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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1958

OPINIONS AND DECISIONS PER CURIAM

MARCH 2 THROUGH JUNE 1, 1959

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REPORTER OF DECISIONS

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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.
TOM C. CLARK, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
CHARLES E. WHITTAKER, Associate Justice.
POTTER STEWART, Associate Justice.*

RETIRED

STANLEY REED, Associate Justice.
HAROLD H. BURTON, Associate Justice.
SHERMAN MINTON, Associate Justice.

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

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*Note on p. iv.

NOTE.

*Mr. Justice Stewart, who had been serving under a recess appointment since October 14, 1958, was nominated by President Eisenhower on January 17, 1959; the nomination was confirmed by the Senate on May 5, 1959; he was given a new commission on May 7, 1959; and he again took the oaths on May 15, 1959. See *post*, p. vii.

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, POTTER STEWART, 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.

October 14, 1958.

(For next previous allotment, see 357 U. S., p. v.)

COMMISSION OF MR. JUSTICE STEWART.

SUPREME COURT OF THE UNITED STATES.

MONDAY, MAY 18, 1959.

It is ordered that the Commission of MR. JUSTICE STEWART be recorded and that his oaths be filed.

The Commission of MR. JUSTICE STEWART is in the words and figures following, viz:

DWIGHT D. EISENHOWER,

PRESIDENT OF THE UNITED STATES OF AMERICA,

To all who shall see these Presents, Greeting:

KNOW YE; That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of Potter Stewart of Ohio I have nominated, and, by and with the advice and consent of the Senate, do appoint him Associate Justice of the Supreme Court of the United States and do authorize and empower him to execute and fulfil the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Him, the said Potter Stewart during his good behavior.

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

Done at the City of Washington this seventh day of May, in the year of our Lord one thousand nine hundred and fifty-nine, and of the Independence of the United States of America the one hundred and eighty-third.

[SEAL] DWIGHT D. EISENHOWER

By the President:

WILLIAM P. ROGERS

Attorney General.

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.

495957 O-59-2

495957 O–59–3

TABLE OF CASES CITED

495957 O-59-4

TABLE OF STATUTES CITED

(A) Statutes of the United States.

(B) Statutes of the States and Territories.

(C) PROCLAMATIONS.

(D) TREATIES.

(E) FOREIGN STATUTES.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1958.

NEW YORK *v.* O'NEILL.

CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 53. Argued November 20, 1958.—Decided March 2, 1959.

While temporarily in Florida, respondent was summoned to appear at a hearing to determine whether he should be delivered into the custody of a New York official to be taken to New York to testify in a grand jury proceeding. This procedure, and adequate safeguards to protect persons subject to it, were established in Florida by the enactment of the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings, which had been enacted also in New York, 39 other States and Puerto Rico. *Held:* The Florida statute, on its face, does not violate the Privileges and Immunities Clause of Art. IV, § 2 of the Constitution nor the Privileges and Immunities or Due Process Clause of the Fourteenth Amendment. Pp. 3–12.

100 So. 2d 149, reversed and cause remanded.

Reeves Bowen, Assistant Attorney General of Florida, argued the cause for petitioner. With him on the brief were *Richard W. Ervin,* Attorney General of Florida, and *Frank S. Hogan.*

L. J. Cushman argued the cause and filed a brief for respondent.

James C. Dezendorf and *Louis A. Kohn* filed a brief for the National Conference of Commissioners on Uniform State Laws, as *amicus curiae,* in support of petitioner.

John Anderson, Jr., Attorney General of Kansas, filed a brief, as *amicus curiae*, in support of petitioner. The following States and the Commonwealth of Puerto Rico joined in this brief: Alabama, by *John Patterson*, Attorney General; Arkansas, by *Bruce Bennett*, Attorney General; California, by *Edmund G. Brown*, Attorney General; Colorado, by *Duke W. Dunbar*, Attorney General; Connecticut, by *John J. Bracken*, Attorney General; Georgia, by *Eugene Cook*, Attorney General; Idaho, by *Graydon W. Smith*, Attorney General; Indiana, by *Edwin K. Steers*, Attorney General; Iowa, by *Norman A. Erbe*, Attorney General; Kentucky, by *Jo M. Ferguson*, Attorney General; Louisiana, by *Jack P. F. Gremillion*, Attorney General; Maine, by *Frank F. Harding*, Attorney General; Maryland, by *C. Ferdinand Sybert*, Attorney General; Minnesota, by *Miles Lord*, Attorney General; Mississippi, by *Joe T. Patterson*, Attorney General; Missouri, by *John M. Dalton*, Attorney General; Montana, by *Forrest H. Anderson*, Attorney General; Nebraska, by *Clarence S. Beck*, Attorney General; Nevada, by *Harvey Dickerson*, Attorney General; New Hampshire, by *Louis C. Wyman*, Attorney General; New Jersey, by *David D. Furman*, Attorney General; New Mexico, by *Fred M. Standley*, Attorney General; New York, by *Louis J. Lefkowitz*, Attorney General; North Carolina, by *Malcolm B. Seawell*, Attorney General; North Dakota, by *Leslie R. Burgum*, Attorney General; Ohio, by *William Saxbe*, Attorney General; Oklahoma, by *Mac Q. Williamson*, Attorney General; Oregon, by *Robert Y. Thornton*, Attorney General; Commonwealth of Puerto Rico, by *Francisco Espinosa, Jr.*, Acting Attorney General; Rhode Island, by *J. Joseph Nugent*, Attorney General; South Carolina, by *T. C. Callison*, Attorney General; Tennessee, by *George F. McCanless*, Attorney General; Texas, by *Will Wilson*, Attorney General; Utah, by *E. Richard Callister*, Attorney General; Vermont, by *Frederick M.*

Reed, Attorney General; Virginia, by *Albertis S. Harrison, Jr.,* Attorney General; Washington, by *John J. O'Connell,* Attorney General; West Virginia, by *W. W. Barron,* Attorney General; and Wyoming, by *Thomas O. Miller,* Attorney General.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case is before us to determine the constitutionality of a Florida statute entitled "Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings." Fla. Stat., 1957, §§ 942.01–942.06. Respondent, a citizen of Illinois, had traveled to Florida to attend a convention. In accordance with the Florida statute, the Circuit Court of Dade County, Florida, responded to a certificate executed by a judge of the Court of General Sessions, New York County (under N. Y. Code Crim. Proc. § 618–a), by summoning respondent before it to determine whether he was to be given into the custody of New York authorities to be transported to New York to testify in a grand jury proceeding in that State. The Circuit Court, ruling that the Florida statute violated the Florida and the United States Constitutions, refused to grant New York's request. 9 Fla. Supp. 153. The Supreme Court of Florida affirmed this decision on the ground that the statute violated the United States Constitution. 100 So. 2d 149. We granted certiorari, 356 U. S. 972, inasmuch as this holding brings into question the constitutionality of a statute now in force in forty-two States and the Commonwealth of Puerto Rico. (Thirty-nine States and Puerto Rico joined in an *amici* brief in support of the Uniform Act.) The certificate filed with the Circuit Court of Dade County recites that respondent's testimony is desired by a New York County grand jury. That certificate is, under the terms of the statute, "prima facie

evidence of all the facts stated therein." Fla. Stat., 1957, § 942.02 (2). Therefore, on the face of the record, respondent's attendance at a grand jury investigation in New York is required by the certificate filed with the Florida court and not withdrawn from it. Neither party has suggested that this is not a live litigation nor do we find any ground for deeming the case to be moot.

The Uniform Act as enacted by the Florida Legislature in 1941 was formulated by the National Conference of Commissioners on Uniform State Laws in its present form in 1936. See Handbook of the National Conference of Commissioners on Uniform State Laws 333 (1936); 9 U. L. A. 91 (1957). The Uniform Act is reciprocal. It is operative only between States which have enacted it or similar legislation for compelling of witnesses to travel to, and testify in, sister States.

The terms of the statute make quite clear the procedures to be followed. The judge of the court of the requesting State files in any court of record in the State in which the witness may be found a certificate stating the necessity of the appearance of such witness in a criminal prosecution or grand jury investigation in the requesting State. The certificate must also state the number of days the witness would be required to attend. Upon receipt of such a certificate a hearing is held by the court in which it is filed. In the hearing, at which under the Florida Act the witness is entitled to counsel, the court which received this certificate is obliged to determine whether an order to attend the prosecution or grand jury investigation in the requesting State would comply with conditions set forth in the statute: that the witness is material and necessary; that the trip to the requesting State would not involve undue hardship to the witness; that the laws of the requesting State and States through which the witness must travel grant him immunity from arrest and the service of civil and criminal process. Fur-

thermore, the statute provides that the witness must be tendered ten cents a mile for each mile to and from the requesting State and five dollars for each day that he is required to travel and attend as a witness. Under the statute the order of the forwarding State to the witness may take two forms: first, the court may issue a summons directing the witness to attend and testify in the requesting State; second, if the certificate of the requesting State so recommends, and if the recommendation is found to be desirable by the court of the forwarding State, the court may immediately deliver the witness to an officer of the requesting State. Furthermore, if such a recommendation is made by the requesting State, instead of the initial notification of hearing the court of the forwarding State may take the witness into immediate custody. Whether the procedure be by notification and then summons or by apprehension and then delivery, the hearing and the issues to be determined therein are the same.

In *Commonwealth of Kentucky* v. *Dennison,* 24 How. 66, Mr. Chief Justice Taney, speaking of the obligation imposed by the Constitution upon the Governor of Ohio to deliver to Kentucky one accused of violation of the criminal laws of Kentucky, called attention "to the obvious policy and necessity of this provision to preserve harmony between States, and order and law within their respective borders . . . ." 24 How., at 103. The same "policy and necessity" underlie the measure adopted by Florida and forty-two other jurisdictions. Unless there is some provision in the United States Constitution which clearly prevents States from accomplishing this end by the means chosen, this Court must sustain the Uniform Act. The absence of a provision in the United States Constitution specifically granting power to the States to legislate respecting interstate rendition of witnesses presents no bar. To argue from the declaratory incor-

poration in the Constitution, Art. IV, § 2, of the ancient political policy among the Colonies of delivering up fugitives from justice an implied denial of the right to fashion other cooperative arrangements for the effective administration of justice, is to reduce the Constitution to a rigid, detailed and niggardly code. In adjudging the validity of a statute effecting a new form of relationship between States, the search is not for a specific constitutional authorization for it. Rather, according the statute the full benefit of the presumption of constitutionality which is the postulate of constitutional adjudication, we must find clear incompatibility with the United States Constitution. The range of state power is not defined and delimited by an enumeration of legislative subject-matter. The Constitution did not purport to exhaust imagination and resourcefulness in devising fruitful interstate relationships. It is not to be construed to limit the variety of arrangements which are possible through the voluntary and cooperative actions of individual States with a view to increasing harmony within the federalism created by the Constitution. Far from being divisive, this legislation is a catalyst of cohesion. It is within the unrestricted area of action left to the States by the Constitution.

The Supreme Court of Florida found that the statute violated the Privileges and Immunities Clauses found in Art. IV, § 2, and in the Fourteenth Amendment. The Privileges and Immunities Clause of Art. IV, § 2, proscribes discrimination by a State against a citizen of another State. *Slaughter-House Cases,* 16 Wall. 36, 77. There is no such discrimination here. The Florida statute applies to all persons within the boundaries, and therefore subject to the jurisdiction, of Florida. The finding of the Florida Supreme Court that the right to ingress and egress is a privilege of national citizenship protected by the Fourteenth Amendment raises an issue that has more than once been stirred in opinions of this Court.

See concurring opinions in *Edwards* v. *California,* 314 U. S. 160, 178 and 184, in connection with *Crandall* v. *Nevada,* 6 Wall. 35. However, even if broad scope be given to such a privilege, there is no violation of that privilege by the Florida statute. Florida undoubtedly could have held respondent within Florida if he had been a material witness in a criminal proceeding within that State. And yet this would not have been less of a limitation on his claim of the right of ingress and egress than is an order to attend and testify in New York. There are restrictions on the exercise of the claimed constitutional right. One such restriction derives from the obligation to give testimony. This obligation has been sustained where it necessitated travel across the Atlantic Ocean. *Blackmer* v. *United States,* 284 U. S. 421.*

More fundamentally, this case does not involve freedom of travel in its essential sense. At most it represents a temporary interference with voluntary travel. Particularly is this so in an era of jet transportation when vast distances can be traversed in a matter of hours. Respondent was perfectly free to return to Florida after testifying in New York. Indeed, New York was obligated to pay his way back to Florida. Or, after testifying, he could return to Illinois or remain in New York. The

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*Compulsion to travel across State boundaries to testify in sister States antedates the United States Constitution. See Laws of Maryland, November 1785, Chapter I, An ACT to approve, confirm and ratify, the compact made by the commissioners appointed by the general assembly of the Commonwealth of Virginia, and the commissioners appointed by this state, to regulate and settle the jurisdiction and navigation of Patowmack and Pocomoke rivers, and that part of Chesapeake bay which lieth within the territory of Virginia: "And in all cases of trial in pursuance of the jurisdiction settled by this compact, citizens of either state shall attend as witnesses in the other, upon a summons from any court or magistrate having jurisdiction, being served by a proper officer of the county where such citizen shall reside."

privilege of ingress and egress among the States which has been urged in opinions is of hardier stuff. The privilege was to prevent the walling off of States, what has been called the Balkanization of the Nation. The requirement which respondent resists conduces, it merits repetition, toward a free-willed collaboration of independent States.

The more relevant challenge to the statute invalidated by the Supreme Court of Florida is that it denies due process of law in violation of the Fourteenth Amendment. Because of the generous protections to be accorded a person brought or summoned before the court of the forwarding State, procedural due process in the hearing itself must be accorded and this is firmly established. The Circuit Court of Dade County ruled that the absence of any provision for bail in the procedure of apprehension and delivery violated due process of law. Since the Supreme Court of Florida expressly refrained from ruling whether the failure of the statute to provide for bail for persons attached and delivered violated either the Florida Constitution or the Fourteenth Amendment, and since silence on bail is not tantamount to proscription of bail, the claim that this silence of the statute is a violation of the Fourteenth Amendment is a hypothetical question which need not now be considered. We may add that the sole claim before us, as it was the sole claim dealt with by the Supreme Court of Florida, is that the statute is unconstitutional on its face. No claim is before us that the administration of the statute in the particular circumstances of this case violates due process.

The Supreme Court of Florida held that inasmuch as what was ordered was to be carried on in a foreign jurisdiction, the Florida courts could not constitutionally be given jurisdiction to order it (citing *Pennoyer* v. *Neff*, 95 U. S. 714). However, the Florida courts had immediate personal jurisdiction over respondent by virtue of his

presence within that State. Insofar as the Fourteenth Amendment is concerned, this gave the Florida courts constitutional jurisdiction to order an act even though that act is to be performed outside of the State. See *Steele* v. *Bulova Watch Co.*, 344 U. S. 280; Restatement, Conflict of Laws, § 94.

The primary purpose of this Act is not eleemosynary. It serves a self-protective function for each of the enacting States. By enacting this law the Florida Legislature authorized and enabled Florida courts to employ the procedures of other jurisdictions for the obtaining of witnesses needed in criminal proceedings in Florida. Today forty-two States and Puerto Rico may facilitate criminal proceedings, otherwise impeded by the unavailability of material witnesses, by utilizing the machinery of this reciprocal legislation to obtain such witnesses from without their boundaries. This is not a merely altruistic, disinterested enactment.

In any event, to yield to an argument that benefiting other States is beyond the power of a State would completely disregard the inherent implications of our federalism within whose framework our organic society lives and moves and has its being—the abundant and complicated interrelationship between national authority and the States, see *Hopkins Federal Savings & Loan Assn.* v. *Cleary,* 296 U. S. 315, and between the States *inter sese.* To yield to this argument would foreclose to the States virtually all arrangements which increase comity among the States. These extra-constitutional arrangements are designed to solve "problems created by a constitutional division of powers without disturbance of the federal nature of our government." Clark, Joint Activity Between Federal and State Officials, 51 Pol. Sci. Q. 230, 269. Reciprocal legislation, such as the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings and the

Acts providing reciprocal periods of grace in the registration of out-of-state automobiles, see *Kane* v. *New Jersey,* 242 U. S. 160, is one such arrangement. The uniform laws proposed by the National Conference of Commissioners on Uniform State Laws and adopted by individual States have (among other benefits) increased ease of interstate commercial relationships by providing uniformity in commercial laws through uniform Acts governing sales and negotiable instruments. Uniform laws have frequently been concerned with enforcement of criminal laws. Thus, the Uniform Criminal Extradition Act, 9 U. L. A. 263 (1957), provides for rendition of alleged criminals whose conduct does not bring them within the constitutional extradition provision. U. S. Const., Art. IV, § 2; *Hyatt* v. *People ex rel. Corkran,* 188 U. S. 691. There are numerous cooperative undertakings among States by the formation of agencies which study joint problems and make suggestions for internal management within individual States calculated to increase comity among the several States. Interstate preserves are regulated through the device of fusion of distinct state administrative agencies by means of joint sessions and joint action. The Federal Government has also acted in aid of States in matters of local concern through auxiliary legislation (in game statutes, for example), through grants-in-aid, and through legislation calling for cooperation between particular state administrative agencies and federal agencies operating within the same general area of regulation. See Frankfurter and Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustments, 34 Yale L. J. 685, 688–691. About such instances it has been said that they "illustrate extra-constitutional forms of legal invention for the solution of problems touching more than one state. They were neither contemplated nor specifically provided for by the Constitution." Frankfurter and Landis, *supra,* at 691.

