ET AL. C. A. 5th Cir. Certiorari denied. *Jack P. F. Gremillion,* Attorney General of Louisiana, *William P. Schuler,* Assistant Attorney General, and *Alvin J. Liska* for petitioners. *A. P. Tureaud* for respondents. Reported below: 252 F. 2d 102.

No. 979. ORLEANS PARISH SCHOOL BOARD *v.* BUSH ET AL. C. A. 5th Cir. Certiorari denied. *Gerard A. Rault* for petitioner. *Thurgood Marshall* for respondents. Reported below: 252 F. 2d 253.

No. 638, Misc. CRAWFORD *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 645, Misc. MATISHEK *v.* FAY, WARDEN. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 658, Misc. WOJCULEWICZ *v.* CUMMINGS, WARDEN. Supreme Court of Errors of Connecticut. Certiorari denied. *Frederick J. Rundbaken* for petitioner. Reported below: 145 Conn. 11, 138 A. 2d 513.

Rehearing Granted.

No. 39. BARTKUS *v.* ILLINOIS, 355 U. S. 281; and

No. 41. LADNER *v.* UNITED STATES, 355 U. S. 282. Petitions for rehearing granted. The judgments entered January 6, 1958, are vacated and the cases are restored to the calendar for reargument immediately preceding No. 534. *Walter T. Fisher,* acting under appointment by the Court, 352 U. S. 958, for petitioner in No. 39. *Harold Rosenwald,* acting under appointment by the Court, 352 U. S. 959, for petitioner in No. 41. Reported below: No. 39, 7 Ill. 2d 138, 130 N. E. 2d 187; No. 41, 230 F. 2d 726.

Rehearing Denied.

No. 488, Misc. IRIZARRY Y PUENTE *v.* PRESIDENT AND FELLOWS OF HARVARD COLLEGE ET AL., *ante,* p. 947. Rehearing denied. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this application.

No. 409, Misc. LITTERIO *v.* UNITED STATES, *ante*, p. 940;

No. 503, Misc. DUNN *v.* UNITED STATES, *ante*, p. 942;

No. 541, Misc. RITCHIE *v.* ILLINOIS, *ante*, p. 944; and

No. 560, Misc. WILLIAMS *v.* MULCAHEY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, *ante*, p. 946. Petitions for rehearing denied.

JUNE 2, 1958.

Miscellaneous Orders.

No. 465. ERIE RAILROAD CO. ET AL. *v.* BALTIMORE & OHIO RAILROAD CO. ET AL.; and

No. 466. NEW YORK CENTRAL RAILROAD CO. *v.* BALTIMORE & OHIO RAILROAD CO. ET AL., 355 U. S. 175. The motion to recall and clarify the judgment is denied. *Samuel H. Moerman, Sidney Goldstein, Francis A. Mulhern, Arthur L. Winn, Jr.* and *J. Stanley Payne* for the Erie Railroad Co. et al., and *Richard J. Murphy* and *Robert D. Brooks* for the New York Central Railroad Co., appellants. *Edwin H. Burgess, Anthony P. Donadio, Norman C. Melvin, Jr., Francis D. Murnaghan, Jr., William C. Purnell* and *Jervis Langdon, Jr.* for the Baltimore & Ohio Railroad Co. et al., *William L. Marbury* and *Donald Macleay* for the Maryland Port Authority, *Harry C. Ames* and *Charles McD. Gillan* for the Baltimore Association of Commerce, and *Thomas N. Biddison* for the Mayor and City Council of Baltimore, appellees. Reported below: 151 F. Supp. 258.

No. 644, Misc. ROBINSON *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied.

No. 738, Misc. BINDER *v.* FREEMAN, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 561. CARITATIVO *v.* CALIFORNIA ET AL. Certiorari to the Supreme Court of California. Petition for certiorari and motion for leave to proceed *in forma pauperis* were granted October 21, 1957. 355 U. S. 853. Counsel filed a brief on behalf of petitioner March 7, 1958, and the case was scheduled for argument by such counsel during the session of this Court beginning May 19, 1958. The case was argued on behalf of petitioner by such counsel on May 21, 1958. No request for appointment of counsel has been made to this Court other than that by motion filed May 2, 1958, by counsel for petitioner suggesting his own appointment. The motion is denied for lack of a timely showing of a need for an appointment. *George T. Davis* for petitioner.

No. 959. SCHLEICH, ALIAS RING, *v.* BUTTERFIELD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. The motion to release administrative records to the Board of Immigration Appeals is granted. In the event of an adverse ruling by the Board of Immigration Appeals the time for filing the respondent's brief is extended for a period of 30 days thereafter. *Ernest Goodman* for movant-petitioner. *Solicitor General Rankin* for respondent. Reported below: 252 F. 2d 191.

No. 647, Misc. MADSEN *v.* HAGAN, WARDEN, ET AL.;
No. 719, Misc. PRESTON *v.* MICHIGAN;
No. 732, Misc. MILES *v.* BANMILLER, WARDEN; and
No. 739, Misc. EX PARTE LOWERY. Motions for leave to file petitions for writs of habeas corpus denied.

No. 715, Misc. HEATH *v.* TINSLEY, 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.

458778 O—58——53

Certiorari Granted. (*See also No. 287, Misc., ante, p. 704.*)

No. 938. HAHN *v.* ROSS ISLAND SAND & GRAVEL CO. Supreme Court of Oregon. Certiorari granted. *Herbert C. Hardy* for petitioner. *Robert T. Mautz* for respondent. Reported below: —— Ore. ——, 320 P. 2d 668.

No. 939. NEW YORK *v.* O'NEILL. Supreme Court of Florida. Certiorari granted. *Richard W. Ervin,* Attorney General of Florida, *Reeves Bowen,* Assistant Attorney General, and *Frank S. Hogan* for petitioner. Reported below: 100 So. 2d 149.

Certiorari Denied. (*See also Misc. Nos. 644 and 715, supra.*)

No. 889. JACKSON *v.* ALLEN INDUSTRIES, INC. C. A. 6th Cir. Certiorari denied. *Joseph H. Bourgon* for petitioner. *Howard M. Lubbers* for respondent. *Solicitor General Rankin, Assistant Attorney General Doub,* and *Samuel D. Slade* filed a brief for the United States, as *amicus curiae,* urging that the petition for certiorari be denied. Reported below: 250 F. 2d 629.

No. 896. BERSWORTH ET AL. *v.* WATSON, COMMISSIONER OF PATENTS. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Ellsworth H. Mosher* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, B. Jenkins Middleton* and *J. Schimmel* for respondent. Reported below: 102 U. S. App. D. C. 187, 251 F. 2d 898.