The manifold arrangements by which the Federal and State Governments collaborate constitute an extensive network of cooperative governmental activities not formulated in the Constitution but not offensive to any of its provisions or prohibitions. See Clark, *supra.* Among the examples of such devices discussed by Dr. Clark are the Selective Service System, Civilian Conservation Corps, deportation law enforcement, administration of the Pure Food and Drugs Act and the federal game statutes, and federal-state contracts for the boarding of federal prisoners in state facilities.

To hold that these and other arrangements are beyond the power of the States and Federal Government because there is no specific empowering provision in the United States Constitution would be to take an unwarrantedly constricted view of state and national powers and would hobble the effective functioning of our federalism. Diffusion of power has its corollary of diffusion of responsibilities, with its stimulus to cooperative effort in devising ways and means for making the federal system work. That is not a mechanical structure. It is an interplay of living forces of government to meet the evolving needs of a complex society.

The Constitution of the United States does not preclude resourcefulness of relationships between States on matters as to which there is no grant of power to Congress and as to which the range of authority restricted within an individual State is inadequate. By reciprocal, voluntary legislation the States have invented methods to accomplish fruitful and unprohibited ends. A citizen cannot shirk his duty, no matter how inconvenienced thereby, to testify in criminal proceedings and grand jury investigations in a State where he is found. There is no constitutional provision granting him relief from this obligation to testify even though he must travel to another State to do so. Comity among States, an end particularly to be

cherished when the object is enforcement of internal criminal laws, is not to be defeated by an *a priori* restrictive view of state power.

The judgment of the Supreme Court of Florida is reversed and the cause is remanded to that court for proceedings not inconsistent with this opinion.

Reversed and remanded.

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

The right to free ingress and egress within the country and even beyond the borders is a basic constitutional right, though it is not contained *in haec verba* in the Constitution. It had been included in the Articles of Confederation, Article IV of which provided in part:

> "The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state . . . ."

As Chafee, Three Human Rights in the Constitution (1956), p. 185, states, the failure to make specific provision for this right in the Constitution must have been on the assumption that it was already included. For it is impossible to think that a right so deeply cherished in the Colonies was rejected outright. "The Convention carefully prevented states from passing tariff laws; surely it did not want state immigration laws." Chafee, *op. cit., supra,* at 185. The Constitution was designed "to secure the freest intercourse between the citizens of the different

States," said Chief Justice Taney in *The Passenger Cases,* 7 How. 283, 492. And he added: "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States." *Id.,* 492. This right of free ingress and egress is one "arising out of the nature and essential character of the Federal government." *Duncan* v. *Missouri,* 152 U. S. 377, 382; *Twining* v. *New Jersey,* 211 U. S. 78, 97. As stated by the Court in *Williams* v. *Fears,* 179 U. S. 270, 274:

> "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution."

It has often been called a right or privilege of national citizenship, *Crandall* v. *Nevada,* 6 Wall. 35, 44, 49; *Ward* v. *Maryland,* 12 Wall. 418, 430; *Slaughter House Cases,* 16 Wall. 36, 79; *Twining* v. *New Jersey, supra,* 97; *Edwards* v. *California,* 314 U. S. 160, 178–181, 183 (concurring opinions). As such, it is protected against state action by the Privileges and Immunities Clause of the Fourteenth Amendment. *Slaughter House Cases, supra,* at 74–79; *In re Kemmler,* 136 U. S. 436, 448.

It has at times been considered under the protective care of the Commerce Clause subject to control by Congress but free from stoppage or impairment by the States. *Edwards* v. *California, supra.*

In *Kent* v. *Dulles,* 357 U. S. 116, we held that this right to travel was a part of the citizen's "liberty" within

the meaning of the Due Process Clause of the Fifth Amendment.

> "Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values." *Id.*, at 126.

Whatever may be the sources of this right of free movement—the right to go to any State or stay home as one chooses—it is an incident of national citizenship and occupies a high place in our constitutional values.

This right of national citizenship has been qualified. One qualification was made by the Extradition Clause of Art. IV, § 2, of the Constitution: [1]

> "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

But that limitation on the right of free movement applies only when the citizen is a fugitive from the law.

Yet O'Neill is not a fugitive from justice. He carries no criminal taint. He is wanted as a witness in New York. But there is no provision of the Constitution which provides for the extradition of witnesses by the States. That power is today judicially created. But I find no authority on the part of the States to enlarge and expand the power of extradition specifically restricted by

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[1] This provision is implemented by an Act of Congress. 18 U. S. C. c. 209.

the Constitution to criminals. As stated in *People ex rel. Corkran* v. *Hyatt,* 172 N. Y. 176, 182, 64 N. E. 825, 826, aff'd 188 U. S. 691, ". . . no person can or should be extradited from one state to another unless the order falls within the constitutional provision, . . . power which independent nations have to surrender criminals to other nations as a matter of favor or comity is not possessed by the states." We allow today only what a constitutional amendment could achieve. We in effect amend Art. IV, § 2, by construction to add "witnesses" to the group now embraced in Art. IV, § 2.

This right of freedom of movement even of the innocent may not be absolute. Perhaps a State could stop a migrant at its borders for health inspection. There may be other narrow and limited qualifications to this right of free ingress and egress which a State may impose. But I know of no power on the part of a State to pick a citizen up and forcibly remove him from its boundaries where there is no basis of extradition. *Blackmer* v. *United States,* 284 U. S. 421, is of no help here. There the United States was requiring a citizen, resident abroad, to return to this country to testify and penalizing him for his refusal. This was his home, to which he was rooted and where his loyalties lay. The obligation was exacted by the Federal Government as a requirement of national citizenship. Congress has stated this responsibility in an Act, 62 Stat. 755, 18 U. S. C. § 1073, which, *inter alia,* makes it a federal crime for a person to move in interstate commerce "to avoid giving testimony" in certain criminal proceedings. And Congress has made explicit provision concerning the State to which the witness may be removed.[2] I can understand how this regulation of national citizenship can

[2] Section 1073 provides: "Violations of this section may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed or in which the person was held in custody or confinement."

be made by Congress which speaks with authority in the federal field of interstate commerce.[3] I fail to see how a State can regulate any of the incidents of national citizenship. I see no greater power on the part of a State to snatch a law-abiding citizen from his abode and send him to another State than to stop him at the border, as was done in *Edwards* v. *California, supra,* because it does not like the cut of his jib. State action was precluded in *Edwards* v. *California, supra,* even though Congress had not acted. It is even more obviously precluded where Congress has acted.[4]

Reciprocal and uniform laws, like interstate compacts, doubtless serve many useful purposes. But a State does not increase its sovereign powers by making an agreement with another State. Whether the right of ingress and egress be bottomed on the Privileges and Immunities Clause of the Fourteenth Amendment, the Commerce Clause, or a basic "liberty" inherent in national citizenship, I know of no way in which a State may take it from a citizen. To say that there is no interference here because O'Neill will be free to return to Florida later is to trifle with a basic human right. The Court's argument enables the States through reciprocal laws to generate power that they lack acting separately. It speaks of the importance

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[3] See H. R. Rep. No. 1458, 73d Cong., 2d Sess., p. 2; H. R. Rep. No. 1596, 73d Cong., 2d Sess., p. 2; *Hemans* v. *United States,* 163 F. 2d 228, 238–239.

[4] In situations no less impressive than the present we have barred state action where, as here, Congress has acted in the same field. *Charleston & Car. R. Co.* v. *Varnville Co.,* 237 U. S. 597; *Hines* v. *Davidowitz,* 312 U. S. 52; *Pennsylvania* v. *Nelson,* 350 U. S. 497. In *Charleston & Car. R. Co.* v. *Varnville Co., supra,* at 604, Mr. Justice Holmes speaking for the Court said:

"When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."

of encouraging "resourcefulness of relationships between States on matters as to which there is no grant of power to Congress and as to which the range of authority restricted within an individual State is inadequate." Yet if the power is inadequate for either Florida or New York acting separately (as I am sure it is), I fail to see how it can be made adequate by the pooling of their inadequacies. To make it such is indeed a saltatorial achievement. The fact that a resident of a State can be compelled to testify in that State is no ground for compelling him "to leave his State and go to some other State to testify viva voce." *In re Allen,* 49 D. & C. Rep. 631, 640. His right to go or stay is an incident of national citizenship, qualified only by an appropriate exercise of federal power.[5]

The power of extradition was an expression of a "policy of mutual support, in bringing offenders to justice," *Kentucky* v. *Dennison,* 24 How. 66, 100; and to substitute a system of law, superior to state authority, for the system of comity prevailing among sovereign nations. *Innes* v. *Tobin,* 240 U. S. 127, 130–131. The Federal Act governing witnesses who are fugitives is an assertion by Congress of control over our nationals. Any policy of providing compulsory delivery of witnesses from one State to another is in other words a federal policy. If we allow the States to exercise that power as they like, we might as well permit them to sanction compulsory delivery of

[5] The Report of Committee on Securing Compulsory Attendance of Non-Resident Witnesses of the National Conference of Commissioners on Uniform State Laws, as reported in 8 Wigmore on Evidence, § 2195 (*e*), states: "This character of legislation is not free from constitutional difficulties, and the only case which we have found in which the constitutionality thereof has been directly upheld is the case of Commonwealth of Massachusetts v. Klaus, 130 N. Y. Supp. 713. In the case cited the constitutionality of the New York statutes was upheld in an opinion by Judge Scott, but there is a strong dissenting opinion by Judge Laughlin."

citizens from one State into another for purposes of being sued. See *Massachusetts* v. *Klaus,* 130 N. Y. Supp. 713, 722 (dissenting opinion). If it took Art. IV, § 2, of the Constitution to provide for the compulsory delivery of a person charged with a crime from one State to another, and a Federal Act to require the delivery of witnesses over state lines, it would seem to follow *a fortiori* that further constitutional provisions would be required to authorize one State to provide for the compulsory delivery of an innocent person to another State. See *In re Allen, supra.*

This is not giving the Constitution a niggardly construction. I urge a liberal construction which will respect the civil rights of the citizens. This right of people to choose such State as they like for their abode, to remain unmolested in their dwellings, and to be protected against being whisked away to another State [6] has been, until today, zealously guarded. Until now, it has been part and parcel of the cherished freedom of movement protected by the Constitution.

I would affirm the judgment entered by a unanimous vote of the Florida Supreme Court.

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[6] The harshness of this procedure is emphasized by a feature of this extradition law on which the Florida Supreme Court has not yet passed. The New York statute (N. Y. Code Crim. Proc. § 618–a; and see Fla. Stat., 1957, § 942.02) gives the witness who is extradited only $5 a day for his maintenance in New York, a sum plainly inadequate in light of today's cost of living.

HARRIS *v.* UNITED STATES.

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

No. 11. Argued January 13–14, 1959.—Decided March 2, 1959.

A two-count indictment charged petitioner with (1) the purchase of 224 grains of heroin from an unstamped package, in violation of 26 U. S. C. § 4704 (a); and (2) receiving and concealing this same drug, knowing it to have been unlawfully imported, in violation of 21 U. S. C. § 174. At the trial, the Government introduced into evidence the heroin itself and testimony that petitioner had been in possession of it; and petitioner offered no explanation of his possession of the same. *Held:* In view of the separate statutory presumptions, proof of possession of unstamped heroin, in the absence of explanation, was sufficient to support a conviction by the jury on each of the counts as covering entirely separate offenses; and consecutive sentences of five years' imprisonment on each count were valid where based upon such separate offenses under different sections of the narcotics laws. Pp. 19–24.

248 F. 2d 196, affirmed.

Sidney M. Glazer argued the cause for petitioner. With him on the brief were *Morris A. Shenker* and *Bernard J. Mellman.*

John L. Murphy argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Jerome M. Feit.*

MR. JUSTICE CLARK delivered the opinion of the Court.

In this narcotics case a two-count indictment charged petitioner with (1) the purchase of 224 grains of heroin from an unstamped package, in violation of 26 U. S. C. § 4704 (a);[1] and (2) receiving and concealing this same

[1] Section 4704 (a) of the Internal Revenue Code of 1954, which provides as follows:

"It shall be unlawful for any person to purchase, sell, dispense,

drug knowing it to have been unlawfully imported, in violation of 21 U. S. C. § 174.[2] The Government introduced into evidence the heroin itself, and testimony that petitioner had been in possession of it. On each count it relied, for proof of the elements of the offense, on the statutory presumptions provided by Congress. While petitioner took the stand, his defense was an alibi and there was therefore a total absence of any explanation by him of his possession of the prohibited drug. Upon being found guilty on each count by a jury, on an instruction that proof of possession of unstamped heroin, in the absence of explanation, might support a conviction on each of the charges in view of the separate statutory presumptions, petitioner was sentenced to consecutive sentences of five years' imprisonment and a $1 fine on each count. Attack is made not only on the validity of the instructions but also on the consecutive sentences. The

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or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

See also § 7237 of the Internal Revenue Code of 1954, which at the time of this trial provided a maximum penalty, for first offenders, of a $2,000 fine and imprisonment for five years.

[2] Section 2 (c) of the Narcotic Drugs Import and Export Act, 35 Stat. 614, as amended by the Act of November 2, 1951, 65 Stat. 767, which provided in pertinent part as follows:

"Whoever . . . receives, conceals, . . . or in any manner facilitates the transportation, concealment, or sale of any . . . narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, . . . shall be fined not more than $2,000 and imprisoned not less than two or more than five years . . . .

"Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Court of Appeals affirmed, 248 F. 2d 196 (C. A. 8th Cir., 1957). In view of the importance of the question in the enforcement of the narcotic laws, we granted certiorari. 357 U. S. 935 (1958). We agree with the Court of Appeals. This disposition requires neither a detail of the facts which may be found in the opinion of the Court of Appeals, *supra,* nor of the court's instructions, of which petitioner now complains.[3]

Congress provided in 1919 that buying narcotics, except in or from the original stamped package, was an offense [4] punishable by fine of not more than $2,000 and imprisonment for not more than five years.[5] The 1919 Act specifically provided that "the absence of appropriate tax-paid stamps . . . shall be prima facie evidence of a violation of this section by the person in whose possession same may be found." [6] Long before, on February 9, 1909, Congress had provided that receiving and concealing unlawfully imported narcotics should likewise be an offense. The Act provided that once the defendant on trial "is shown to have, or to have had, possession of [the narcotic drug] such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury." [7]

Petitioner does not challenge the power of the Congress to adopt these statutes, nor does he attack the separateness of the offenses created, the distinct punishments provided, nor the presumptions therein authorized. But he says that where the presumptions are coupled with a single act of possession of unstamped narcotics cumulative sentences are not permissible and the ones here imposed must

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[3] Petitioner made no objection to the court's charge at the time of the trial. See Fed. Rules Crim. Proc., 30.

[4] 40 Stat. 1131.

[5] 38 Stat. 789.

[6] 40 Stat. 1131.

[7] 35 Stat. 614.

fall under the doctrine of *Blockburger* v. *United States,* 284 U. S. 299 (1932). We think not.

As we see it, *Gore* v. *United States,* 357 U. S. 386 (1958), controls the question here. There, consecutive sentences were upheld on three counts of an indictment charging (1) sale of narcotics not pursuant to a written order form; (2) purchase, sale and distribution not in or from a stamped package; and (3) transportation and concealment of illegally imported narcotics. The three offenses derived from one transaction, a sale of narcotics. It will be noted that two of the offenses there charged are present here where the one fact proved by direct evidence is possession, rather than a sale. The Court reasoned that "three violations of three separate offenses created by Congress at three different times," indicated a clear and continuing purpose on its part "of dealing more and more strictly with, and seeking to throttle more and more by different legal devices, the traffic in narcotics. Both in the unfolding of the substantive provisions of law and in the scale of punishments, Congress has manifested an attitude not of lenity but of severity toward violation of the narcotics laws." *Supra,* at 391.[8] We see no significant differences between the two cases. The direct proof in *Gore* was of a sale of heroin without a written order charged in one of the three counts upon which the consecutive sentences were based. Resort to the statutory presumptions was made to establish the other two counts on which those sentences were assessed. Here the direct evidence proved possession of the unstamped drug, and resort was made to the statutory presumptions for support of the two offenses charged.

[8] Although enacted subsequent to this conviction, the continuing purpose of Congress to wipe out the narcotics traffic is shown in § 201 of the Narcotic Control Act of 1956, 70 Stat. 572, 18 U. S. C. (1952 ed., Supp. V) § 1402, wholly outlawing any possession of heroin.

Petitioner insists that each offense here requires proof of only the single fact of possession, which brings it within the rule in *Blockburger, supra.* However, petitioner completely overlooks the fact that the "acts or transactions" prohibited by the respective statutes cannot be equated to possession alone. Let us analyze the offenses. Under the first count of the indictment, the prosecution must prove a purchase of narcotics, other than in or from the original stamped package. In order to establish these ultimate facts, the prosecutor may put on direct evidence of possession of the unstamped heroin and the statutory presumption of § 4704 (a) then has the effect of establishing, prima facie, that there was in fact a purchase and that the purchase was other than in or from the original stamped package. In this case, the heroin itself was introduced in evidence, thus the jury could determine whether or not it was stamped. Similarly, under the second count, the prosecution was obligated to prove three ultimate facts: (1) that the heroin was received and concealed; (2) that it had been imported contrary to law; and (3) that petitioner knew of the unlawful importation. After putting on direct evidence of the possession, the prosecution was aided by the statutory presumption of § 174 that the ultimate facts of the violation—entirely different, it must be noted, from those of the first count—were also present.

Thus, the *violation,* as distinguished from the direct evidence offered to prove that violation, was distinctly different under each of the respective statutes. Instead of limiting his proof to an alibi, petitioner could, by offering evidence tending to controvert one presumption or the other as to the ultimate facts, have earned an acquittal on either count and still have been found guilty on the other. Furthermore, to take advantage of the presumption of § 174 it is necessary only to prove possession

by direct evidence; whereas to take advantage of the presumption of § 4704 (a) it is necessary to prove by direct evidence that the narcotic was unstamped as well as that it was in the defendant's possession. It follows, even if the *Blockburger* test were applicable, that the offenses were separate and that consecutive sentences could be imposed on each count.

We have considered the other contentions raised by petitioner and found them to be without merit. The judgment of the Court of Appeals is

Affirmed.

MR. CHIEF JUSTICE WARREN concurs in the result.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent.

AHO *v.* JACOBSEN.

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

No. 36. Decided March 2, 1959.

Certiorari granted; judgment vacated; and case remanded to the District Court for retrial on the admiralty side.

Reported below: 249 F. 2d 309.

George J. Engelman and *Harry Kisloff* for petitioner.

Paul R. Frederick for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the District Court for retrial on the admiralty side, *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, in light of *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625.

McDANIEL *v.* THE LISHOLT ET AL.

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

No. 424. Decided March 2, 1959.

Certiorari granted; judgment vacated; and case remanded to the District Court for a new trial.

Reported below: 257 F. 2d 538.

C. Dickerman Williams for petitioner.

James M. Estabrook and *Francis X. Byrn* for respondent A/S Lise.

PER CURIAM.

The petition for writ of certiorari is granted and the judgment of the United States Court of Appeals for the Second Circuit is vacated. The case is remanded to the District Court for a new trial in light of *Kermarec* v. *Compagnie Generale Transatlantique,* 358 U. S. 625.

NEW JERSEY ET AL. *v.* UNITED STATES ET AL.

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

No. 621. Decided March 2, 1959.*

168 F. Supp. 324, affirmed.

David D. Furman, Attorney General of New Jersey, for appellants in No. 621.

Milton T. Lasher, William A. Roberts, Irene Kennedy and *Maxwell A. Howell* for appellants in No. 622.

Solicitor General Rankin, Assistant Attorney General Hansen and *Robert W. Ginnane* for the United States and the Interstate Commerce Commission, and *Thomas E. Dewey* and *Gerald E. Dwyer* for the New York Central Railroad Co., appellees.

PER CURIAM.

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

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*Together with No. 622, *County of Bergen et al.* v. *United States et al.*, on appeal from the same court.

BROWN-FORMAN DISTILLERS CORP. *v.* COLLECTOR OF REVENUE.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 142. Decided March 2, 1959.

Appeal dismissed and certiorari denied.
Reported below: 234 La. 651, 101 So. 2d 70.

Harry McCall for appellant.

Robert L. Roland 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 certiorari, certiorari is denied.

E T & W N C TRANSPORTATION CO. *v.* CURRIE, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA.

No. 524. Decided March 2, 1959.

248 N. C. 560, 104 S. E. 2d 403, affirmed.

Kester Walton and *James H. Epps, Jr.* for appellant.

PER CURIAM.

The judgment is affirmed. *Northwestern States Portland Cement Co.* v. *Minnesota,* and *Williams* v. *Stockham Valves & Fittings, Inc.,* 358 U. S. 450.

MR. JUSTICE FRANKFURTER, MR. JUSTICE WHITTAKER and MR. JUSTICE STEWART dissent for the reasons stated in the dissenting opinions in these cases.

UNITED STATES *v.* EMBASSY RESTAURANT, INC., ET AL.

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

No. 174. Argued January 22, 1959.—Decided March 9, 1959.

Contributions due to be paid by a bankrupt employer to the trustees of a union welfare fund under a collective bargaining agreement *held* not entitled to priority in payment under § 64 (a) (2) of the Bankruptcy Act as "wages . . . due to workmen." Pp. 29–35.

254 F. 2d 475, reversed.

John F. Davis argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Rice, Melva M. Graney* and *George F. Lynch.*

Richard H. Markowitz argued the cause for the Welfare Funds, respondents. With him on the brief was *Charles A. Rothman.*

W. Randolph Montgomery filed a brief for the National Association of Credit Management, Inc., as *amicus curiae,* in support of the United States.

Jacob Sheinkman, Herbert Ferster and *Mortimer Horowitz* filed a brief for the Amalgamated Clothing Workers of America et al., as *amici curiae,* in support of respondents.

MR. JUSTICE CLARK delivered the opinion of the Court.

The sole issue involved here is whether contributions by an employer to a union welfare fund which are required by a collective bargaining agreement are entitled, in bankruptcy, to priority as being "wages . . . due to workmen" under § 64 (a) (2) of the Bankruptcy Act, as

amended.[1] Both the trial court, 154 F. Supp. 141, and the Court of Appeals, 254 F. 2d 475, held that such contributions enjoyed priority. This resulted in a conflict with the Court of Appeals for the Second Circuit, *Local 140 Security Fund* v. *Hack*, 242 F. 2d 375, in view of which we granted certiorari. 358 U. S. 811.

The facts are undisputed. Embassy Restaurant, Inc., was bound in collective bargaining agreements with Local Unions 111 and 301. The agreements related to hours, wages and other conditions of employment. Under these agreements Embassy was obligated to contribute to the trustees of the welfare funds of Locals 111 and 301 $8 per month per full-time employee. The welfare plans were organized to maintain "life insurance, weekly sick benefits, hospital and surgical benefits" and other advantages for members of the locals. Trustees administered each plan under a formal trust agreement and were authorized to formulate and establish the conditions of eligibility for benefits, control all the funds received, collect all contributions, and in their "sole discretion" to handle all legal proceedings incident thereto. Title to all of the funds, property and income was placed in the trustees exclusively and no employee or anyone claiming under him had any right whatsoever in the plan or any part thereof. In the

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[1] 30 Stat. 563, § 64, as amended, 11 U. S. C. (Supp. V) § 104 (a) (2), provides:

"(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be . . . (2) wages . . . not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; . . . (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: . . ."

bankruptcy proceeding the trustees filed proofs of a claim for unpaid contributions due by Embassy, and asserted a second priority for all amounts that had accrued during the three months immediately preceding the bankruptcy. This priority was disallowed by the Referee but, on review, it was granted by both the trial court and the Court of Appeals. We have concluded that such contributions are not entitled to such priority in payment.

At the outset we point out that "The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt's estate. . . ." *Kothe* v. *R. C. Taylor Trust,* 280 U. S. 224, 227, and that "if one claimant is to be preferred over others, the purpose should be clear from the statute." *Nathanson* v. *Labor Board,* 344 U. S. 25, 29.[2] Moreover, if the contributions are placed in the wage priority class, they will likewise be rendered nondischargeable under § 17 of the Act,[3] resulting in their remaining outstanding debts of the bankrupt if the assets of the estate are insufficient to discharge them for three months prior to the bankruptcy.

The trustees attempt to bring contributions within this preferred class by claiming them to be "wages . . . due to workmen." This class of claims has been given a preferred position in the Bankruptcy Act for over 100 years,[4] long before welfare funds played any part in labor negotiations. True, the Congress has amended the Act, but such amendments have been few and guarded ones, such as raising the ceiling on the amount permitted,[5] shifting

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[2] See also *Kuehner* v. *Irving Trust Co.,* 299 U. S. 445, 452; *Sampsell* v. *Imperial Paper Corp.,* 313 U. S. 215, 219.

[3] 30 Stat. 550, as amended, 11 U. S. C. § 35 (a)(5).

[4] The Act of August 19, 1841, c. 9, 5 Stat. 445, established a third priority for those who had performed "labor as an operative" of the bankrupt.

[5] *E. g.,* Act of May 27, 1926, c. 406, § 15, 44 Stat. 666.

the relative priorities [6] and enlarging the class to salesmen, clerks, etc.[7] If it had wished to include contributions, Congress could easily have included them at any of these times. On the contrary, however, the purpose of Congress has constantly been to enable employees displaced by bankruptcy to secure, with some promptness, the money directly due to them in back wages, and thus to alleviate in some degree the hardship that unemployment usually brings to workers and their families. Evidence of this purpose is found in a 1934 amendment to the Bankruptcy Act.[8] In that year, Congress amended § 63 to allow workmen's compensation claims as provable debts. In awarding them priority, however, Congress relegated these claims to a seventh priority in contrast to the then fourth priority of wages.[9] Only four years later, Congress abolished the priority status of these compensation claims, though it continued them as provable debts under § 63, 11 U. S. C. § 103 (a)(6). It is therefore evident that not all types of obligations due employees from their employers are regarded by Congress as being within the concept of wages, even though having some relation to employment. Moreover, such action indicated the care Congress has exercised in regard to the protection it has granted "wages . . . due to workmen."

Let us examine the nature of these contributions. They are flat sums of $8 per month for each workman. The amount is without relation to his hours, wages or productivity. It is due the trustees, not the workman, and the latter has no legal interest in it whatsoever. A workman cannot even compel payment by a defaulting employer. Moreover it does not appear that the parties to the col-

[6] *E. g.*, Act of June 22, 1938, c. 575, § 64, 52 Stat. 874, 11 U. S. C. § 104.

[7] *E. g.*, Act of June 15, 1906, c. 3333, 34 Stat. 267.

[8] Act of June 7, 1934, c. 424, 48 Stat. 924.

[9] *Id.*, 923.

lective agreement considered these welfare payments as wages. The contract here refers to them as "contributions." Finally, Embassy's obligation is to contribute sums to the trustees, not to its workmen; it is enforceable only by the trustees who enjoy not only the sole title, but the exclusive management of the funds.

It is contended, however, that since "unions bargain for these contributions as though they were wages" and industry likewise considers them "as an integral part of the wage package," they must in law be considered "wages." This approach overlooks the fact that we deal with a statute, not business practice. Nor do we believe that holdings that various fringe benefits are wages under the N. L. R. A.[10] or the Social Security Act[11] are apposite. We construe the priority section of the Bankruptcy Act, not those statutes. It specifically fixes the relative priority of claims of classes of creditors. Here that class is "wages . . . due to workmen."

The contributions here are not "due to workmen," nor have they the customary attributes of wages. Thus, they cannot be treated as being within the clear, unequivocal language of "wages . . . due to workmen" unless it is clear that they satisfy the purpose for which Congress established the priority. That purpose was to provide the workman a "protective cushion" against the economic displacement caused by his employer's bankruptcy.[12] These payments, owed as they are to the trustee rather than to the workman, offer no support to the workman in periods of financial distress. Furthermore, if the claims of the trustees are to be treated on a par with wages, in a case where the employer's assets are insufficient to pay

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[10] *Inland Steel Co.* v. *Labor Board*, 170 F. 2d 247, 251 (contributions to an employee pension plan).

[11] *MacPherson* v. *Ewing*, 107 F. Supp. 666 (sick pay).

[12] *In re Victory Apparel Mfg. Corp.*, 154 F. Supp. 819, 822; *Blessing* v. *Blanchard*, 223 F. 35, 37.

all in the second priority, the workman will have to share with the welfare plan, thus reducing his own recovery.

Respondents argue that precedent allows the priority to be asserted by one other than the workman himself. We are cited to *Shropshire, Woodliff & Co.* v. *Bush,* 204 U. S. 186, and *United States* v. *Carter,* 353 U. S. 210. In *Shropshire,* wages due a workman had been assigned by him, and the assignee was seeking the wage priority enjoyed by his assignor. In allowing the claim to have priority, the Court said:

> "When one has incurred a debt for wages due to workmen, . . . that debt . . . is entitled to priority . . . .
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> . . . . . .
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> "The character of the debts was fixed when they were incurred, and could not be changed by assignment," 204 U. S., at 189,

and also, that "The priority is attached to the debt and not to the person of the creditor . . . ." *Ibid.* Application of these principles to the facts here helps respondents not at all; the obligation to make contributions, when incurred, was to the trustees, not to the workmen. The debt was never owed the workmen. Furthermore, assignability of wage claims as in *Shropshire,* may benefit the bankrupt's employees, who are thus enabled to obtain their money sooner than they might by waiting out the bankruptcy procedure.

Nor does the *Carter* case, *supra,* support the granting of a priority to these contributions. There we dealt with the Miller Act,[13] which granted to every person furnishing labor or material the right to sue on the contractor's payment bond "for the sum or sums justly due him." The contractor defaulted and the trustees of a welfare fund similar to that involved here sued on the bond for recovery

[13] 49 Stat. 793, 40 U. S. C. §§ 270a–270d.

of contributions "justly due." Our opinion did not hold that contributions were part of "wages . . . due to workmen." In fact we pointed out that the trust agreement provided that the contributions "shall not constitute or be deemed to be wages." The basis of the opinion was that the Miller Act "does not limit recovery on the statutory bond to 'wages,' " *id.*, at 217. The Act having the broad protective purposes of securing all claims that are "justly due," we held that the trustees might recover. In short, though the contributions were not wages, they were "justly due" as a claim within "the purposes of the Miller Act." Under the Bankruptcy Act, however, not all claims "justly due" have priority. They must be within a class, such as "wages . . . due to workmen." The claims here are not. If this class is to be so enlarged, it must be done by the Congress.

The judgment is

Reversed.

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

I believe payments made by employers to union welfare funds are "wages . . . due to workmen . . . ," under the Bankruptcy Act's priority section.[1] The history of the section is one of continuous congressional expansion. Priority for the "full amount of the wages due" on account of "any labor as an operative in the service of any bank-

[1] § 64, 30 Stat. 563, as amended, 11 U. S. C. § 104. The question has caused considerable difficulty in the federal courts. Compare, *e. g.*, the opinions below in this case, 254 F. 2d 475, 154 F. Supp. 141 and *In re Otto,* 146 F. Supp. 786, with *Local 140 Security Fund* v. *Hack,* 242 F. 2d 375; *In re Brassel,* 135 F. Supp. 827; *In re Victory Apparel Mfg. Corp.,* 154 F. Supp. 819. Similarly commentators have split. Compare, *e. g.*, Notes, 19 Ga. B. J. 107; 66 Yale L. J. 449; 44 Va. L. Rev. 995; 57 Mich. L. Rev. 403, with Notes, 34 Chi.-Kent L. Rev. 235; 42 Minn. L. Rev. 295.

rupt" was first granted in the 1841 Bankruptcy Act; it was limited to $25.[2] The Bankruptcy Acts of 1867 and 1898 increased the sum available to each claimant and broadened the coverage of the priority beyond "operatives" or "workmen" to "workmen, clerks or servants."[3] In 1906 Congress brought still more workers into the protected category by defining the group as "workmen, clerks, travelling or city salesmen, or servants."[4] The priority was once again increased, now to $600, in 1926.[5]

The Chandler Act passed in 1938 raised the workers' priority to second behind expenses of administration and ahead of federal and local taxes. At the same time its scope was further broadened to cover "workmen, servants, clerks, or travelling or city salesmen on a salary or commission basis, whole or part-time, whether or not selling exclusively for the bankrupt."[6] Finally, in 1956, Congress took occasion to guard against narrow interpretation of the class of workers covered by adding to the priority section of the Chandler Act the words "and for the purposes of this clause, the term 'travelling or city salesmen' shall include all such salesmen, whether or not they are independent contractors selling the products or services of the bankrupt on a commission basis, with or without a drawing account or formal contract."[7]

This last change in the priority section was the sole subject of a very short Act passed by Congress. Like most of the earlier changes, it was enacted after court decisions barring some workers from the protected class or indi-

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[2] Act of August 19, 1841, 5 Stat. 445.