No. 898. MCKINNEY *v.* KELLEY. Supreme Court of Vermont. Certiorari denied. *Albert G. Avery* for petitioner. Reported below: 120 Vt. ——, 141 A. 2d 660.

No. 909. GIARDANO ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Morris A. Shenker* and *Morris Lavine* for Giardano, and *Sidney M. Glazer* for Lopiparo, petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Joseph F. Goetten* and *John P. Burke* for the United States. Reported below: 251 F. 2d 109.

No. 930. WALDIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Jacob Kossman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States. Reported below: 253 F. 2d 551.

No. 931. RAIDY *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. *Bernard M. Goldstein* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States, and *David R. Owen* for the Bethlehem Steel Co., respondents. Reported below: 252 F. 2d 117.

No. 932. WHITE ET AL. *v.* GATES, SECRETARY OF THE NAVY, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Carl W. Berueffy* and *Eugene Gressman* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for respondents. Reported below: 102 U. S. App. D. C. 346, 253 F. 2d 868.

No. 933. PEACOCK ET AL. *v.* LUBBOCK COMPRESS CO. C. A. 5th Cir. Certiorari denied. Reported below: 252 F. 2d 892.

No. 941. DAVIDITIS, ALIAS DAVIS, ET AL. *v.* NATIONAL BANK OF MATTOON. C. A. 7th Cir. Certiorari denied. Reported below: 251 F. 2d 299.

No. 934. Babb *v.* United States. C. A. 5th Cir. Certiorari denied. *John D. Cofer* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 252 F. 2d 702.

No. 937. LeCuno Oil Co. *v.* Smith, Trustee, et al. Court of Civil Appeals of Texas, Sixth Supreme Judicial District. Certiorari denied. *Angus G. Wynne* for petitioner. *C. A. Brian* for respondents. Reported below: 306 S. W. 2d 190.

No. 940. Davis et al. *v.* Foreman et al. C. A. 7th Cir. Certiorari denied. Reported below: 251 F. 2d 421.

No. 944. La Salle Steel Co. *v.* Rogers, Attorney General, Successor to the Alien Property Custodian. C. A. 7th Cir. Certiorari denied. *Vincent O'Brien* for petitioner. *Solicitor General Rankin, Assistant Attorney General Townsend, George B. Searls* and *Irwin A. Seibel* for respondent. Reported below: 250 F. 2d 607.

No. 945. Borough of Ringwood, New Jersey, *v.* United States. C. A. 3d Cir. Certiorari denied. *Louis Wallisch, Jr.* and *Aaron Dines* for petitioner. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *Harold S. Harrison* for the United States. Reported below: 251 F. 2d 145.

No. 951. Howells, Executor, *v.* Fox, District Director of Internal Revenue. C. A. 10th Cir. Certiorari denied. *George E. Bridwell* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Melva M. Graney* and *Louise Foster* for respondent. Reported below: 251 F. 2d 94.

No. 962. U. S. Dairies Sales Corp. et al. *v.* Mojonnier Dawson Co. C. A. 7th Cir. Certiorari denied. *Vincent O'Brien* for petitioners. *John F. McCanna* for respondent. Reported below: 251 F. 2d 345.

No. 974. Moore *v.* Standard Oil Co. of California et al. C. A. 9th Cir. Certiorari denied. *Donald McL. Davidson, W. H. Ferguson* and *C. S. Burdell* for petitioner. *Francis R. Kirkham* for the Standard Oil Co. of California, *George W. Jansen* for the Texas Co., *W. J. DeMartini* for the Richfield Oil Corporation, *Robert W. Graham* for the General Petroleum Corporation, *DeWitt Williams* for the Tide Water Associated Oil Co., and *Moses Lasky* for the Union Oil Co. of California, respondents. Reported below: 251 F. 2d 188.

No. 976. Sealy et al. *v.* Department of Public Instruction of Pennsylvania et al. C. A. 3d Cir. Certiorari denied. *Frank D. Reeves* and *Robert A. Wright* for petitioners. *Thomas D. McBride,* Attorney General of Pennsylvania, and *Lois G. Forer,* Deputy Attorney General, for the Department of Public Instruction of Pennsylvania et al., *Geo. F. Baer Appel* for the State Public School Building Authority, and *Edward H. P. Fronefield* and *Howard M. Lutz* for the School District of the Township of Darby et al., respondents. Reported below: 252 F. 2d 898.

No. 649. Local 174 and Joint Council No. 28 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al. *v.* Selles. Supreme Court of Washington. Certiorari denied. Mr. Justice Black took no part in the consideration or decision of this application. *Samuel B. Bassett* for petitioners. *Paul Coughlin* and *Jack R. Cluck* for respondent. Reported below: 50 Wash. 2d 660, 314 P. 2d 456.

No. 982. STOVER *v.* FARMERS' EDUCATIONAL AND COOPERATIVE UNION OF AMERICA. C. A. 8th Cir. Certiorari denied. *James R. McManus* for petitioner. *Thomas B. Roberts* and *Charles F. Brannan* for respondent. Reported below: 250 F. 2d 809.

No. 615, Misc. KAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *William J. Schafer, III,* for the United States. Reported below: 252 F. 2d 789.

No. 629, Misc. JACKSON *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *C. Watson Hover* for respondent.

No. 630, Misc. LEVERETTE *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for the United States. Reported below: —— Ct. Cl. ——, 159 F. Supp. 591.

No. 649, Misc. SHERIDAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 650, Misc. SHOTWELL *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Reported below: 352 Mich. 42, 88 N. W. 2d 313.

No. 653, Misc. REESE *v.* LOONEY, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General White* and *Harold H. Greene* for respondent. Reported below: 252 F. 2d 683.

No. 654, Misc. DAUGHERTY *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 652, Misc. BRIDGMON *v.* FLORIDA. Supreme Court of Florida. Certiorari denied.

No. 655, Misc. HAZELGROVE *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. *George B. Hoffman, Jr.* for petitioner. Reported below: —— Ind. ——, 145 N. E. 2d 897.

No. 657, Misc. BLAND *v.* ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 659, Misc. GREGORY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 660, Misc. WILLIAMS *v.* CALIFORNIA. District Court of Appeal of California, First Appellate District. Certiorari denied. Reported below: 155 Cal. App. 2d 328, 318 P. 2d 106.

No. 662, Misc. TROTTER *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Stanley U. Robinson, Jr.* for petitioner. *C. Watson Hover* for respondent. Reported below: 167 Ohio St. 154, 146 N. E. 2d 603.

No. 663, Misc. LANGFORD *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 664, Misc. RAPPAPORT *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 666, Misc. ANDERSON *v.* CULVER, STATE PRISON CUSTODIAN. Supreme Court of Florida. Certiorari denied.