[3] Act of March 2, 1867, 14 Stat. 529; Act of July 1, 1898, 30 Stat. 563.

[4] Act of June 15, 1906, 34 Stat. 267.

[5] Act of May 27, 1926, 44 Stat. 667.

[6] Act of June 22, 1938, 52 Stat. 874.

[7] 70 Stat. 725, 11 U. S. C. (Supp. V) § 104.

cating that others might be barred.[8] We should, I think, be warned by the foregoing history of the wage priority section against niggardly interpretations of the language used in that section.

The Court argues, however, that payments to welfare funds are neither "wages" nor "due to workmen." It is hard for me to see how they could not be "wages." The payments are certainly not gifts. As was stated less than a year ago by a Senate Committee, which had made an extended study of plans such as those here involved, "regardless of the form they take, the employers' share of the costs of these plans or the benefits the employers provide are a form of compensation." [9] Courts have long held that compensation for services rendered is a valid definition of "wages" both in the priority section of the Bankruptcy Act and in other contexts.[10] This is certainly in accord with the customary meaning of the word. It appears, moreover, that unions and employees consider such payments as the equivalent of wages and

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[8] See, *e. g., In re Scanlan,* 97 F. 26; *In re Greenewald,* 99 F. 705; *In re Kominers,* 252 F. 183; *In re Collin,* 18 F. Supp. 848; *In re Clover Dairies, Inc.,* 42 F. Supp. 1006; *In re Herbert Candy Co.,* 43 F. Supp. 588. In recommending the latest change the House Judiciary Committee stated ". . . language in some court cases has been confusing . . . . [T]here is language from which one might infer that a salesman who was a 'separate contractor' could not qualify." H. R. Rep. No. 921, 84th Cong., 1st Sess. 2.

[9] S. Rep. No. 1440, 85th Cong., 2d Sess. 4. The Committee also called attention to the fact that "In little more than a decade private employee welfare and pension plans have grown from relatively small significance to a position where approximately 84 million persons are depending in some manner upon the benefits which they promise." *Id.,* at 3.

[10] *E. g., In re Gurewitz,* 121 F. 982; *Glandzis* v. *Callinicos,* 140 F. 2d 111; *National Labor Relations Board* v. *Bemis Bro. Bag Co.,* 206 F. 2d 33, 37. See also Note, 19 Ga. B. J. 107.

that they have been treated as wages in other statutes.[11] In fact, where such treatment has seemed undesirable, Congress has *expressly* excluded them from the category.[12] Of course, a word need not mean the same thing in different statutes, but the meaning attributed in one Act is far from irrelevant to the interpretation of another.

It cannot be argued that a sum paid by an employer for a worker's services loses its status as wages merely because it is used to purchase insurance benefits.[13] For the Bankruptcy Act has as yet authorized no investigation of how a worker spends his money to determine if he is entitled to a priority for it. And in all events insurance payments would not seem to be the type of expenditure which Congress would discourage.

It is also hard for me to imagine how the fact that the moneys are paid to parties other than the workmen is in any way connected with the question of whether the payments are wages, whatever its relevance might be to whether the sums are "due to workmen." This is especially true in the light of *Shropshire, Woodliff & Co.* v. *Bush,* 204 U. S. 186, which held that moneys due an assignee of the worker were entitled to priority as wages. The Government admits that if a formal assignment had been made here, wage status might be granted. It does not explain, however, how the lack of a formal assignment can change payments from "wages" to some-

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[11] See, *e. g., Inland Steel Co.* v. *National Labor Relations Board,* 170 F. 2d 247, 251. See also Note, 66 Yale L. J. 449, 458, 460.

[12] 68A Stat. 32, 26 U. S. C. (Supp. IV) § 106; 68A Stat. 417, 26 U. S. C. (Supp. IV) § 3121 (a); 68A Stat. 447, 26 U. S. C. (Supp. IV) § 3306 (b)(2). Cf. *Brown* v. *Maryland,* 12 Wheat. 419, 438, ". . . the exception of a particular thing from general words, proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made . . . ."

[13] See *In re Otto,* 146 F. Supp. 786, 790; *In re Ross,* 117 F. Supp. 346.

thing else or make granting a priority less in line with congressional policy.[14]

The question of whether the payments are "due to workmen" is on its face somewhat more difficult. But to my way of thinking, the correct answer has been made easy by prior cases in this Court. In the *Shropshire* case, the Court said, "The priority is attached to the debt and not to the person of the creditor; to the claim and not to the claimant. The act does not enumerate classes of creditors and confer upon them the privilege of priority in payment, but, on the other hand, enumerates classes of debts as 'the debts to have priority.' " 204 U. S., at 189. It then held that an assignee of a worker had priority since the debt was wages due to workmen.

Even if it could be meaningfully argued that in *Shropshire* the money was at one time due to workmen, and therefore remained so after assignment, while here it never was due to them, we are, I think, precluded from that position unless we depart from the reasoning of *United States* v. *Carter,* 353 U. S. 210. That case construed § 2 (a) of the Miller Act, 49 Stat. 794, 40 U. S. C. § 270b (a), which provides that "Every person who has furnished labor . . . and who has not been paid in full . . . shall have the right to sue on [a] payment bond . . . for the sum or sums justly due him." The Court held that, for the purposes of the Miller Act, payments to welfare funds are, "as much 'justly due' to the employees who have earned them as are the wages payable directly to them in cash." 353 U. S., at 220. In fact, the Court stated that trustees of the welfare fund have an even better right to sue than most assignees since

[14] The Court notes that workmen's compensation claims were at one time given priority by Congress and were subsequently removed. As compensation rights are not contracted for in exchange for labor I do not see how their disposition is relevant to the problem in this case.

the trustees, unlike the usual assignee, sue for the benefit of the workers. *Ibid.* I cannot see why the Bankruptcy Act should be construed differently from the Miller Act on the question of whether welfare fund contributions are due to workmen. This is especialy true since the policies of the relevant provisions of the two Acts are quite similar.

Finally it seems to me undesirable to make a distinction in this area between payments on assignment and payments in trust. At best it would let the carrying out of congressional policy depend on the skill with which unions prepare legal documents, and on the various state laws covering the validity of wage assignments. At worst it would give priorities to assignees of the workmen, usually creditors, while denying them to insurance funds for their benefit. Unless we are prepared to repudiate what we said in the *Carter* and *Shropshire* cases, I think § 64 (a)(2) of the Bankruptcy Act means that the sums which Embassy contracted to pay to these employees for their labor by making payments to welfare funds are wages due to workers. If the provision granting priority to wages is to be narrowed, it should be done by Congress—not by this Court.

I would affirm.

BROWN *v.* UNITED STATES.

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

No. 4. Argued October 16, 1958.—Decided March 9, 1959.

Subpoenaed to testify before a federal grand jury which was investigating possible violations of Part II of the Interstate Commerce Act, petitioner refused, on grounds of possible self-incrimination, to answer questions which were concededly relevant to the grand jury's inquiry. The grand jury sought the aid of the district judge, who heard extensive arguments on the subject, ruled that petitioner would be accorded immunity as extensive as the privilege he had asserted, and ordered petitioner to answer the questions. After returning to the jury room, petitioner persisted in his refusal, and he was again brought before the district judge, who addressed the same questions to him in the presence of the grand jury, explicitly directed him to answer them, and, upon his refusal to do so, adjudged him guilty of criminal contempt and sentenced him to imprisonment for 15 months. *Held:* The judgment is sustained. Pp. 42–52.

1. Section 205 (e) of the Motor Carrier Act, 49 U. S. C. § 305 (d), clothed petitioner with statutory immunity coextensive with his constitutional privilege not to incriminate himself; and, therefore, he had an unqualified duty to answer the questions as he was directed to do. Pp. 44–47.

2. Since petitioner's disobedience of the court's order occurred in the court's presence, it was proper for the court to proceed under Rule 42 (a) of the Federal Rules of Criminal Procedure; and the court's action in affording petitioner a *locus penitentiae* before finally adjudicating him in contempt was entirely proper. Pp. 47–52.

3. The sentence of 15 months' imprisonment was not an abuse of the District Court's discretion. P. 52.

247 F. 2d 332, affirmed.

Myron L. Shapiro argued the cause for petitioner. With him on the brief was *J. Bertram Wegman.*

John F. Davis argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Carl H. Imlay.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was sentenced to 15 months' imprisonment for criminal contempt stemming from his refusal to testify before a federal grand jury. His conviction was affirmed by the Court of Appeals, 247 F. 2d 332. The case was brought here primarily to review the validity of the procedure which resulted in the contempt adjudication. 356 U. S. 926. Other issues relate to the nature and extent of immunity from prosecution conferred by § 205 (e) of the Interstate Commerce Act, as amended,[1] and the severity of the punishment imposed by the District Court.

A grand jury in the Southern District of New York investigating possible violations of Part II of the Interstate Commerce Act [2] issued a subpoena directing the petitioner to appear and testify as to "all and everything which you may know in regard to an alleged violation of Sections 309, 322, Title 49, United States Code." In response to this subpoena the petitioner appeared and, after being sworn, answered a few preliminary questions. He was then asked six further questions concededly relevant to the grand jury's inquiry. These he refused to answer upon the ground of possible self-incrimination. After consulting with his lawyer, who was continuously present in an adjoining anteroom, the petitioner persisted in his refusal to answer, although advised at length by the Assistant United States Attorney that the applicable

[1] 49 Stat. 550; 54 Stat. 922, 49 U. S. C. § 305 (d).

[2] Commonly known as the Motor Carrier Act, 49 Stat. 543, as amended, 54 Stat. 919, 49 U. S. C. § 301 *et seq.*

statute conferred complete immunity from prosecution as to any matter concerning which the petitioner might testify, and that, therefore, "you do not have any privilege to plead the Fifth Amendment."

Thereupon the scene of the proceedings shifted to the courtroom, where the grand jury sought the aid of the district judge. After being apprised of what had transpired in the grand jury room, the district judge heard extensive argument by counsel as to the scope of immunity afforded a grand jury witness under the applicable statute.

Following a weekend recess the district judge ruled that under the statute the petitioner would be accorded immunity as extensive as the privilege he had asserted, and directed that the petitioner therefore return to the grand jury room and answer the questions. Later the same day the grand jury again returned to the courtroom "to request the aid and assistance of the Court." The district judge was advised through the official reporter that the petitioner had refused to obey the court's order to answer the questions.

The judge then addressed the same questions to the petitioner in the grand jury's presence. Each question was met with a refusal to answer upon the ground of possible self-incrimination. The petitioner was thereupon explicitly directed by the judge to answer each question, and he just as explicitly refused. The judge inquired whether the petitioner would persist in his refusal if he returned to the grand jury room and were again asked the questions there. The petitioner replied that he would. After further argument by counsel, the district judge held the petitioner in contempt and imposed sentence.

Throughout the proceedings in the courtroom the petitioner was represented by counsel, who unsuccessfully advanced three basic contentions: (1) A witness who testifies before a grand jury investigating offenses under the Motor Carrier Act is accorded no statutory immunity

from subsequent prosecution based upon his testimony. (2) Even if some immunity is conferred, it is not coextensive with the constitutional privilege against self-incrimination. (3) In any event, the District Court, by adjudging the petitioner in criminal contempt without following the procedural requirements of Rule 42 (b) of the Federal Rules of Criminal Procedure, deprived the petitioner of due process of law. The same contentions are advanced here. In addition, we are asked to hold that the sentence of 15 months' imprisonment was an abuse of the District Court's discretion.

In determining that § 205 (e) of the Motor Carrier Act clothed the petitioner with statutory immunity coextensive with his constitutional privilege not to incriminate himself, the District Court and the Court of Appeals were plainly correct. The relevant statutory language is unambiguous: ". . . and any person subpenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title [Part I of the Interstate Commerce Act] . . . ." [3] The obvious purpose and effect of this

[3] The full text of the subsection, as it appears in the United States Code, is as follows: "So far as may be necessary for the purposes of this chapter, the Commission and the members and examiners thereof and joint boards shall have the same power to administer oaths, and require by subpena the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents, and to take testimony by deposition, relating to any matter under investigation, as the Commission has in a matter arising under chapter 1 of this title; and any person subpenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title, unless otherwise provided in this chapter." 49 U. S. C. § 305 (d).

language is to confer the same immunity upon a witness testifying in an investigation under Part II of the Interstate Commerce Act as is conferred upon one testifying in an investigation under Part I. Both Part I and Part II contain criminal sanctions, and the power of a grand jury to investigate violations of either Part is unquestioned.

The statute which confers immunity upon a witness testifying in a grand jury investigation under Part I was enacted in 1893.[4] For more than half a century it has

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[4] 27 Stat. 443, 49 U. S. C. § 46. "No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of chapter 1 of this title on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided,* That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $100 nor more than $5,000, or by imprisonment for not more than one year or by both such fine and imprisonment."

See also 32 Stat. 904, 49 U. S. C. § 47, which provides: "No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under chapter 1 of this title

been settled that this statute confers immunity from prosecution coextensive with the constitutional privilege against self-incrimination, and that the witness may not therefore lawfully refuse to testify. *Brown* v. *Walker,* 161 U. S. 591 (1896). The context in which the doctrine originated and the history of its reaffirmance through the years have been so recently re-examined by this Court in *Ullman* v. *United States,* 350 U. S. 422, as to make it a needless exercise to retrace that ground here. Suffice it to repeat that *Brown* v. *Walker* has become "part of our constitutional fabric." 350 U. S., at 438. It is thus clearly too late in the day to question the constitutional sufficiency of the immunity provided under Part I of the Act.

In contending that this immunity is not fully imported into Part II the petitioner grasps at straws. He points out that the above-quoted language of 49 U. S. C. § 305 (d) which incorporates into Part II the immunity provisions of Part I is separated by only a semicolon from a provision which gives the Commission investigative powers under Part II. See footnote 3. He would therefore have us rewrite the section so as to make the immunity provision applicable only to witnesses appearing before the Commission, not to those appearing before a grand jury or in a court. Such a construction would not only do violence to plain language, but also, as the Court of Appeals observed, to the whole structure of the Interstate Commerce Act. See 247 F. 2d, at 336–337.

The petitioner argues alternatively that even if some immunity is granted by Part II to a grand jury witness, the immunity is not commensurate with that of Part I, and that its scope is therefore constitutionally insufficient. The contention is that § 305 (d) provides immunity from

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or any law amendatory thereof or supplemental thereto: *Provided,* That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

prosecution only for offenses related to violations of the Motor Carrier Act itself because of the clause appearing at the beginning of the section—"So far as may be necessary for the purposes of this chapter." See footnote 3. Assuming that this clause limits the immunity provision of the section at all, it clearly limits only the class of witnesses to whom the immunity will attach, not the scope of the immunity conferred. The petitioner "subpoenaed . . . in connection with [a] matter under investigation under this chapter . . . necessary for the purposes of this chapter" was clearly within that class.

Congress thus provided that the petitioner could not and would not incriminate himself by answering the questions put to him. He could not "be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he [might] testify. . . ." 49 U. S. C. § 46. He therefore had an unqualified duty to answer the questions as he was directed to do.

We turn then to the petitioner's attack upon the validity of the procedure which the District Court followed in adjudicating him in contempt.[5] This procedure, it is contended, robbed the petitioner not only of the safe-

[5] The petitioner and his counsel were advised in advance what the procedure was to be. "Mr. Wachtell: The Government's understanding of the nature of this proceeding is this: At this point the grand jury is still merely requesting the assistance of the Court. What the Government would request is that if it appears, as will be shown by the testimony of the grand jury reporter, that the witness is persisting in his refusal, the Government will then request of this Court that the Court itself, in the presence of the grand jury, will put the six questions to the witness and ask him, first, whether he is willing to answer them now, and, second, would he answer them if he were sent back to the grand jury again. And if the witness again refuses here and now in the physical presence of the Court or persists in his refusal to answer, that the witness be held in summary contempt under Rule 42 (a) of the Federal Rules of Criminal Procedure.

"The Court: That is what I propose."

guards of notice, opportunity to prepare a defense, and a hearing, but also of the presumption of innocence and other rights basic to a fair criminal trial.

In view of the apparent breadth of the petitioner's argument, it may promote analysis of this aspect of the case to emphasize at the outset what it does not involve. This is not a situation where the contempt was in any sense personal to the judge, raising issues of possible unfairness resulting from the operation of human emotions. Cf. *Cooke* v. *United States,* 267 U. S. 517, 539; *Sacher* v. *United States,* 343 U. S. 1; *Offutt* v. *United States,* 348 U. S. 11. This is not a case of "misbehavior" involving factual issues as to the nature of the petitioner's conduct and whether it occurred in the "presence" of the court or "so near thereto as to obstruct the administration of justice."[6] Cf. *Ex parte Savin,* 131 U. S. 267; *Ex parte Cuddy,* 131 U. S. 280; *Nye* v. *United States,* 313 U. S. 33, 44–53. Moreover, the petitioner does not question the power of the court to punish disobedience of its lawful order as a criminal contempt,[7] and to do so summarily, if the disobedience occurs in the presence of the court and in the sight or hearing of the judge.[8]

The issue presented is thus considerably narrower than the broad strokes of the petitioner's argument would at

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[6] 18 U. S. C. § 401 (1).

[7] 18 U. S. C. § 401. Power of court:

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

. . . . . .

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

[8] Rule 42. Criminal Contempt:

"(a) SUMMARY DISPOSITION. 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."

first suggest. Indeed, the argument boils down to the contention that when the petitioner first disobeyed the court's order in the grand jury room the court had no choice but to initiate criminal contempt proceedings against him at once, under the provisions of Rule 42 (b) of the Federal Rules of Criminal Procedure,[9] and that it therefore violated his rights by calling him before it and giving him another opportunity to answer the questions before adjudicating him in contempt. This argument disregards the historic relationship between court and grand jury. It finds support in neither precedent nor reason.

A grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses. It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify if, after appearing, he refuses to do so.

When the petitioner first refused to answer the grand jury's questions, he was guilty of no contempt. He was

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[9] Rule 42. Criminal Contempt: "(b) DISPOSITION UPON NOTICE AND HEARING. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

entitled to persist in his refusal until the court ordered him to answer. Unless, therefore, it was to be frustrated in its investigative purpose, the grand jury had to do exactly what it did—turn to the court for help. If the court had ruled that the privilege against self-incrimination had been properly invoked, that would have been the end of the matter. Even after an adverse ruling upon his claim of privilege, the petitioner was still guilty of no contempt. It was incumbent upon the court unequivocally to order the petitioner to answer. Cf. *Wong Gim Ying* v. *United States,* 98 U. S. App. D. C. 23, 231 F. 2d 776. The court did so.

When upon his return to the grand jury room the petitioner again refused to answer the grand jury's questions, now in direct disobedience of the court's order, he was for the first time guilty of contempt. At that point a contempt proceeding could unquestionably and quite properly have been initiated. Since this disobedience of the order did not take place in the actual presence of the court, and thus could be made known to the court only by the taking of evidence, the proceeding would have been conducted upon notice and hearing in conformity with Rule 42 (b). See *Carlson* v. *United States,* 209 F. 2d 209, 216 (C. A. 1st Cir.).

A judge more intent upon punishing the witness than aiding the grand jury in its investigation might well have taken just such a course. Instead, the court made another effort to induce the petitioner to testify. Again unequivocally advising the petitioner that the statute afforded him complete immunity, the court directed him to answer the questions. Had the petitioner done so, he would have purged himself of contempt, and the grand jury's investigation could have proceeded.[10] His deliberate refusal,

[10] The petitioner's contention that the court's very act of directing him to answer somehow violated his privilege against self-incrimination is thus clearly incorrect.

continuing his contempt, cf. *Yates* v. *United States,* 355 U. S. 66, 75, left the court no choice.[11] Since the disobedience occurred in the court's presence, it was clearly proper to proceed under Rule 42 (a).

Rule 42 of the Federal Rules of Criminal Procedure is no innovation. It simply makes "more explicit" the long-settled usages of law governing the procedure to be followed in contempt proceedings.[12] No decision of this Court has ever questioned the propriety of summary contempt proceedings in aid of a grand jury investigation. Repeated decisions of this Court and the Courts of Appeals have, at least *sub silentio,* approved such a procedure, stemming as it does from the usages of the common law.[13] Indeed less than a decade ago this Court did not consider the question sufficiently doubtful to merit discussion.[14] In the light, therefore, of both reason and

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[11] We do not discuss the petitioner's claim, first advanced in the Court of Appeals, that the District Court proceeding was conducted in "secrecy," because the record does not show this to be the fact.

[12] *Sacher* v. *United States,* 343 U. S. 1, 7; Notes of Advisory Committee on Rules, 18 U. S. C. A., Rule 42.

[13] *Rogers* v. *United States,* 340 U. S. 367; *Wilson* v. *United States,* 221 U. S. 361, 369, *semble*; *Hale* v. *Henkel,* 201 U. S. 43, 46; *United States* v. *Curcio,* 234 F. 2d 470, 473 (C. A. 2d Cir.), rev'd on other grounds, 354 U. S. 118 (1957); *Lopiparo* v. *United States,* 216 F. 2d 87 (C. A. 8th Cir.); *United States* v. *Weinberg,* 65 F. 2d 394, 396 (C. A. 2d Cir.). For the earlier practice at common law, see *People ex rel. Phelps* v. *Fancher,* 4 Thompson & Cook (N. Y. 1874) 467; *People ex rel. Hackley* v. *Kelly,* 24 N. Y. 74, 79–80 (1861); *In re Belle Harris,* 4 Utah 5, 8–9, 5 P. 129, 130–132 (1884); *Heard* v. *Pierce,* 8 Cush. 338, 342–345 (Mass. 1851).

[14] In *Rogers* v. *United States,* 340 U. S. 367, the petitioner attacked the validity of the summary procedure by which she was found guilty of criminal contempt for refusing to testify before a grand jury. (See petitioner's brief Nos. 20, 21, 22, O. T., 1950, pp. 54–58; brief of United States, *ibid.,* pp. 51–53.) Neither the opinion of the Court nor the dissenting opinion discussed the question. A petition for rehearing which complained of the Court's silence on this issue

authority, we hold that the court's action in affording the petitioner a *locus penitentiae* before finally adjudicating him in contempt was entirely proper.

We hold, finally, that the sentence of 15 months' imprisonment was not an abuse of the District Court's discretion. Because there is no statutory limit upon a District Court's sentencing power in cases of criminal contempt, *Green* v. *United States,* 356 U. S. 165, this Court is not without power to review its exercise. Cf. *Yates* v. *United States,* 356 U. S. 363; *Nilva* v. *United States,* 352 U. S. 385, 396. But the decision is one primarily for the District Court, to be made "with the utmost sense of responsibility and circumspection." *Green* v. *United States, supra,* at 188. The record does not indicate that the district judge's decision was otherwise reached. Before sentence was imposed, the petitioner's counsel was fully, repeatedly and patiently heard.[15]

Affirmed.

(Petition for Rehearing No. 20, O. T., 1950, pp. 6–10) was denied. 341 U. S. 912.

[15] The petitioner points out that the sentence imposed was in excess of the maximum punishment authorized by statute for substantive violations of the Motor Carrier Act. A more relevant comparison might be made to the statutory offenses involving obstruction of the administration of justice, punishable by a maximum of five years' imprisonment. 18 U. S. C. § 1503. The record shows that the grand jury was investigating suspected violations of the Motor Carrier Act not by the petitioner, but by others. The District Court was informed that the testimony the grand jury "desired to elicit from this witness . . . is of the very greatest importance, and the witness's refusal to answer is a very great stumbling block to this investigation and to all these investigations." If within 60 days of the termination of these proceedings the petitioner indicates his willingness to testify, the District Court will no doubt consider that fact in passing upon a motion for reduction of his sentence under Rule 35 of the Federal Rules of Criminal Procedure.

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

I find myself in disagreement with the majority opinion, not because of its interpretation of the scope of the immunity provisions here in question, but because it sanctions the procedure used below to convict petitioner summarily of criminal contempt and to sentence him to 15 months' imprisonment under Rule 42 (a) when the proceedings should have been in accordance with Rule 42 (b). The denial of even the minimal protections accorded by Rule 42 (b) deprived petitioner of an opportunity to prepare a legal defense, or to demonstrate extenuating circumstances,[1] and satisfied neither the plain intent of Rule 42 nor the principles of fair play.

Rule 42 (b) prescribes that criminal contempts "shall" be prosecuted on notice allowing a "reasonable time for the preparation of the defense" and other protections, except in those instances wherein Rule 42 (a) provides that contempts committed in the presence of the court "may" be punished summarily. This demonstrates that the general mode of procedure was to be that prescribed by Rule 42 (b). On the other hand, Rule 42 (a) covers

[1] The prosecutor indicated to the court that the inquiry, though directed toward minor violations of the Interstate Commerce Act, was really part of an effort to discover facts concerning notorious gangsters suspected of complicity in the Victor Riesel acid-throwing incident and general racketeering in the Southern District of New York. In view of the total absence of any intimation that petitioner had violated the Interstate Commerce Act or was himself guilty of criminal conduct, the actual basis for his refusal to testify may well have been fear of gangster reprisals, a not unreasonable fear in such circumstances. Regardless of the legal significance of such a defense, see *Widger* v. *United States*, 244 F. 2d 103, a hearing would have provided an opportunity for presentation of such facts to the judge and might well have affected the length of sentence.

only specific situations and even then the contempt procedure need not be summary. In the light of the concern long demonstrated by both Congress [2] and this Court [3] over the possible abuse of the contempt power, it is obvious that Rule 42 (a) was reserved for exceptional circumstances. These might include threatening the judge, *United States* v. *Hall,* 176 F. 2d 163, or other acts disrupting court proceedings and obstructing the administration of the court's business. *United States* v. *Landes,* 97 F. 2d 378.

Rule 42 (a) was not inserted in the Rules in order to ease the difficulties of prosecuting contempts. It was not meant to authorize the practice of having government prosecutors force persons who had already committed contempts outside of the presence of the court to repeat the action before the court and thus subject themselves to deprivation of their rights under Rule 42 (b). Given the purpose of Rule 42 (a) with its admittedly precipitous character and extremely harsh consequences, this Court should not countenance a procedure whereby a contempt already completed out of the court's presence may be reproduced in a command performance before the court to justify summary disposition. That is not to say the Government could not properly bring the petitioner before the court a second time. Of course, both the Government and the grand jury could use such additional persuasion to obtain answers to the questions. But that second refusal should not constitute a second contempt. Nor should this procedure alone justify imposing a more

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[2] See, generally, Frankfurter and Landis, Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers, 37 Harv. L. Rev. 1010.

[3] See, *e. g., Cammer* v. *United States,* 350 U. S. 399; *Offutt* v. *United States,* 348 U. S. 11; *Nye* v. *United States,* 313 U. S. 33; *Cooke* v. *United States,* 267 U. S. 517; *Ex parte Terry,* 128 U. S. 289; *Anderson* v. *Dunn,* 6 Wheat. 204.

severe penalty than would have been appropriate for contempt of the grand jury.[4]

After petitioner refused to answer the questions the judge might very properly have summarily committed the petitioner to jail for civil contempt until he answered the questions. *Oriel* v. *Russell,* 278 U. S. 358, 363. See *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 442. This is not disputed. In such a proceeding the recalcitrant witness although summarily committed is said to carry the keys to the jail in his own pocket. See *In re Nevitt,* 117 F. 448, 461. Or, upon presentment, the judge might have given notice in open court of a criminal contempt proceeding to be commenced under the procedures set forth in Rule 42 (b), and the Government so concedes. That is the normal manner of proceeding in these cases. See *Wong Gim Ying* v. *United States,* 98 U. S. App. D. C. 23, 27, 231 F. 2d 776, 780; *Carlson* v. *United States,* 209 F. 2d 209, 216.

But the Government was not satisfied with such a procedure. On April 8, though ostensibly seeking the court's assistance in obtaining the answers to the questions, the prosecutor never even faintly suggested any coercive remedy.[5] Rather, from the outset he spoke in terms assuming that petitioner would continue his refusal to testify and made known to the court that he would seek a summary disposition under Rule 42 (a) immediately. After the finding of contempt, he asked the judge to

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[4] Although the district judge asked petitioner other questions during this second proceeding in the courtroom, the judge's certificate makes clear that the contempt found was for refusal to answer the six substantive questions and not for any other answers. Cf. *Carlson* v. *United States,* 209 F. 2d 209, 216.

In practice, contempts before the court are punished no more severely than those before the grand jury. See n. 11, *infra.*

[5] See the statement in n. 5 of the Court's opinion. But see n. 9, *infra.*

give petitioner a substantial sentence and the judge complied—with 15 months in the penitentiary. He then asked the judge to omit a purge clause which the judge did.[6] Thereafter he urged the judge to deny bail and the judge promptly acceded to that request.

Beyond a short statement, nothing was offered by the Assistant United States Attorney to show the seriousness of the contempt.[7] The offense the grand jury was investigating was punishable by no more than a fine. 71 Stat. 352, 49 U. S. C. (Supp. V) § 322 (a).

I do not assert that the contempt could not be more serious than the offense under investigation,[8] but where there is a disparity such as exists in this case, a hearing should be held to demonstrate, subject to rebuttal, at least the purpose and significance of the grand jury investigation, the witness' relationship to the subject matter under investigation, and the effect of the witness' recalcitrance on the future of the investigation.

The Court's opinion observes that the judge may reduce the sentence within 60 days of the termination of these proceedings under Rule 35. But that power has been held to be discretionary, *Flores* v. *United States,* 238 F.

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[6] See n. 13, *infra.*

[7] The only expression by the Assistant United States Attorney about the connection of petitioner with the grand jury investigation then in progress was the following statement made during discussion of the punishment:

"The information that it is desired to elicit from this witness, I represent to the Court, is of the very greatest importance, and the witness' refusal to answer is a very great stumbling block to this investigation and to all these investigations."

[8] Comparing this sentence with that possible under the penalty for obstructing the administration of justice, 18 U. S. C. § 1503, is not meaningful because in such a prosecution petitioner would have been entitled to all of the safeguards normally afforded criminal defendants, including, of course, the very basic protection of trial by jury.

2d 758; *Miller* v. *United States,* 224 F. 2d 561, and does not in any sense make a term in the penitentiary comparable to a jail commitment for civil contempt. Exercise of Rule 35 power does not make petitioner any less a convicted criminal. Also, the failure to invoke civil contempt indicates that the judge intended the sentence to be punitive and not coercive.[9]

It is asserted that only a legal issue is involved here—the scope of immunity—so that there was no need to give petitioner time to prepare a defense under Rule 42 (b).[10] But this overlooks the right of petitioner to present evidence in extenuation and to show what other courts had done in similar circumstances. This argument also neglects the importance of affording the judge an opportunity for reflection. A judge should not be forced—or goaded—into spur-of-the-moment decisions where the imprisonment of a person is in the balance. There is no indication that the district judge expected the grand jury to return on the afternoon of April 8. Yet, within a short time after its return, the judge had convicted the petitioner and sentenced him to 15 months in prison for his conduct and had denied bail. Neither counsel discussed the sentences given in comparable cases and, from the severity of the sentence here, it is clear that the judge was not

[9] This would seem true despite the confusion existent in the courtroom just before the sentencing wherein the prosecutor asked the judge for a "substantial sentence, and that is done not so much for any punitive effect as it would be for the coercive effect of the sentence." This was stated just after the prosecutor had requested the judge to omit a purge clause!