No. 667, Misc. HINES *v.* ZIMMER. Supreme Court of New York, Kings County. Certiorari denied.

No. 668, Misc. BUXTON *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 672, Misc. MILLER *v.* TOWN OF SUFFIELD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 249 F. 2d 16.

No. 674, Misc. LATHAM *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 675, Misc. GRAZIANO *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 676, Misc. NOR WOODS *v.* CALIFORNIA ADULT AUTHORITY ET AL. Supreme Court of California. Certiorari denied.

Rehearing Denied.

No. 133. SINKLER *v.* MISSOURI PACIFIC RAILROAD CO., *ante*, p. 326;

No. 826. CAINE *v.* CALIFORNIA, *ante*, p. 340;

No. 835. BROTHERHOOD OF RAILROAD TRAINMEN *v.* SMITH ET AL., *ante*, p. 937;

No. 855. BLACKBURN *v.* MAYO, PRISON CUSTODIAN, *ante*, p. 938;

No. 856. POOL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 938; and

No. 594, Misc. CORONA ET AL. *v.* UNITED STATES, *ante*, p. 954. Petitions for rehearing denied.

No. 514, October Term, 1944. ROBINSON *v.* UNITED STATES, 324 U. S. 282. Motion for leave to file fourth petition for rehearing denied.

No. 711. PETROCARBON LIMITED *v.* WATSON, COMMISSIONER OF PATENTS, 355 U. S. 955. Motion for leave to file petition for rehearing denied.

INDEX

ADMINISTRATIVE PROCEDURE. See **Aliens**, 1–2; **Citizenship**, 1–4; **False Claims Act**, 1–2; **Federal Maritime Board**; **Interstate Commerce Commission**, 1–2; **Packers and Stockyards Act**; **Panama Canal.**

ADMIRALTY. See also **Federal Maritime Board**; **Panama Canal.**

1. *Jones Act—Right of action—Member of crew—Defense Bases Act—Sufficiency of evidence.*—Employee injured while transferring at sea from tug to "Texas tower" radar warning station not confined to remedy under Defense Bases Act but may sue under Jones Act if member of crew; evidence sufficient to go to jury on question whether he was member of crew of any vessel. Grimes v. Raymond Concrete Pile Co., p. 252.

2. *Jones Act — Negligence — Navigation — Seaman — Member of crew—Sufficiency of evidence.*—Plaintiff's evidence presented evidentiary basis for jury finding whether or not (1) tug was in navigation, (2) decedent was seaman and member of crew, and (3) employer negligence played a part in producing his death. Butler v. Whiteman, p. 271.

AFFIDAVIT. See **Citizenship**, 1–3.

AGENTS. See **Employers' Liability Act**, 1.

ALABAMA. See **Labor**, 3.

ALASKA. See **Workmen's Compensation.**

ALIENS. See also **Citizenship**, 1–4; **Constitutional Law**, I, 1–2, V, 1.

1. *Deportation — Suspension — Consideration of application.*—In circumstances of case, alien ordered deported was entitled to have application for suspension of deportation considered under § 244 (a) (1) of Immigration and Nationality Act of 1952. Dessalernos v. Savoretti, p. 269.

2. *Deportation—Anarchist Act of 1918—"Time of entering."*—Alien who entered United States in 1923, was Communist in 1932–1936, but then quit Party and never rejoined, abandoned rights of residence and went abroad in 1937, and was readmitted to United States in 1938, not deportable in 1951 under § 4 (a) of Anarchist Act of 1918, as amended, because he was not a Communist when he entered in 1938 or at any time thereafter. Bonetti v. Rogers, p. 691.

ALIENS—Continued.

3. *Alien crewman remaining in United States after expiration of permit—Trial—Venue.*—Alien crewman willfully remaining in United States after expiration of landing permit is guilty of continuing offense and may be prosecuted in any district where he is found. United States v. Cores, p. 405.

ANARCHIST ACT OF 1918. See **Aliens**, 2.

ANNUITIES. See **Taxation**, 5.

ANTITRUST ACTS. See also **Procedure**, 8.

Sherman Act—Unreasonable restraint of trade—Railroad's "preferential routing" agreements.—"Preferential routing" agreements incorporated by railroad in deeds and leases to several million acres of land were unlawful as unreasonable restraints of trade under § 1 of Sherman Act. Northern Pacific R. Co. v. United States, p. 1.

APPEAL. See **Procedure**, 1–7.

ARCHIVES. See **Supreme Court.**

ARIZONA. See **Constitutional Law**, III, 3.

ARKANSAS. See **Constitutional Law**, III, 4.

ARMED FORCES. See **Citizenship**, 4; **Constitutional Law**, I, 2.

ASSIGNMENT. See **Taxation**, 1.

BACK PAY. See **Labor**, 2–3.

BAIL JUMPING. See **Contempt**, 2.

BURDEN OF PROOF. See **Citizenship**, 4.

BUSINESS EXPENSES. See **Taxation**, 3–4.

CALIFORNIA. See **Interstate Commerce Commission**, 1; **Labor**, 2.

CAPITAL GAIN. See **Taxation**, 1.

CARRIERS. See **Admiralty**, 1–2; **Antitrust Acts**; **Employers' Liability Act**, 1–2; **Federal Maritime Board**; **Interstate Commerce Commission**, 1–2; **Procedure**, 2; **Taxation**, 4.

CHILDREN. See **Constitutional Law**, VI.

CITIZENSHIP. See also **Aliens**, 1–2; **Constitutional Law**, I, 1–2.

1. *Denaturalization proceedings—Prerequisite—Affidavit of good cause.*—Affidavit showing good cause is prerequisite to initiation of denaturalization proceeding; must be filed with complaint when proceedings are instituted. Matles v. United States, p. 256.

CITIZENSHIP—Continued.

2. *Denaturalization—Fraudulent procurement—Affidavit of good cause—Sufficiency of evidence.*—In 1952 suit under § 338 (a) of Nationality Act of 1940 to set aside 1938 naturalization decree on ground that it had been obtained fraudulently, affidavit of responsible official based on official records satisfied "good cause" requirement of § 338 (a); but evidence insufficient to prove fraudulent procurement of citizenship by Communist. Nowak v. United States, p. 660.

3. *Denaturalization—Fraudulent procurement—Affidavit of good cause—Sufficiency of evidence.*—In 1953 suit under § 340 (a) of Immigration and Nationality Act of 1952 to set aside 1938 naturalization decree on ground that it had been obtained by "concealment of a material fact" and "willful misrepresentation," affidavit of "good cause" was sufficient; but evidence was insufficient to support decree of denaturalization of Communist. Maisenberg v. United States, p. 670.