[10] Although this Court disagrees with petitioner's argument concerning the breadth and applicability of the immunity provisions in question, the Court of Appeals did grant bail and its opinion recognized that the point had some "novel aspects." 247 F. 2d 332, 338. Thus, when considering the action taken by the district judge, it must be recognized that the question of immunity was not frivolous.

advised how other judges were treating similar offenses.[11] There is no statutory limit for the length of sentence in contempts of this character. Apparently, the 15-month sentence in this case is the longest contempt sentence ever

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[11] The following cases involving contempt of the grand jury appear to be the only appellate decisions in the Second Circuit: *O'Connell* v. *United States*, 40 F. 2d 201 (three months with purge clause), cert. granted 281 U. S. 716, cert. dismissed on stipulation of counsel 296 U. S. 667. *Lang* v. *United States*, 55 F. 2d 922 (90 days with purge clause), cert. granted 285 U. S. 533, cert. dismissed 286 U. S. 523. *United States* v. *Weinberg*, 65 F. 2d 394 (60 days); *United States* v. *Zwillman*, 108 F. 2d 802 (six-month sentence reversed); *United States* v. *Weisman*, 111 F. 2d 260 (six-month sentence reversed); *United States* v. *St. Pierre*, 132 F. 2d 837 (five-month sentence), cert. dismissed as moot 319 U. S. 41. The following cases in the Second Circuit definitely adopted the procedure here in question: *United States* v. *Trock*, 232 F. 2d 839 (four-month sentence with purge clause), reversed 351 U. S. 976; *United States* v. *Curcio*, 234 F. 2d 470 (six-month sentence with purge clause) reversed 354 U. S. 118; *United States* v. *Gordon*, 236 F. 2d 916 (six-month sentence containing a purge clause reversed); *United States* v. *Courtney*, 236 F. 2d 921 (three-month sentence reversed); *United States* v. *Miranti*, 253 F. 2d 135 (two 5-year sentences reversed with a comment on the district judge's anger at the witnesses).

Cases from other Circuits involving grand jury contempts: *United States* v. *Caton*, 25 Fed. Cas. No. 14,758 ($5 fine); *In re Counselman*, 44 F. 268 ($500 fine and civil contempt) reversed *sub nom. Counselman* v. *Hitchcock*, 142 U. S. 547; *Elwell* v. *United States*, 275 F. 775 ($500 fine and civil contempt); *Camarota* v. *United States*, 111 F. 2d 243 (six months); *United States* v. *Hoffman*, 185 F. 2d 617 (five months), reversed 341 U. S. 479; *Healey* v. *United States*, 186 F. 2d 164 (four sentences of one year or more and one $10 fine reversed); *United States* v. *Greenberg*, 187 F. 2d 35 (five-month sentence), reversed 341 U. S. 944; *Carlson* v. *United States*, 209 F. 2d 209 (18-month sentence vacated); *Hooley* v. *United States*, 209 F. 2d 219 (nine-month sentence vacated); *O'Keefe* v. *United States*, 209 F. 2d 223 (nine-month sentence vacated); *Maffie* v. *United States*, 209 F. 2d 225 (one-year sentence vacated); *Daly* v. *United States*, 209 F. 2d 232 (one-year sentence vacated); *Hooley* v. *United States*, 209 F. 2d 234 (one-year sentence vacated).

The following cases involve contempts for refusals to answer in

sustained by any appellate court in the federal system for a refusal to answer questions of a court or grand jury.[12] Even a short delay might have given the judge enough time for research to establish that the Government's reason for seeking omission of the purge clause was groundless.[13] Also, the judge took no time to consider the bail

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the courtroom: *Rogers* v. *United States,* 179 F. 2d 559, aff'd 340 U. S. 367 (four-month sentence for refusal before court to testify before grand jury); *Green* v. *United States,* 193 F. 2d 111 (C. A. 2d Cir.) (six-month sentence for telling court he would not obey order to produce records before the grand jury at a later date); *United States* v. *Field,* 193 F. 2d 92 (C. A. 2d Cir.) (one sentence of 90 days and two sentences of 6 months, all with purge clauses for refusals to answer certain questions and produce certain documents at hearing before the court); *Enrichi* v. *United States,* 212 F. 2d 702 (six-month sentence and $500 fine for refusal before court to testify before grand jury).

Even refusals to testify during the course of trial have not been punished as severely: *In re Cashman,* 168 F. 1008 (D. C. S. D. N. Y.) (8 months and $750 fine for refusal to answer questions at bankruptcy hearing); *United States* v. *Barker,* 11 F. R. D. 421 (90 days and $1,000 fine for refusal to testify on cross-examination during trial); *United States* v. *Flegenheimer,* 82 F. 2d 751 (C. A. 2d Cir.) (six months for witness' refusal to give direct testimony); *United States* v. *Gates,* 176 F. 2d 78 (C. A. 2d Cir.) (30 days with purge clause for refusal to answer question on cross-examination during trial); *Widger* v. *United States,* 244 F. 2d 103 (one-year sentence for refusal to testify reversed).

[12] All of the longer sentences have been vacated or reversed on appeal: *United States* v. *Miranti,* 253 F. 2d 135 (C. A. 2d Cir.); *Carlson* v. *United States,* 209 F. 2d 209; *Healey* v. *United States,* 186 F. 2d 164. The 18-month sentence sustained in *Lopiparo* v. *United States,* 216 F. 2d 87, was not for a refusal to testify. Rather, the contempt there was based upon the judge's disbelief of defendant's story that he could not find the corporate books which he was ordered to produce before the grand jury. 216 F. 2d, at 91. Even the sentence in that case contained a purge clause.

[13] The stated reason for requesting omission of a purge clause was the legal effect it might have in shortening the fixed term. But see *Lopiparo* v. *United States,* 222 F. 2d 897. Cf. *Loubriel* v. *United States,* 9 F. 2d 807, relied on by the Government.

495957 O–59–9

question. After a minimum of argument by counsel, the judge denied bail pending appeal.[14]

Shortcuts in criminal procedure are always confusing [15] and dangerous, but they are particularly so here, because if sanctioned by this Court, prosecutors throughout the federal system will be tempted to do all they can to make Rule 42 (b) a dead letter. The contempt power traditionally has been utilized sparingly and only when necessary to uphold the dignity of the courts. Early in our history, the limits of the power to punish for contempt were said to be "the least possible power adequate to the end proposed." *Anderson* v. *Dunn*, 6 Wheat. 204, 231. As MR. JUSTICE FRANKFURTER has said in *Sacher* v. *United States*, 343 U. S. 1, 24–25 (dissenting opinion):

> "To dispense with indictment by grand jury and trial by a jury of twelve does not mean the right to disregard reason and fairness. Reason and fairness demand, even in punishing contempt, procedural safeguards within which the needs for the effective administration of justice can be amply satisfied while at the same time the reach of so drastic a power is

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[14] Eight days later, the Court of Appeals granted bail and petitioner has been at large since.

[15] The question of whether the April 8 proceedings were conducted in secret is the subject of some confusion caused by the swift procedure invoked. It is clear that on April 5 the courtroom was cleared. It is also clear that on April 8 the grand jury returned to the courtroom ostensibly for further aid and assistance, and that the grand jury reporter read to the court what had happened earlier. Though the transcript does not so indicate, it would seem most likely that secrecy was again in effect. In fact, petitioner's counsel objected to the procedure and asked that he be served in "open court" with notice of the charges. There is no indication of any change in this situation after the refusal to answer and before the actual contempt proceeding. The Assistant United States Attorney has stated that in fact there were no spectators in the courtroom on April 8. A secret proceeding is no less secret because the defendant is allowed to have counsel. See also n. 10, *supra*.

kept within limits that will minimize abuse. While experience has shown the necessity of recognizing that courts possess this authority, experience has also proven that restrictions appropriate to the purposes of the power must fence in its exercise. Hence Congress, by legislation dating back more than a hundred years, has put geographic and procedural restrictions upon the power of the United States courts to punish summarily for contempt. . . .

"The Court did so for a reason deeply imbedded in our legal system and by that very fact too often neglected. Times of tension, which are usually periods of war and their aftermath, bring it to the surface. Reflecting no doubt their concern over untoward events in law enforcement arising out of the First World War, Mr. Justice Brandeis and Mr. Justice Holmes gave quiet warning when they observed that 'in the development of our liberty insistence upon procedural regularity has been a large factor.' *Burdeau* v. *McDowell,* 256 U. S. 465, 477. It is not for nothing that most of the provisions of our Bill of Rights are concerned with matters of procedure.

"That is what this case is about—'procedural regularity.' Not whether these petitioners have been guilty of conduct professionally inexcusable, but what tribunal should sit in judgment; not whether they should be punished, but who should mete out the appropriate punishment; not whether a Federal court has authority to prevent its proceedings from being subverted, but how that authority should be exercised so as to assure the rectitude of legal proceedings and at the same time not detract from the authority of law itself."

And, shortly thereafter, the Court adopted this viewpoint. See *Offutt* v. *United States,* 348 U. S. 11. The importance of procedural regularity often lies in advising

the defendant of the procedure he must expect and giving him time to prepare. Also, judicial reflection is an invaluable by-product of procedures that are designed to be no more precipitous than necessary to meet the demands of the situation. Here, there was no demonstrated need for haste and no resultant benefit (except in saving the United States Attorney's office the time and effort of preparing for a hearing on notice). There had already been a fully committed contempt before the grand jury which might have been prosecuted within a short time giving petitioner only "a reasonable time for the preparation of the defense." This Court with its supervisory power over the administration of criminal justice in the federal courts, *McNabb* v. *United States*, 318 U. S. 332, 340, should not permit the utilization of summary contempt procedures where immediate action is not necessary for the preservation of the respect and dignity of the federal courts. Improvident use of summary procedures only weakens that respect.[16]

In the light of the sentences given in this type of case, I doubt if any judge in the federal system would summarily send a witness to the penitentiary for 15 months for merely refusing to testify in a grand jury investigation of whether a trucker is operating without an ICC certificate. It is quite obvious that much of the sentence was for some reason collateral to that investigation. It is not sufficient for the purpose of increasing punishment to act on the suspicion that the refusal of the witness to testify may redound to the interest of a racketeer, and on that basis deny him the protections that Congress has seen fit to accord to all witnesses before grand juries. If such factors are to play a part in the sentence the witness is entitled to a hearing on notice.

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[16] Reliance upon the improper application of Rule 42 (a) to petitioner in this case, makes it unnecessary to discuss the issue raised in *Green* v. *United States*, 356 U. S. 165, 193 (dissenting opinion).

Unfortunately, the failure to adhere to procedural regularity may be glossed over in the investigation of matters of burning public interest, but it should be remembered that the deprivation of the rights of a witness in such an investigation must apply as a precedent to people in all walks of life, both good and bad. I suggest that the full import of the decision in this case will not be recognized until it is applied at some future time in other types of investigations and to other people.

I would reverse the conviction.

GANGER ET AL. *v.* CITY OF MIAMI.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 153. Argued March 2–3, 1959.—Decided March 9, 1959.

Appeal dismissed for want of a properly presented substantial federal question.

Reported below: 101 So. 2d 116, 123.

Thomas H. Anderson and *Herbert L. Nadeau* argued the cause for appellants. With them on the brief was *Clyde Epperson.*

Milton M. Ferrell argued the cause and filed a brief for appellee.

PER CURIAM.

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

TOWNSEND *v.* SAIN, SHERIFF, ET AL.

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

No. 552, Misc. Decided March 9, 1959.

Certiorari granted; judgment vacated; and case remanded.

George N. Leighton and *William R. Ming, Jr.* for appellant.

Benjamin S. Adamowski for respondents.

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 Seventh Circuit is vacated and the case is remanded. *United States ex rel. Jennings* v. *Ragen, Warden,* 358 U. S. 276.

Syllabus.

SECURITIES AND EXCHANGE COMMISSION *v.* VARIABLE ANNUITY LIFE INSURANCE CO. OF AMERICA ET AL.

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

No. 290. Argued January 15, 19, 1959.—
Decided March 23, 1959.*

Respondent corporations, calling themselves "life insurance" companies and submitting to regulation by the insurance commissioners of the District of Columbia and several States, offer for sale in interstate commerce so-called "variable annuity" contracts, which have some of the features of conventional life insurance and annuity contracts but which entitle the purchasers, not to a specified definite amount per annum, but only to fluctuating amounts based upon pro rata participations in respondents' investment portfolios and the gains and losses thereon. *Held:* Such "variable annuity" contracts are "securities" which must be registered with the Securities and Exchange Commission under the Securities Act of 1933, and the issuers are subject to regulation under the Investment Company Act of 1940, since such contracts are not "insurance" policies or "annuity" contracts and respondents are not "insurance" companies or engaged in the "business of insurance," within the meaning of the exemption provisions of those Acts or the McCarran-Ferguson Act. Pp. 66–73.

(a) While the States have traditionally regulated the business of insurance, their characterization of particular contracts is not conclusive, since the construction of the exemption provisions of the Federal Acts presents federal questions. Pp. 68–69.

(b) the issuer of a "variable annuity" contract that has no element of fixed return does not assume any investment risk, which is inherent in the concepts of "insurance" and "annuity." Pp. 71–73.

103 U. S. App. D. C. 197, 257 F. 2d 201, reversed.

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*Together with No. 237, *National Association of Securities Dealers, Inc.*, v. *Variable Annuity Life Insurance Co. of America et al.*, also on certiorari to the same Court.

Thomas G. Meeker argued the cause for petitioner in No. 290. With him on the brief were *Solicitor General Rankin, John F. Davis, David Ferber* and *Pace Reich.*

John H. Dorsey argued the cause and filed a brief for petitioner in No. 237.

Roy W. McDonald and *James M. Earnest* argued the causes for the Variable Annuity Life Insurance Company of America, respondent. With them on the brief was *Malcolm Fooshee.*

Benjamin H. Dorsey argued the causes for the Equity Annuity Life Insurance Co., respondent. With him on the brief were *Smith W. Brookhart* and *Ralph E. Becker.*

Frank F. Roberson filed a brief in No. 290 for the Mutual Life Insurance Company of New York et al., as *amici curiae,* in support of respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is an action instituted by the Securities and Exchange Commission [1] to enjoin respondents from offering their annuity contracts to the public without registering them under the Securities Act of 1933, 48 Stat. 74, 15 U. S. C. § 77a, and complying with the Investment Company Act of 1940, 54 Stat. 789, 15 U. S. C. § 80a. The District Court denied relief, 155 F. Supp. 521; and the Court of Appeals affirmed, 103 U. S. App. D. C. 197, 257 F. 2d 201. The case is here on petitions for writs of certiorari which we granted, 358 U. S. 812, because of the importance of the question presented.

[1] National Association of Securities Dealers, Inc., petitioner in No. 237, and the Equity Annuity Life Ins. Co., a respondent in each case, were allowed to intervene.

Respondents are regulated under the insurance laws of the District of Columbia and several other States. It is argued that that fact brings into play the provisions of the McCarran-Ferguson Act, 59 Stat. 33, 15 U. S. C. § 1011, § 2 (b) of which provides that "No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . ." It is said that the conditions under which that law is applicable are satisfied here. The District of Columbia and some of the States are "regulating" these annuity contracts and, if the Commission is right, the Federal Acts would at least to a degree "supersede" the state regulations since the Federal Acts prescribe their own peculiar requirements.[2] Moreover, "insurance" or "annuity" contracts are exempt from the Securities Act when "subject to the supervision of the insurance commissioner . . . of any State . . . ." [3] Respondents are also exempt from the Investment Company Act if they are "organized as an insurance company, whose primary and predominant business activity is the writing of insurance . . . and which is subject to supervision by the insurance commissioner . . . of a State . . . ." [4] While the term "security" as defined in the Securities Act [5] is broad enough to include any

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[2] For example, the Investment Company Act has provisions governing the size of investment companies, § 14; the affiliations of directors, officers, and employees, § 10; the relation of investment advisers and underwriters of investment companies, § 15; the transactions between investment companies and their affiliates and underwriters, § 17; the capital structure of investment companies, § 18; their dividend policies, § 19; their loans, § 21.

[3] § 3 (a) (8).

[4] §§ 3 (c) (3) and 2 (a) (17).

[5] Section 2 (1) provides:

"When used in this title, unless the context otherwise requires—

"(1) The term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or

"annuity" contract, and the term "investment company" as defined in the Investment Company Act [6] would embrace an "insurance company," the scheme of the exemptions lifts *pro tanto* the requirements of those two Federal Acts to the extent that respondents are actually regulated by the States as insurance companies, *if indeed they are such.* The question common to the exemption provisions of the Securities Act and the Investment Company Act and to § 2 (b) of the McCarran-Ferguson Act is whether respondents are issuing contracts of insurance.

We start with a reluctance to disturb the state regulatory schemes that are in actual effect, either by displacing them or by superimposing federal requirements on transactions that are tailored to meet state requirements. When the States speak in the field of "insurance," they speak with the authority of a long tradition. For the

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participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing." 15 U. S. C. § 77 (b)(1).

[6] Section 3 (a) provides in part:

"When used in this title, 'investment company' means any issuer which—

"(1) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities;

. . . . . .

"(3) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis."

regulation of "insurance," though within the ambit of federal power (*United States* v. *Underwriters Assn.*, 322 U. S. 533), has traditionally been under the control of the States.

We deal, however, with federal statutes where the words "insurance" and "annuity" are federal terms. Congress was legislating concerning a concept which had taken on its coloration and meaning largely from state law, from state practice, from state usage. Some States deny these "annuity" contracts any status as "insurance." [7] Others accept them under their "insurance" statutes.[8] It is apparent that there is no uniformity in the rulings of the States on the nature of these "annuity" contracts. In any event how the States may have ruled is not decisive. For, as we have said, the meaning of "insurance" or "annuity" under these Federal Acts is a federal question.

While all the States regulate "annuities" under their "insurance" laws, traditionally and customarily they have been fixed annuities, offering the annuitant specified and definite amounts beginning with a certain year of his or her life. The standards for investment of funds underlying these annuities have been conservative. The variable annuity introduced two new features. First, premiums collected are invested to a greater degree in common stocks and other equities. Second, benefit payments vary with the success of the investment policy. The first variable annuity apparently appeared in this country about 1952 when New York created the College Retirement Equities Fund [9] to provide annuities for teachers.

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[7] See 1 CCH, Blue Sky Reporter (1956) #4711; *Spellacy* v. *American Life Ins. Assn.*, 144 Conn. 346, 131 A. 2d 834.

[8] See *People* v. *Supreme Brotherhood*, 193 Misc. 996, 86 N. Y. S. 2d 127.

[9] N. Y. Laws 1952, c. 124.

It came into existence as a result of a search for a device that would avoid paying annuitants in depreciated dollars.[10] The theory was that returns from investments in common stocks would over the long run tend to compensate for the mounting inflation. The holder of a variable annuity cannot look forward to a fixed monthly or yearly amount in his advancing years. It may be greater or less, depending on the wisdom of the investment policy. In some respects the variable annuity has the characteristics of the fixed and conventional annuity: payments are made periodicially; they continue until the annuitant's death or in case other options are chosen until the end of a fixed term or until the death of the last of two persons; payments are made both from principal and income; and the amounts vary according to the age and sex of the annuitant. Moreover, actuarially both the fixed-dollar annuity and the variable annuity are calculated by identical principles. Each issuer assumes the risk of mortality from the moment the contract is issued. That risk is an actuarial prognostication that a certain number of annuitants will survive to specified ages. Even if a substantial number live beyond their predicted demise, the company issuing the annuity—whether it be fixed or variable—is obligated to make the annuity payments on the basis of the mortality prediction reflected in the contract. This is the mortality risk assumed both by respondents and by those who issue fixed annuities. It is this feature, common to both, that respondents stress when they urge that this is basically an insurance device.[11]

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[10] See Morrisey, Dispute Over the Variable Annuity, 35 Harv. Bus. Rev. 75; Johnson, The Variable Annuity: What It is and Why It is Needed, Ins. L. J., June 1956, p. 357; Day and Melnikoff, The Variable Annuity as a Life Insurance Company Product, 10 J. Am. Soc. Ch. L. Under. 45; Barrons, Vol. 36, Jan. 23, 1956, p. 3.

[11] See Day, A Variable Annuity is Not a "Security," 32 Notre Dame Law. 642.

The difficulty is that, absent some guarantee of fixed income, the variable annuity places all the investment risks on the annuitant, none on the company.[12] The holder gets only a *pro rata* share of what the portfolio of equity interests reflects—which may be a lot, a little, or nothing. We realize that life insurance is an evolving institution. Common knowledge tells us that the forms have greatly changed even in a generation. And we would not undertake to freeze the concepts of "insurance" or "annuity" into the mold they fitted when these Federal Acts were passed. But we conclude that the concept of "insurance" involves some investment risk-taking on the part of the company. The risk of mortality, assumed here, gives these variable annuities an aspect of insurance. Yet it is apparent, not real; superficial, not substantial. In hard reality the issuer of a variable annuity that has no element of a fixed return assumes no true risk in the insurance sense. It is no answer to say that the risk of declining returns in times of depression is the reciprocal of the fixed-dollar annuitant's risk of loss of purchasing power when prices are high and gain of purchasing power when they are low. We deal with a more conventional concept of risk-bearing when we speak of "insurance." For in common understanding "insurance" involves a guarantee that at least some fraction of the benefits will be payable in fixed amounts. See *Spellacy* v. *American Life Ins. Assn.*, 144 Conn. 346, 354–355, 131 A. 2d 834, 839; Couch, Cyclopedia of Insurance Law, Vol. 1, § 25; Richards, Law of Insurance, Vol. 1, § 27; Appleman, Insurance Law and Practice, Vol. 1, § 81. The companies that issue these annuities take the risk of failure.

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[12] See Bellinger, Hagmann and Martin, The Meaning and Usage of the Word "Annuity," 9 J. Am. Soc. Ch. L. Under. 261; Haussermann, The Security in Variable Annuities, Ins. L. J., June 1956, p. 382.

But they guarantee nothing to the annuitant except an interest in a portfolio of common stocks or other equities [13]—an interest that has a ceiling but no floor.[14]

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[13] See *Securities & Exchange Comm'n* v. *Howey Co.*, 328 U. S. 293, 298–299:

". . . an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise." See Loss and Cowett, Blue Sky Law (1958), pp. 351, 356–357.

[14] These companies use an assumed net investment rate of 3½ percent per annum in the actuarial calculation of the initial annuity payment. If the net investment rate were at all times precisely 3½ percent, the amount of annuity payments would not vary. But there is no guarantee as to this. The companies use a reporting device, the annuity unit, the value of which informs the annuity holder of the variations in the company's actual returns from the assumed investment rate of 3½ percent. To state the matter in more detail: the amount of any payment depends on the value of the "annuity unit" and the number of such units held by the annuitant. At the time when he has paid all of his premium and is entitled to his first annuity payment, he will have a certain monetary interest in the fund (determined by the number of "accumulation units" he holds). The first payment is determined by reference to standard annuity tables, assuming a net investment return of 3½ percent per annum. It is the amount per month which a capital contribution of the annuitant's interest in the fund by a person of his age and sex would buy. This figure is converted into annuity units by dividing it by the then value of an annuity unit. The number of annuity units held by the annuitant remains constant throughout the payout period.

The value of an annuity unit is determined each month as follows: The value of the unit for the preceding month is multiplied by the net investment factor (adjusted to neutralize the 3½ percent interest factor used in the annuity table), which is the sum of one plus the net investment rate. The net investment rate is (after a slight reduction for a margin to cover expenses, and provide for contingency reserves and addition to surplus) the ratio of investment income plus (minus) net realized and unrealized capital gains (losses) less certain

There is no true underwriting of risks,[15] the one earmark of insurance as it has commonly been conceived of in popular understanding and usage.

Reversed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART joins, concurring.

I join the opinion and judgment of the Court. However, there are additional reasons which lead me to the Court's result, and since the nature of this case lends it to rather extended treatment, I will express these reasons separately.

First. The facts of this case are quite complex, but the basic problem involved is much more simple. I will try to point it up before developing the details of the sort of contracts sold by the respondents. It is one of the coverage of two Acts of Congress which concentrated on applying specific forms of regulatory controls to the various ways in which organizations get and administer other people's money—the Securities Act of 1933 [1] and the Investment Company Act of 1940.[2] These Acts were specifically drawn to exclude any "insurance policy" and any "annuity contract" (Securities Act § 3 (a)(8))

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taxes to the value of the fund during that month. The number of annuity units held times the value of each unit in a month produces the annuity payment for that month.

[15] There is one true insurance feature to some of these policies, though it is ancillary and secondary to the annuity feature. If the applicant is insurable and 60 years of age or under, he gets life insurance on a decreasing basis for a term of five years.

[1] 48 Stat. 74, as amended, 15 U. S. C. §§ 77a–77aa.

[2] 54 Stat. 789, as amended, 15 U. S. C. §§ 80a–1 to 80a–52.

The Court's opinion makes it clear why the issue is identical under the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U. S. C. §§ 1011–1015.

and any "insurance company" [3] (Investment Company Act § 3 (c)(3)) from their coverage. These exclusions were to take effect where the issuer of the policy or contract was subject to the supervision of the state "insurance commissioner, bank commissioner, or any agency or officer performing like functions" (Securities Act § 3 (a)(8)) or where a company classifiable as an "insurance company" was "subject to supervision by the insurance commissioner or a similar official or agency of a State" (Investment Company Act § 2 (a)(17)). The exclusions left these contracts and companies to the sole control of such state officials. Except for these exclusions, there is little doubt that these contracts and the companies issuing them would be subject to the Federal Acts.[4]

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[3] Defined as a "company which is organized as an insurance company, whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies, and which is subject to supervision by the insurance commissioner or a similar official or agency of a State . . . ." Investment Company Act § 2 (a)(17). The business of the respondents here consists solely of issuing contracts of the nature of those in question here.

[4] Under the Securities Act, it would appear that in the case of the ordinary insurance policy, the exemption would be just confirmatory of the policy's noncoverage under the definition of security. See H. R. Rep. No. 85, 73d Cong., 1st Sess. 15. The status of an ordinary annuity contract might be different. But, in any event, absent the specific insurance exclusion, it would appear that the variable annuity contract would come under the term "investment contract" or possibly "certificate of interest or participation in any profit-sharing agreement" in the definition of security, § 2 (1). On the other hand, even an ordinary insurance company might be an investment company within the meaning of § 3 (a)(1) and § 3 (a)(3) of the Investment Company Act, were it not for the specific exemption. The Chief Counsel of the SEC's Investment Trust Study testified that the specific exemption was necessary in the light of the definition. See Hearings before Subcommittee of the Senate Committee on Banking and Currency on S. 3580, 76th Cong., 3d Sess. 181. *A fortiori* a company issuing the sort of contracts in question here would be included if there were no question of the insurance exemption.

Why these exclusions? They could not have been made out of some general desire on the part of Congress to avoid any concurrent regulation by both the Federal Government and the States of investments or companies subject to the two Acts. On the contrary, § 18 of the Securities Act and § 50 of the Investment Company Act preserve generally the jurisdiction of state officials over their subject matter; the former in terms of "the jurisdiction of the securities commission (or any agency or office performing like functions) of any State" and the latter in terms of "the jurisdiction of any other commission, board, agency, or officer of . . . any State or political subdivision." Conversely, of course, however adequately State Securities Commissioners might regulate an investment, it was not for that reason to be freed from federal regulation. Concurrent regulation, then, was contemplated by the Acts as a quite generally prevailing matter. Nor is it rational to assume that Congress thought that *any* business whatsoever regulated by a specific class of officials, the State Insurance Commissioners, would be for that reason so perfectly conducted and regulated that all the protections of the Federal Acts would be unnecessary. This approach of personally selective deference to the state administrators is hardly to be attributed to Congress. The point must have been that there then was a form of "investment" known as insurance (including "annuity contracts") which did not present very squarely the sort of problems that the Securities Act and the Investment Company Act were devised to deal with, and which were, in many details, subject to a form of state regulation of a sort which made the federal regulation even less relevant.

At this time, of course, the sort of "variable annuity" contract with which we are concerned in this case did not exist. When Congress made the exclusions provided for in the Acts, it did not make them with the "variable

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annuity" contract before it. Of course, the point is not that if the insurance industry seeks to retain its exemption, it must limit itself to the forms of policies and contracts in effect in 1933 and 1940. But if a brand-new form of investment arrangement emerges which is labeled "insurance" or "annuity" by its promoters, the functional distinction that Congress set up in 1933 and 1940 must be examined to test whether the contract falls within the sort of investment form that Congress was then willing to leave exclusively to the State Insurance Commissioners. In that inquiry, an analysis of the regulatory and protective purposes of the Federal Acts and of state insurance regulation as it then existed becomes relevant.[5]

At the core of the 1933 Act are the requirements of a registration statement and prospectus to be used in connection with the issuance of "securities"—that term being very broadly defined.[6] Detailed schedules, set forth

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[5] No subsequent development in state insurance regulation appears to have occurred which would better adapt the system to regulation of companies performing the functions of investment trusts; but of course, in any event, the issue is the scope of state regulation in 1933 and 1940. The basic patterns do not appear to have changed and present-day regulation (apart from any measures which may have been taken specifically to deal with the contracts in question) can be examined to see the sort of regulation that Congress was deferring to in the Acts.

[6] ". . . any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing." Securities Act § 2 (1), 15 U. S. C. § 77 (b) (1).

in the Act, list the material that the registration statement and the prospectus are to contain.[7] The emphasis is on disclosure; the philosophy of the Act is that full disclosure of the details of the enterprise in which the investor is to put his money should be made so that he can intelligently appraise the risks involved.

The regulation of life insurance and annuities by the States proceeded, and still proceeds, on entirely different principles. It seems as paternalistic as the Securities Act of 1933 was keyed to free, informed choice. Prescribed contract clauses are ordained legislatively or administratively. Solvency and the adequacy of reserves to meet the company's obligations are supervised by the establishment of permissible categories of investments and through official examination.[8] The system does not depend on disclosure to the public, and, once given this form of regulation and the nature of the "product," it might be difficult in the case of the traditional life insurance or annuity contract to see what the purpose of it would be.

This congressional division of regulatory functions is rational and purposeful in the case of a traditional life insurance or annuity policy, where the obligations of the company were measured in fixed-dollar terms and where the investor could not be said, in any meaningful sense, to be a sharer in the investment experience of the com-

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[7] Securities Act §§ 7 and 10 and Schedules A and B.

[8] A leading text on life insurance outlines the areas of state life insurance regulation as follows: the establishment of a standard of solvency for the setting up of minimum reserves; the organization of domestic companies and the admission of foreign insurers; the rendition of annual statements and the making (frequently on a cooperative basis among the States) of periodic examinations; overseeing the equitable treatment of policyholders by prescribing contract terms and checking misrepresentation, discrimination, rebating and "twisting"; licensing and regulating the conduct of agents; and supervision of investments in accord with a statutory permissive list. Huebner and Black, Life Insurance (5th ed. 1958), pp. 518–524.

pany. In fact, one of the basic premises of state regulation would appear to be that in one sense the investor in an annuity or life insurance company *not* become a direct sharer in the company's investment experience; that his investment in the policy or contract be sufficiently protected to prevent this. But the situation changes where the coin of the company's obligation is not money but is rather the present condition of its investment portfolio. To this extent, the historic functions of state insurance regulation become meaningless. Prescribed limitations on investment and examination of solvency and reserves become perfectly circular to the extent that there is no obligation to pay except in terms measured by one's portfolio. But beyond controlling corporate solvency and the adequacy of reserves, and maintaining observance of the legal list of investments, the state plans of regulation do not go in regulating investment policy. Where the nature of the obligation assumed is such, the federally protected interests in disclosure to the investor of the nature of the corporation to whom he is asked to entrust his money and the purposes for which it is to be used become obvious and real. The contract between the investor and the organization no longer squares with the sort of contract in regard to which Congress in 1933 thought its "disclosure" statute was unnecessary.

The provisions of the Investment Company Act of 1940, which passes beyond a simple "disclosure" philosophy, also are informed by policies that are very relevant to the contracts involved in this case. While the Act does cover face-amount certificate companies whose obligations are specified in fixed-dollar amounts,[9] the majority of its provisions are of greatest regulatory relevance in the case of the much more common sort of

[9] See § 3 (a) (2). Specific regulatory provisions for this sort of company are found in § 28. Reserve requirements are established by the Federal Act as a method of regulation.

investment company, where the investors (or at least certain categories of them) participate on an "equity" basis in the investment experience of the enterprise. Salient regulatory provisions call for registration and recital, by an investment company, of its investment policies and operating practices; [10] regulate the relationships between the company and its investment adviser, including fees and provisions for termination of the contract; [11] regulate trading practices,[12] changes in investment policy,[13] the issuance of senior securities,[14] proxies and voting trusts,[15] the terms of redemption by investors of their interests in the company; [16] regulate, in the case of periodic investment plans (which were made subject to special regulation), the "sales load," or amount of the investor's payment that does not become part of his interest in the enterprise; [17] and provide for detailed reports to investors.[18] While these controls apply in many cases to fixed-dollar obligations, like face-amount certificates and the bonds of closed-end investment companies, they are of particular relevance to situations where the investor is committing his funds to the hands of others on an equity basis, with the view that the funds will be invested in securities and his fortunes will depend on the success of the investment. The traditional state insurance department regulation of contract terms, reserves, solvency, and permissible investments simply does not touch the points of definition of investment policy and investment technique, and control over investment policy changes and over the interests of the men who shape the policies of investment and furnish investment advice that the 1940 Federal Act provides. These controls may be largely irrelevant to traditional banks and insurance companies, which Congress clearly exempted; they were not investing

[10] § 8.
[11] § 15.
[12] § 12.
[13] § 13.
[14] § 18.
[15] § 20.
[16] § 22.
[17] § 27.
[18] § 30 (d).

heavily in equity securities and holding out the possibilities of capital gains through fund management; but where the investor is asked to put his money in a scheme for managing it on an equity basis, it is evident that the Federal Act's controls become vital.