4. *Loss of citizenship by service in foreign army—Burden of proof—Sufficiency of evidence.*—When American birth proven, Government has burden of proving voluntary act resulting in loss of citizenship under § 401 (c) of Nationality Act of 1940; evidence not sufficient to prove that service in Japanese army was voluntary. Nishikawa v. Dulles, p. 129.

CLAYTON ACT. See **Contempt**, 2.

CLERK. See **Supreme Court.**

COMMERCE. See **Antitrust Acts; Interstate Commerce Commission; Packers and Stockyards Act.**

COMMODITY CREDIT CORP. See **False Claims Act**, 1.

COMMUNISM. See **Aliens**, 2; **Citizenship**, 2–3; **Constitutional Law**, V, 1; **Contempt**, 1–2; **Criminal Law**, 1; **Procedure**, 10.

COMPETITION. See **Antitrust Acts; Federal Maritime Board.**

CONFESSIONS. See **Constitutional Law**, III, 3–4.

CONGRESS. See **Constitutional Law**, I, 1–2; **Criminal Law**, 1.

CONSTITUTIONAL LAW. See also **Contempt**, 1–2; **Labor**, 2–3.

I. Power of Congress.

1. *Citizenship—Nationality Act—Voting in foreign election.*—Congress has power to provide that anyone who votes in a foreign political election shall lose his American citizenship; not prevented by Fourteenth Amendment; § 401 (e) of Nationality Act of 1940 sustained. Perez v. Brownell, p. 44.

CONSTITUTIONAL LAW—Continued.

2. *Citizenship—Nationality Act—Desertion from Army.*—Section 401 (g) of Nationality Act of 1940, providing for loss of citizenship by soldier who is convicted by court-martial of desertion in time of war and is dishonorably discharged, *held* unconstitutional as applied. Trop v. Dulles, p. 86.

II. Equal Protection of Laws.

Racial discrimination—Selection of grand jury.—Consistent exclusion of Negroes from grand juries denied defendant equal protection of laws guaranteed by Fourteenth Amendment, and his conviction for murder is reversed. Eubanks v. Louisiana, p. 584.

III. Due Process of Law.

1. *State courts—Double jeopardy—Consecutive trials for multiple offenses committed on same occasion.*—State conviction for murder and death sentence after same defendant had been convicted in two earlier trials and sentenced to imprisonment for two other murders committed on same occasion did not violate due process, though details of all such murders were introduced in evidence. Ciucci v. Illinois, p. 571.

2. *State courts—Double jeopardy—Consecutive trials for multiple offenses committed on same occasion.*—State conviction for robbery after acquittal of same defendant in three earlier trials for robbing three other people on same occasion did not constitute double jeopardy or otherwise violate Due Process Clause of Fourteenth Amendment where state law made each robbery a separate offense. Hoag v. New Jersey, p. 464.

3. *State courts—Confession of murder.*—Where undisputed evidence showed that confession was voluntary, federal court properly denied habeas corpus to review state-court conviction for murder; it is for trial court and jury to weigh conflicting evidence on such issues; District Court did not abuse discretion in denying writ on basis of record without full hearing nor err in considering evidence not in trial record but submitted before District Court. Thomas v. Arizona, p. 390.

4. *State courts—Coerced confession.*—Admission in evidence of confession coerced by fear of lynching at state-court trial of Negro for murder violated Due Process Clause of Fourteenth Amendment, though other evidence may have been sufficient to convict. Payne v. Arkansas, p. 560.

IV. Double Jeopardy.

1. *State courts—Consecutive trials for multiple offenses committed on same occasion.*—State conviction for robbery after acquittal of

CONSTITUTIONAL LAW—Continued.

same defendant in three earlier trials for robbing three other people on same occasion did not constitute double jeopardy or otherwise violate Due Process Clause of Fourteenth Amendment where state law made each robbery a separate offense. Hoag v. New Jersey, p. 464.

2. *State courts—Consecutive trials for multiple offenses committed on same occasion.*—State conviction for murder and death sentence after same defendant had been convicted in two earlier trials and sentenced to imprisonment for two other murders committed on same occasion did not violate due process, though details of all such murders were introduced in evidence. Ciucci v. Illinois, p. 571.

V. Self-Incrimination.

1. *Waiver of privilege—Voluntary testimony in own behalf.*—By testifying in own behalf in denaturalization proceeding, defendant waived privilege against self-incrimination; refusal to answer on cross-examination questions re Communist Party membership was punishable by imprisonment on summary conviction without jury for criminal contempt. Brown v. United States, p. 148.

2. *State courts—Coerced confession.*—Admission in evidence of confession coerced by fear of lynching at state-court trial of Negro for murder violated Due Process Clause of Fourteenth Amendment, though other evidence may have been sufficient to convict. Payne v. Arkansas, p. 560.

3. *State courts—Confession of murder.*—Where undisputed evidence showed that confession was voluntary, federal court properly denied habeas corpus to review state-court conviction for murder; it is for trial court and jury to weigh conflicting evidence on such issues; District Court did not abuse discretion in denying writ on basis of record without full hearing nor err in considering evidence not in trial record but submitted before District Court. Thomas v. Arizona, p. 390.

VI. Full Faith and Credit.

Custody decree—Child in another State—Changed circumstances.—Where New York divorce court awarded custody of child to grandfather in North Carolina but later amended decree and awarded custody to mother, who sued 14 months later in North Carolina to enforce amended decree, North Carolina was not bound by New York decree if circumstances had changed so as to make it in child's best interest to remain in grandfather's custody. Kovacs v. Brewer, p. 604.

CONTEMPT. See also **Criminal Law,** 1; **Procedure,** 10.

1. *Criminal contempt—Refusal to answer—Waiver of privilege against self-incrimination.*—By testifying in own behalf in denaturalization proceeding, defendant waived privilege against self-incrimination, and summary conviction without jury of criminal contempt for refusing on cross-examination to answer questions re Communist Party membership sustained. Brown v. United States, p. 148.

2. *Criminal contempt—Willful disobedience of court order to surrender for execution of sentence—Conviction by judge without jury—Three-year sentence.*—Willful disobedience of court order to surrender for execution of sentence after affirmance of conviction for violating Smith Act was criminal contempt; conviction by judge without indictment or jury trial, and sentence to three years' additional imprisonment sustained; sufficiency of evidence. Green v. United States, p. 165.

CONTRACTS. See **Labor,** 1–2.

COURT MARTIAL. See **Constitutional Law,** I, 2.

COURTS. See **Contempt,** 1–2; **Procedure.**

CREDIT INSURANCE. See **False Claims Act,** 2.

CREWMEN. See **Admiralty,** 1–2; **Aliens,** 3.

CRIMINAL LAW. See also **Aliens,** 3; **Constitutional Law,** II; III, 1–4; V, 2–3; **Contempt,** 1–2; **False Claims Act,** 1–2; **Procedure,** 1, 7, 10.

1. *Contempt of Congress—Refusal to answer—Questions not pertinent.*—Conviction under 2 U. S. C. § 192 for refusal to answer before Senate Subcommittee reversed where refusal related to questions not pertinent to subject on which Subcommittee had been authorized to take testimony. Sacher v. United States, p. 576.

2. *Narcotics violations — Defenses — Entrapment.*—Where undisputed testimony of government witnesses established entrapment as matter of law, conviction for selling narcotics reversed. Sherman v. United States, p. 369.

3. *Narcotics violations—Defenses—Entrapment.*—Where person charged with illegal sales of narcotics claimed entrapment, but evidence on that issue was conflicting, judge properly submitted issue to jury. Masciale v. United States, p. 386.

CROSS-EXAMINATION. See **Constitutional Law,** V, 1.

CUSTODY DECREE. See **Constitutional Law,** VI.

DAMAGES. See **Admiralty,** 1–2; **Employers' Liability Act,** 1–2; **Labor,** 2–3; **Workmen's Compensation.**

DEDUCTIONS. See **Taxation**, 3–4.

DEFENSE BASES ACT. See **Admiralty**, 1.

DENATURALIZATION. See **Citizenship**, 1–4; **Constitutional Law**, I, 1–2; V, 1.

DEPORTATION. See **Aliens**, 1–2; **Constitutional Law**, I, 1–2.

DESERTION. See **Constitutional Law**, I, 2.

DISABILITY. See **Workmen's Compensation.**

DISCOVERY. See **Procedure**, 8.

DISCRIMINATION. See **Antitrust Acts**; **Constitutional Law**, II; **Federal Maritime Board**; **Interstate Commerce Commission**, 2; **Packers and Stockyards Act.**

DIVERSITY CITIZENSHIP. See **Procedure**, 9.

DIVORCE. See **Constitutional Law**, VI.

DOUBLE JEOPARDY. See **Constitutional Law**, IV.

DUE PROCESS. See **Constitutional Law**, III.

EMPLOYERS' LIABILITY ACT. See also **Admiralty**, 1–2; **Workmen's Compensation.**

1. *Liability of employer—Injury caused by fault of others performing, under contract, operations of employer.*—When railroad employee's injury is caused by fault of others performing, under contract, operational activities of his employer, such others are "agents" of the employer within meaning of § 1 of Federal Employers' Liability Act. Sinkler v. Missouri Pacific R. Co., p. 326.

2. *Liability of employer—Question for jury—Sufficiency of evidence.*—Ferguson v. St. Louis-S. F. R. Co., p. 41.

ENTRAPMENT. See **Criminal Law**, 2–3.

EQUAL PROTECTION OF LAWS. See **Constitutional Law**, II.

ESTATE TAXES. See **Taxation**, 5.

EVIDENCE. See also **Admiralty**, 1–2; **Citizenship**, 2–3; **Constitutional Law**, III, 1, 3–4; V; **Contempt**, 1–2; **Criminal Law**, 2–3; **Employers' Liability Act**, 2; **Interstate Commerce Commission**, 2; **Procedure**, 6, 8.

Sufficiency—Burden of proof—Nationality Act—Loss of citizenship by service in foreign army.—When American birth proven, Government has burden of proving voluntary act resulting in loss of citizenship under § 401 (c) of Nationality Act of 1940; evidence not sufficient to prove that service in Japanese Army was voluntary. Nishikawa v. Dulles, p. 129.

EXCHANGE. See **Taxation**, 2.

EXPATRIATION. See **Aliens**, 1–2; **Citizenship**, 1–4; **Constitutional Law**, I, 1–2.

EXPENSES. See **Taxation**, 3–4.

FALSE CLAIMS ACT.

1. *Claims "against Government"—Commodity Credit Corp.*—A claim against the Commodity Credit Corporation is a claim "against the Government of the United States," within meaning of civil provisions of the False Claims Act. Rainwater v. United States, p. 590; United States v. McNinch, p. 595.

2. *Claims "against Government"—Federal Housing Administration—Application for credit insurance.*—A claim against the Federal Housing Administration is a claim "against the Government of the United States"; but a lending institution's application for credit insurance is not a "claim," within the meaning of the civil provisions of the False Claims Act. United States v. McNinch, p. 595.

FEDERAL EMPLOYERS' LIABILITY ACT. See **Admiralty**, 1–2; **Employers' Liability Act**, 1–2.

FEDERAL HOUSING ADMINISTRATION. See **False Claims Act**, 2.

FEDERAL MARITIME BOARD.

Shipping conference—Dual rate system—Stifling competition.—Order approving dual-rate system of shipping conference designed to stifle competition of independent carrier held unlawful under § 14 of Shipping Act of 1916. Federal Maritime Board v. Isbrandtsen Co., p. 481.

FEDERAL RULES OF CIVIL PROCEDURE. See **Procedure**, 3–4, 8.

FEDERAL RULES OF CRIMINAL PROCEDURE. See **Procedure**, 7.

FEDERAL-STATE RELATIONS. See **Interstate Commerce Commission**, 1–2; **Labor**, 2–3; **Procedure**, 1, 9.

FIFTH AMENDMENT. See **Constitutional Law**, V, 1; **Contempt**, 1.

FINAL JUDGMENT. See **Procedure**, 4.

FINES. See **Taxation**, 4.

FOREIGN RELATIONS. See **Constitutional Law**, I, 1.

FOURTEENTH AMENDMENT. See **Constitutional Law**, I, 1; II; III, 1–4.

FRAUD. See **Citizenship**, 2–3; **False Claims Act**, 1–2.

FULL FAITH AND CREDIT. See **Constitutional Law**, VI.

FULL HEARING. See **Packers and Stockyards Act.**

GAMBLING. See **Taxation**, 3.

GOOD CAUSE. See **Citizenship**, 1–3.

GRAND JURIES. See **Constitutional Law**, II; **Procedure**, 8.

HABEAS CORPUS. See **Constitutional Law**, III, 3.

HEARING. See **Packers and Stockyards Act.**

HIGHWAYS. See **Taxation**, 4.

ILLINOIS. See **Constitutional Law**, III, 1.

IMMIGRATION AND NATIONALITY. See **Aliens**, 1–3; **Citizenship**, 1–4; **Constitutional Law**, I, 1–2.

IMPOUNDED FUND. See **Procedure**, 2.

INCOME TAX. See **Taxation**, 1–4.

INDICTMENT. See **Contempt**, 2.

IN FORMA PAUPERIS. See **Procedure**, 7.

INFORMERS. See **Criminal Law**, 2–3.

INSURANCE. See **False Claims Act**, 2; **Taxation**, 5.

INTERNAL REVENUE CODE. See **Taxation.**

INTERNAL SECURITY ACT OF 1950. See **Aliens**, 2.

INTERSTATE COMMERCE. See **Antitrust Acts**; **Interstate Commerce Commission**; **Packers and Stockyards Act.**

INTERSTATE COMMERCE COMMISSION.

1. *Authority under § 5 (2) (a)—Approval of transfer of local business to subsidiary—Purpose to escape state regulation.*—Where interstate motor carrier proposed transfer of local business to wholly owned new subsidiary, in order to escape state regulation, approval was not within exclusive and plenary authority of I. C. C. under § 5 (2) (a) of Act. County of Marin v. United States, p. 412.

2. *Increase in intrastate freight rates—Findings—Sufficiency of evidence.*—Order under § 13 (3) and (4) of Interstate Commerce Act, granting general increase in intrastate freight rates, which had been denied by State Commission, invalid because based on findings lacking sufficient support in evidence. Public Service Comm'n of Utah v. United States, p. 421.

458778 O—58——54

JAPAN. See **Citizenship**, 4.

JONES ACT. See **Admiralty**, 1–2.

JUDGMENTS. See **Procedure**, 3–4, 6.

JUDICIAL REVIEW. See **Panama Canal**; **Procedure.**

JURISDICTION. See **Aliens**, 3; **Labor**, 2–3; **Procedure.**

JURY. See **Constitutional Law**, II; V, 1, 3; **Contempt**, 1–2; **Criminal Law**; 3; **Procedure**, 8–9.

LABOR. See also **Admiralty**, 1–2; **Employers' Liability Act**; **Workmen's Compensation.**

1. *National Labor Relations Act—Refusal to bargain—Employer insistence on contract clauses unacceptable to employees.*—Employer's refusal to sign collective-bargaining agreement unless it contained certain clauses unacceptable to employees and not relating to "wages, hours, and other terms and conditions of employment" amounted to refusal to bargain. Labor Board v. Borg-Warner Corp., p. 342.

2. *National Labor Relations Act—Jurisdiction of state courts—Suit for unlawful expulsion from union.*—Where union expelled member in violation of his contractual rights under its constitution and by-laws, state court had jurisdiction to order his reinstatement and award damages for lost wages and physical and mental suffering, even though National Labor Relations Board may have had power to award back pay. International Association of Machinists v. Gonzales, p. 617.

3. *National Labor Relations Act—Jurisdiction of state courts—Tort action for interference with right to work.*—Where union, by mass picketing and threats of violence during strike, prevented nonmember from entering plant and working, state court had jurisdiction to award him compensatory and punitive damages, even if union's conduct was unfair labor practice and National Labor Relations Board had power to award him back pay. Automobile Workers v. Russell, p. 634.

LIVESTOCK. See **Packers and Stockyards Act.**

LOUISIANA. See **Constitutional Law**, II.

LYNCHING. See **Constitutional Law**, III, 3–4.

MARKET AGENCY. See **Packers and Stockyards Act.**

MAXIMUM WEIGHT LAWS. See **Taxation**, 4.

MEMBER OF CREW. See **Admiralty**, 1–2; **Aliens**, 3.

MEXICO. See **Constitutional Law**, I, 1.

MILITARY. See **Citizenship**, 4; **Constitutional Law**, I, 2.

MONOPOLY. See **Antitrust Acts; Federal Maritime Board.**

MOTOR CARRIERS. See **Interstate Commerce Commission,** 1; **Taxation,** 4.

MURDER. See **Constitutional Law,** II; III, 1, 3–4.

NARCOTICS. See **Criminal Law,** 2–3.

NATIONAL ARCHIVES. See **Supreme Court.**

NATIONALITY ACTS. See **Aliens; Citizenship; Constitutional Law,** I, 1–2.

NATIONAL LABOR RELATIONS ACT. See **Labor.**

NATURALIZATION. See **Citizenship,** 1–3.

NAVIGATION. See **Admiralty.**

NEGLIGENCE. See **Admiralty; Employers' Liability Act; Procedure,** 6, 9; **Workmen's Compensation.**

NEGROES. See **Constitutional Law,** II; III, 3–4; V, 2–3.

NEW JERSEY. See **Constitutional Law,** III, 2.

NEW YORK. See **Constitutional Law,** VI.

NORTH CAROLINA. See **Constitutional Law,** VI.

OIL. See **Taxation,** 1–2.

PACKERS AND STOCKYARDS ACT.

Stockyard owner's regulations—Restrictions on market agency—Validity.—Stockyard owner's regulations providing that market agency doing business at its stockyard shall not, in "normal marketing area" thereof, solicit business for, or divert business to, any other market *held* invalid as applied to market agency also registered at other stockyards; taking of evidence not essential to "full hearing" in circumstances of case. Denver Union Stock Yard Co. v. Producers Livestock Marketing Assn., p. 282.

PANAMA CANAL.

Suit to compel reduction of tolls—Appropriateness of judicial action—Administrative Procedure Act.—Controversy as to whether Panama Canal Co., as creature of Congress and agent of President, should fix lower tolls for use of Canal not presently appropriate for judicial action; question not subject to judicial review under § 10, Administrative Procedure Act. Panama Canal Co. v. Grace Line, p. 309.

PAUPERS. See **Procedure,** 7.

PENALTIES. See **Taxation,** 4.

PERSONAL INJURIES. See **Admiralty; Employers' Liability Act; Procedure,** 6, 9; **Workmen's Compensation.**

PICKETING. See **Labor,** 3.

PROCEDURE. See also **Constitutional Law,** III; V; VI; **Contempt,** 1–2; **Criminal Law,** 3; **Panama Canal.**

1. *Supreme Court—Review of state-court judgment—Material not in record.*—Material not in record of state courts and not considered by them will not be considered by Supreme Court in reviewing judgment of State Supreme Court affirming murder conviction and death sentence. Ciucci v. Illinois, p. 571.

2. *Supreme Court—District Court order to distribute fund impounded pending appeal—Supersedeas.*—After Supreme Court's modification and affirmance of judgment of District Court and remand to it for remand to Interstate Commerce Commission for further proceedings on order raising suburban commuter fares of railroad, District Court ordered distribution of fund impounded pending that appeal. On notice of appeal from its order for distribution of funds, District Court denied stay and Supreme Court denies supersedeas. Chicago, M., St. P. & P. R. Co. v. Illinois (opinion of FRANKFURTER, J., dissenting), p. 906.

3. *Courts of Appeals—Appeal—Timeliness—"Entry of Judgment."*—In suit against Government for money only, time for appeal ran from filing of formal judgment specifying amount—not from filing of opinion granting summary judgment for plaintiff but not specifying amount. United States v. Schaefer Brewing Co., p. 227.

4. *Courts of Appeals—Appeal—Timeliness—Final judgment.*—District Court's order dismissing cause of action was final judgment and appeal filed within 30 days thereafter was timely under Rule 73 (a), Federal Rules of Civil Procedure. Jung v. K. & D. Mining Co., p. 335.

5. *Courts of Appeals—Appeal from order dismissing complaint.*—Rule that plaintiff who has voluntarily dismissed his complaint may not appeal from order of dismissal not applicable when order resulted from plaintiff's motion to amend earlier order so as to expedite review thereof. United States v. Procter & Gamble Co., p. 677.

6. *Courts of Appeals—Reversing District Court and directing judgment for appellant—Remand for taking of evidence.*—When District Court had stricken affirmative defense under State Workmen's Compensation Act and awarded judgment to plaintiff without hearing his evidence on issue, Court of Appeals erred in directing judgment for defendant without remand to permit plaintiff to introduce evidence. Byrd v. Blue Ridge Electric Cooperative, p. 525.

PROCEDURE—Continued.

7. *Courts of Appeals—Denial of leave to appeal in forma pauperis from conviction of crime—Issue not frivolous.*—Court of Appeals should not have denied leave to appeal *in forma pauperis* from conviction for crime when issue raised was not frivolous. Ellis v. United States, p. 674.

8. *District Courts — Discovery and production — Grand jury records.*—Defendants in civil suit to enjoin violations of Sherman Act failed to show "good cause" under Rule 34 for discovery and production of grand jury records when they did not show that grand jury investigation had been subverted by Government to elicit evidence in civil case. United States v. Procter & Gamble Co., p. 677.

9. *District Courts—Diversity of citizenship cases—State law—Jury to decide factual issues.*—Though factual issue on affirmative defense under State Workmen's Compensation Act is triable by judge in state courts, it should be tried by jury in federal court having jurisdiction because of diversity of citizenship. Byrd v. Blue Ridge Electric Cooperative, p. 525.

10. *District Courts—Criminal contempt—Remand for resentencing.*—After reversing in part judgment of conviction for contempt this Court vacated judgment and remanded case to District Court for resentencing in light of opinion; but District Court resentenced for same time. This Court vacates that judgment and remands with directions that sentence be reduced. Yates v. United States, p. 363.

RACIAL DISCRIMINATION. See **Constitutional Law**, II.

RADAR STATION. See **Admiralty**, 1.

RAILROADS. See **Antitrust Acts**; **Employers' Liability Act**; **Interstate Commerce Commission**, 2; **Procedure**, 2.

RATES. See **Federal Maritime Board**; **Interstate Commerce Commission**; **Panama Canal**; **Procedure**, 2.

RECORDS. See **Supreme Court.**

REMAND. See **Procedure**, 2, 6, 10.

RESTRAINT OF TRADE. See **Antitrust Acts**; **Federal Maritime Board**; **Packers and Stockyards Act.**

RIGHT TO WORK. See **Labor**, 2–3.

ROADS. See **Taxation**, 4.

ROBBERY. See **Constitutional Law**, III, 2.

RULES OF CIVIL PROCEDURE. See **Procedure**, 3–4, 8.

RULES OF CRIMINAL PROCEDURE. See **Procedure**, 7.

SEAMEN. See **Admiralty**, 1–2; **Aliens**, 3.

SELF-INCRIMINATION. See **Constitutional Law**, V.

SENTENCE. See **Constitutional Law**, IV; **Contempt**, 2; **Procedure**, 10.

SHERMAN ACT. See **Antitrust Acts**; **Procedure**, 8.

SHIPPING. See **Admiralty**; **Federal Maritime Board**; **Panama Canal.**

STAY. See **Procedure**, 2.

STOCKYARDS. See **Packers and Stockyards Act.**

STRIKES. See **Labor**, 3.

SULPHUR. See **Taxation**, 1.

SUPERSEDEAS. See **Procedure**, 2.

SUPREME COURT. See also **Procedure**, 1–2.

Clerk authorized to transfer certain records and papers to National Archives, p. 901.

SURRENDER ORDER. See **Contempt**, 2.

SUSPENSION. See **Aliens**, 1.

TAFT-HARTLEY ACT. See **Labor.**

TAXATION.

1. *Income tax—Payment for assignment of oil payment right—Ordinary income—Not capital gain.*—Payment for assignment of oil payment right (or sulphur payment right) taxable as ordinary income; not long-term capital gain under § 117 of Internal Revenue Code of 1939. Commissioner v. P. G. Lake, Inc., p. 260.

2. *Income tax—Exchange of oil payment right for real estate—Not tax-free exchange.*—Exchange of oil payment right for fee simple interest in real estate not tax-free exchange of property under § 112 (b)(1) of Internal Revenue Code of 1939. Commissioner v. P. G. Lake, Inc., p. 260.

3. *Income tax—Deductions—Expenses of leasing premises and hiring employees for gambling enterprises.*—Amounts expended to lease premises and hire employees for conduct of gambling enterprises, illegal under state law, *held* deductible as ordinary and necessary business expenses under § 23 (a)(1)(A) of Internal Revenue Code of 1939. Commissioner v. Sullivan, p. 27.

4. *Income tax—Deductions—Fines paid by truck owners for violations of maximum weight laws.*—Fines paid by truck owners for violations of state maximum weight laws *held* not deductible as "ordi-

TAXATION—Continued.

nary and necessary" business expenses under § 23 (a) (1) (A) of Internal Revenue Code of 1939. Tank Truck Rentals v. Commissioner, p. 30; Hoover Motor Express Co. v. United States, p. 38.

5. *Federal estate tax—Proceeds of irrevocably assigned single-premium life insurance policies.*—Proceeds of single-premium life insurance policies which had been assigned irrevocably to children of insured not includable in estate of insured for purposes of federal estate tax under § 811 (c) (1) (B) of Internal Revenue Code of 1939, though such policies were bought at same time and from same companies as single-premium nonrefundable life annuities payable to insured. Fidelity-Philadelphia Trust Co. v. Smith, p. 274.

TEMPORARY DISABILITY. See **Workmen's Compensation.**

TEXAS TOWER. See **Admiralty,** 1.

TOLLS. See **Panama Canal.**

TORTS. See **Labor,** 3.

TRANSPORTATION. See **Admiralty; Antitrust Acts; Employers' Liability Act; Federal Maritime Board; Interstate Commerce Commission; Panama Canal; Procedure,** 2; **Taxation,** 4.

TRIAL. See **Aliens,** 3; **Constitutional Law,** III; V; **Contempt; Procedure.**

TRUCKS. See **Taxation,** 4.

UNIONS. See **Labor.**

UTAH. See **Interstate Commerce Commission,** 2.

VENUE. See **Aliens,** 3.

VOTING. See **Constitutional Law,** I, 1.

WAIVER. See **Constitutional Law,** V.

WAR. See **Citizenship,** 4; **Constitutional Law,** I, 2.

WATER CARRIERS. See **Admiralty; Federal Maritime Board; Panama Canal.**

WEIGHT LAWS. See **Taxation,** 4.

WITNESSES. See **Constitutional Law,** V, 1; **Contempt,** 1; **Criminal Law,** 1.

WORDS.

1. *"Acquisition."*—§ 5 (2) (a), Interstate Commerce Act. County of Marin v. United States, p. 412.

2. *"Agents."*—Federal Employers' Liability Act. Sinkler v. Missouri Pacific R. Co., p. 326.

WORDS—Continued.

3. *"Any place in the United States at which the violation may occur."*—§ 279, Immigration and Nationality Act. United States v. Cores, p. 405.

4. *"Attached to the principles of the Constitution of the United States."*—§ 4, Nationality Act of 1906. Nowak v. United States, p. 660; Maisenberg v. United States, p. 670.

5. *"Business expenses."*—§ 23 (a) (1) (A) of Internal Revenue Code of 1939. Commissioner v. Sullivan, p. 27; Tank Truck Rentals v. Commissioner, p. 30; Hoover Motor Express Co. v. United States, p. 38.

6. *"Capital gain."*—§ 117, Internal Revenue Code of 1939. Commissioner v. P. G. Lake, Inc., p. 260.

7. *"Carrier."*—§ 5 (2) (a), Interstate Commerce Act. County of Marin v. United States, p. 412.

8. *"Claim . . . against the Government of the United States."*—False Claims Act. Rainwater v. United States, p. 590; United States v. McNinch, p. 595.

9. *"Concealment of a material fact."*—§ 340 (a), Immigration and Nationality Act of 1952. Maisenberg v. United States, p. 670.

10. *"Conformity to the usages at law . . . now prevailing."*—§ 24 of Clayton Act of 1914, 18 U. S. C. § 402. Green v. United States, p. 165.

11. *"District in which the offense was committed."*—Rule 18, Federal Rules of Criminal Procedure. United States v. Cores, p. 405.

12. *"Entry of the judgment."*—Rule 73 (a), Federal Rules of Civil Procedure. United States v. Schaefer Brewing Co., p. 227.

13. *"Expenses."*—§ 23 (a) (1) (A) of Internal Revenue Code of 1939. Commissioner v. Sullivan, p. 27; Tank Truck Rentals v. Commissioner, p. 30; Hoover Motor Express Co. v. United States, p. 38.

14. *"Full hearing."*—Packers and Stockyards Act. Denver Union Stock Yard Co. v. Producers Livestock Marketing Assn., p. 282.

15. *"Good cause."*—§ 338 (a), Nationality Act of 1940. Nowak v. United States, p. 660; Maisenberg v. United States, p. 670.

16. *"Good cause."*—Rule 34, Federal Rules of Civil Procedure. United States v. Procter & Gamble Co., p. 677.

17. *"Good faith."*—28 U. S. C. § 1915. Ellis v. United States, p. 674.

18. *"Infamous crime."*—Fifth Amendment. Green v. United States, p. 165.

WORDS—Continued.

19. *"Judgment."*—Rule 73 (a), Federal Rules of Civil Procedure. United States v. Schaefer Brewing Co., p. 227.

20. *"Member of a crew of any vessel."*—§ 1654 of Defense Bases Act. Grimes v. Raymond Concrete Pile Co., p. 252.

21. *"Necessary" business expenses.*—§ 23 (a)(1)(A) of Internal Revenue Code of 1939. Commissioner v. Sullivan, p. 27; Tank Truck Rentals v. Commissioner, p. 30; Hoover Motor Express Co. v. United States, p. 38.

22. *"Ordinary income."*—Internal Revenue Code of 1939. Commissioner v. P. G. Lake, Inc., p. 260.

23. *"Ordinary and necessary expenses" of business.*—§ 23 (a)(1)(A) of Internal Revenue Code of 1939. Commissioner v. Sullivan, p. 27; Tank Truck Rentals v. Commissioner, p. 30; Hoover Motor Express Co. v. United States, p. 38.

24. *"Reasonable stockyard services."*—Packers and Stockyards Act. Denver Union Stock Yard Co. v. Producers Livestock Marketing Assn., p. 282.

25. *"Remains."*—§ 252 (c), Immigration and Nationality Act. United States v. Cores, p. 405.

26. *"Resort to other discriminating or unfair methods."*—§ 14, Shipping Act of 1916. Federal Maritime Board v. Isbrandtsen Co., p. 481.

27. *"State where the said crimes shall have been committed."*—U. S. Const., Art. III, § 2, cl. 3; Sixth Amendment. United States v. Cores, p. 405.

28. *"Temporary disability."*—Alaska Workmen's Compensation Act. Alaska Industrial Board v. Chugach Electric Assn., p. 320.

29. *"Time of entering the United States."*—§ 4 (a) Anarchist Act of 1918, as amended by § 22 of Internal Security Act of 1950. Bonetti v. Rogers, p. 691.

30. *"Undue, unreasonable, or unjust discrimination against interstate . . . commerce."*—§ 13 (4), Interstate Commerce Act. Public Service Comm'n of Utah v. United States, p. 421.

31. *"Unjust, unreasonable or discriminatory regulation or practice."*—Packers and Stockyards Act. Denver Union Stock Yard Co. v. Producers Livestock Marketing Assn., p. 282.

32. *"Wages, hours, and other terms and conditions of employment."*—§ 8 (d) of National Labor Relations Act. Labor Board v. Borg-Warner Corp., p. 342.

33. *"Willful misrepresentation."*—§ 340, Immigration and Nationality Act of 1952. Maisenberg v. United States, p. 670.

WORKMEN'S COMPENSATION. See also **Admiralty; Employers' Compensation Act; Procedure,** 6, 9.

Alaska—Award of "temporary disability" payments after payment for "total and permanent disability."—In circumstances of case, there was factual basis for award of "temporary disability" payments under Alaska Workmen's Compensation Act after payment had been made for "total and permanent disability." Alaska Industrial Board v. Chugach Electric Assn., p. 320.

U. S. GOVERNMENT PRINTING OFFICE: 1958 O—458778


OAMGENPUB1118