This is not to say that because subjection of the contracts in question here to federal regulation is desirable, it has in fact been accomplished; but one must apply a test in terms of the purposes of the Federal Acts as a guide to interpreting the scope of an exemption from their coverage for "insurance." Cf. *Securities & Exchange Comm'n* v. *W. J. Howey Co.*, 328 U. S. 293, 299. When Congress passed the Securities Act of 1933 and the Investment Company Act of 1940, no State Insurance Commissioner was, incident to his duties in regulating insurance companies, engaged in the sort of regulation, outlined above as provided in the Federal Acts, that Congress thought would be appropriate for the protection of people entrusting their money to others to be invested on an equity basis. There is no reason to suppose that Congress intended to make an exemption of forms of investment to which its regulatory scheme was very relevant in favor of a form of state regulation which would not be relevant to them at all.

Second. Much bewilderment could be engendered by this case if the issue were whether the contracts in question were "really" insurance or "really" securities—one or the other. It is rather meaningless to view the problem as one of pigeonholing these contracts in one category or the other. Obviously they have elements of conventional insurance, even apart from the fixed-dollar term life insurance and the disability waiver of premium insurance sold with some of these contracts (both of which are quite incidental to the main undertaking). They patently contain a significant annuity feature (unless one defines an annuity as a contract necessarily providing fixed-sum pay-

ments),[19] and the granting of annuities has been considered part of the business of life insurance.[20] Of course, some urge that even the traditional annuity has few "insurance" features and is basically a form of investment. 1 Appleman, Insurance Law and Practice, § 83; *Prudential Ins. Co.* v. *Howell,* 29 N. J. 116, 121–122, 148 A. 2d 145, 148. But the point is that, even though these contracts contain, for what they are worth, features of traditional annuity contracts, administering them also involves a very substantial and in fact predominant element of the business of an investment company, and that in a way totally foreign to the business of a traditional life insurance and annuity company, as traditionally regulated by state law. This is what leads to the conclusion that it is not within the intent of the 1933 and 1940 statutes to exempt them.

The individual deferred variable annuity contract of respondent Variable Annuity Life Insurance Company (VALIC) gives a basis for exploration of this. A sample

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[19] The important insurance State of Connecticut has. See *Spellacy* v. *American Life Ins. Assn.,* 144 Conn. 346, 355, 131 A. 2d 834, 839. In any event, these contracts are annuities, "life annuities," in the sense that they provide for payments at periodic intervals for a period measured by a human life or lives, with the payments representing both an income element and a liquidation of contributed capital, with no further return of the investor's capital after the annuity period runs. Cf. Heubner and Black, *op. cit., supra,* at 99–100. Of course, there are annuity contracts which provide payments only for terms of years. See Vance, Insurance (3d ed. 1951), p. 1020. These have no mortality factor, and, it would appear, no insurance element at all. One of the alternative settlement options under one respondent's policies is a "variable" form of such an arrangement.

[20] State statutes make it clear that the writing of traditional annuities is part of the usual business of life insurance companies. See, *e. g.,* Cal. Insurance Code § 101; Conn. Gen. Stat., 1949, c. 295, § 6144; Smith-Hurd Ill. Ann. Stat., Tit. 73, § 616; N. Y. Insurance Law, §§ 46, 190. Cf. Huebner and Black, *op. cit., supra,* at 92; Mehr and Osler, Modern Life Insurance (rev. ed. 1956), pp. 69–70.

contract, given in evidence in the District Court, is one issued to a 35-year-old male, providing for his making 30 annual payments of $1,000 each. Of this, $39.60 is the consideration for an undertaking by the company by which payment of the annual $1,000 is waived in the event of disability. Of the remaining $960.40, designated the "basic annuity premium," specified percentages are used to credit to the account of the investor certain "accumulation units." Of the first year's "basic annuity premium," less than 45% is so used; for the next 4 years, the percentage is in the approximate range of 85% to 87%; [21] for years 6 through 10, the figure is 89%, and for the remainder of the 30-year pay-in period it is 92%. Declining term life insurance in a fixed-dollar amount, beginning at five times the annual "basic annuity premium" the first year and declining through a period of 5 years to nil, is provided as a benefit over and above the "accumulation units" credited to the account of the investor.[22] The contract is said to build up a "cash value" as the investor's payment "buys" further accumulation units, but while the value is one which can and would be finally settled by the payment of dollars, the obligation owed by the company to the investor is not one owed to him in dollar terms. It is one which is measured only in terms of "units"—the petitioners suggest a resemblance to "shares"—in a portfolio. The units are established by an

[21] The precise percentages are: first year, 44.79%; second, 85.27%; third, 85.82%; fourth, 86.45%; fifth, 87.17%. The pattern for the second through fifth years would appear to reflect the diminishing cost of declining term insurance sold as part of the contract.

[22] The cost of such insurance, bought separately, would be about 2% of the first 5-years' pay-ins. Longer terms than the 5-year are available. The contract is sold without term life insurance and without waiver of premium on disability to persons who are deemed "uninsurable." The fixed-dollar term insurance and the disability waiver risks of VALIC are heavily reinsured in orthodox insurance companies.

arbitrary computation which has the effect of dividing the company's investment assets as of a starting day into a number of units, and assigning to each unit its share of the over-all market value—though the division is not in fact made.[23] Then monthly the value of the units is recomputed. This is done, broadly, by taking into account all interest and dividends paid on the company's portfolio and all realized capital gains and losses, with relevant income taxes, together with all unrealized capital shrinkage and increase, less a monthly surcharge of 0.15% (1.8% per annum) of asset value.[24] New dollars from investors which "buy" units buy them at the new rate, thus preventing dilution, and those investors who draw down their accumulated units receive cash for them at such rate.[25]

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[23] Even before there are contract holders, a "unit" is set up in terms of the then value of the company's investment portfolio. While the number of units credited to investors does not accordingly account for the entire value of the "fund," the value of the units fluctuates as the value of the company's investment portfolio fluctuates in the same fashion as if they were shares in an open-end investment fund.

[24] The surcharge is accounted for in the same way as that part of the premium gross income that does not go toward the crediting of accumulation units. The analogy is to an annual "management fee" in an investment trust. Of course, the surcharge is not in fact paid to anyone as a fee for any specific purpose; but to the extent that it is made, a portion of the company's assets is freed from being charged with the valuation of units credited to investors. To this extent, the company's assets become available for the payment of expenses, for the satisfaction of its obligations in the event the investors as a group outlive their tabular expectancy, and for dividends to common stockholders.

[25] A concrete example of a few years' hypothetical experience during the pay-in period may illustrate the workings of these contracts. It is based on the specific contract described in the text.

Assume a unit value of $1 at the start of the contract. The investor's first annual payment of $1,000, less the disability waiver premium and the "loading charge," buys 430 units at the $1 rate.

Assume a favorable year in the company's portfolio's market performance; net capital gains (realized and unrealized) of 15% and

The contract uses insurance terminology throughout and many of the common features of life insurance and annuity policies are operative in regard to it at this "pay-in" stage. There are "incontestability" and "suicide" clauses (which mainly relate to the term insurance); a "grace period" allowed for the payment of premiums; a provision for "policy loans" (the drawing down of accumulated units in cash, subject to replacement later to the extent that repayment of the amount of money received will then permit, the transaction bearing a resemblance to the liquidation by a common stock investor of his holdings in anticipation of a "bear market"); and provision for a "cash value" (that is, for the cashing in of the accumulated units, subject to a surrender charge in the early years). And very certainly the commitment of the

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interest and dividends of 3% of original value, all net of income taxes. On the average asset value at month ends during the year, the 1.8% annual charge would come to about 2% of original value. This would make the value of a unit after a year about $1.16.

Of the second annual premium of $1,000, $819 goes toward buying 706 units at the new rate of $1.16. Thus after the second annual premium, the investor has 1,136 units to his credit.

Assume a very favorable second year in the market, with net capital gains of 25% of the year's beginning value (29 cents a unit) and income items of 5% of beginning value (about 6 cents a unit), all net of income taxes. The annual charge of 1.8% will come to about 2.4 cents per unit, and the resulting value at year end will be about $1.49 per unit.

Of the third annual premium of $1,000, $824 goes toward buying 553 units at the new rate of $1.49. Thus after the third annual premium, the investor has 1,689 units to his credit.

Assume a bear market the third year, with a 12% net capital shrinkage in the company's portfolio (about 18 cents a unit) and income at 2% of beginning value (3 cents a unit), all net of income taxes. The 1.8% charge would come to about 2.5 cents a unit. These adjustments would give a year end unit value of about $1.31 a unit.

If instead of going on with the contract, the investor then "cashed in his chips," he would get $2,212.59 for his 1,689 units, less a $10 surrender charge.

company eventually to disburse the accumulated values on a life annuity basis once the pay-in period is over is present throughout this period. But what the investor is participating in during this period, despite its acknowledged "insurance" features, is something quite similar to a conventional open-end management investment company, under a periodic investment plan. The investor's cash (less a charge analogous to a loading charge, which is, at least in the early years, very high, but which, it should be said, has to cover annuity premium taxes and some quite conventional mortality risks) goes to buy "units" in a portfolio managed by the persons in control of the corporation. His "units" fluctuate with the income and capital gain and loss experience of the management of the portfolio. He may cash them in, wholly or partially. The amount of his equity is subjected to a charge, on asset value, of 1.8% per annum. Except for the temporary term insurance and the waiver of premium coverage, the entire nature of the company's obligation to its investor during this period is not in dollars (though of course it will be converted into them, just as a commodity transaction can be), but solely in terms of the value of its portfolio. In this sort of operation, examination by state insurance officials to determine the adequacy of reserves and solvency becomes less and less meaningful. The disclosure policy of the Securities Act of 1933 becomes, by comparison, more and more relevant. And the detailed protections of the 1940 legislation—disclosure of investment policy, regulation of changes of that policy, of capital structure, conflicts of interest, investment advisers—all become relevant in an acute way here. These are the basic protections that Congress intended investors to have when they put their money into the hands of an investment trust; there is no adequate substitute for them in the traditional regulatory controls administered by state insurance departments,

because these controls are not relevant to the specific regulatory problems of an investment trust.[26]

The same conclusions follow from a consideration of the next stage of this contract. Before the maturity date, when the schedule of payments in on the contract ceases and the payments out commence, the investor can draw down his "units" in cash, and dispense with all "annuity" features. Failing this, he is entitled to elect one of several annuity alternatives. These are, in the sample policy, a straight life annuity on the life of the investor, a straight life annuity with 10 years' payments certain, and a joint and survivor annuity on the life of the investor and another. Again, while the duration of the company's obligation to pay is independent of its investment experience, the amount of each payment is not a direct money obligation but a function of the status of the company's portfolio. The amounts of the payments are calculated in this fashion: The dollar value of the accumulated units credited to the investor throughout the years is

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[26] The least-subtle example of the absent protections is that regarding investment policy. The state investment lists are minima; within the limits of the lists, the companies have very broad discretion in making investments, see Mehr and Osler, *op. cit., supra,* at 612, and there appears to be no control at all over their changing their investment policies. The difference in emphasis between the two forms of regulation and the obvious correspondence of the contract in question with an investment trust in this essential regulatory matter hardly needs underscoring.

Even the minimal controls over investment policy furnished by the prescribed lists are administered primarily by one State, the State of incorporation. New York's Insurance Law, § 90, applying in terms the local controls, at least "in substance," to foreign companies doing business within the State, appears the exception rather than the rule. See Vance, *op. cit., supra,* at 43. Other States insist on their own requirements as to part of the assets of a foreign insurance company doing a local business. See Cal. Insurance Code § 1153. Some States explicitly make some deference to the State of incorporation. See Smith-Hurd Ill. Ann. Stat., Tit. 73, § 723 (e).

ascertained. A standard annuity table (including a 3½% interest assumption) is used to determine the dollar amount of the first monthly pay-out, based on a capital contribution of the accumulated amount, under the option selected by the investor. The number of "annuity units" (which are functions of the fluctuating asset value of the portfolio of the company) that this amount would buy is computed, and this number of annuity units is paid (transmuted into a varying cash payment) to the investor every subsequent month for the duration of the company's commitment under the option selected. Like that of an "accumulation unit" during the pay-in period, the value in dollars of an "annuity unit" is readjusted monthly to give effect to the investment income of the securities in the company's portfolio for the period, as well as to capital gains and losses, realized and unrealized. Since the first payment (which forms the basis for measurement of the subsequent payments) contains an assumed interest factor, and since the monthly valuation change includes income items—interest and dividends—received in respect of the company's portfolio, to avoid paying double "interest" the 3½% assumed interest factor is wrung out every month by multiplying the preceding month's valuation by 0.9971.[27] And the 1.8% annual surcharge on asset value is applied also.[28]

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[27] The reciprocal of 1.000 plus monthly interest at the rate of 3½% per annum.

[28] A concrete hypothetical example of the workings of the contract in the pay-out period may be useful. Assume that the investor described in the text and in footnote 25 did not cash in his contract, but kept it during the entire 30-year pay-in period. Assume that he has accumulated, through premium-payment "purchases" at varying prices throughout the years, 14,000 units and that the value of a unit has mounted to $3 over the years. The investor can now take his $42,000 in cash, if he chooses. But let us assume that he is healthy and without dependents, so that he is moved to elect the option of a straight life annuity. This capital contribution of $42,000 by a 65-

The effect of this is that the investor, during the pay-out period, is in almost every way as much a participant in something equivalent to an investment trust as before. His monthly payment is not really a dollar payment, though it is converted into dollars before it is paid to him; it is a payment in terms of a portfolio of securities. It is true that the company has a fixed obligation to continue payments, and that the duration and the amount of the payments are not affected by collective longevity in excess of the company's assumptions; the company's obligation to continue payments is not limited in any way by reference to the number of units owned by all the investors

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year-old male would buy a fixed-dollar annuity of $286 a month. This is in fact what our investor will get the first month. But this first monthly payment will be used to fix the number of annuity units he will receive monthy for the rest of his life.

Assume that the value at this time of an annuity unit is $2. (While the value of an annuity unit tends to move in the same direction as the value of an accumulation unit, it differs from it because every month it is multiplied by 0.9971 to "wring out" the assumed interest factor in the annuity table. So over the years, the current values of the two sorts of units will drift apart, even though they move the same way with the fluctuations of the company's portfolio.) At the $2 rate, the first monthly payment is 143 units, and this number of units will be paid the investor monthly for life.

Assume that there is a sharp break in the market during the first month of the pay-out period. (Actually, there is a one-month lag in computation, but for the purposes of demonstration this can be ignored.) Suppose this market break shrinks the capital value of the company's portfolio by 8% (16 cents a unit). Assume income items during the month at 3% per annum (0.5 cents). Then deduct the omnipresent 1.8% annual charge (0.3 cents). This puts the current value at $1.842; the 0.9971 multiplier must be applied to wring out the interest assumption in the annuity table. This gives an adjusted value of $1.8367. The investor is then paid, for his second monthly payment, 143 units at this new rate, or $262.65.

The recomputation of the unit value takes place monthly, and every month the investor is paid 143 units at the new rate, whatever this may come to in dollars.

at the start of their annuity periods. If the lives of the group of investors exceed the longevity assumptions of the table, the proceeds of what might otherwise have been characterized as a very high "loading charge" (8% at its lowest application, with 11% the minimum for the first 10 years) and a substantial "annual management fee" (1.8% of asset value annually) will have to provide, with the company's other surplus and capital, enough to continue payments. But the individual payment is still a payment measured basically in the same way as one's interest in an investment trust is measured. And in a very real sense the investor is more vitally interested in the investment experience of the company at this period than he ever was in the pay-in period, and in a way more vitally than any holder of an open-end investment company certificate, or share in a publicly traded closed-end company ever is: he has become completely "locked in." He obviously cannot draw down the present value of his "units" once the option to receive annuity payments has been exercised; he cannot "cash in his chips" that he bought in the faith of the management of the fund; his rights are technically assignable, but practically unmarketable since they depend on his individual life span. The company can radically change investment policies, change advisers, do whatever it pleases (so long as it does not run afoul of the minimal investment regulations of the State), and there is nothing the contract holder can do about it. It is not rational to say that Congress abandoned the very appropriate protections of the Investment Company Act in this investor's case in favor of provisions of state regulation that are quite irrelevant to the basic problems of protecting him.

The respondents seek to equate this contract with a fixed-dollar "participating" annuity sold by a mutual company, or one sold by a stock company on a participating basis. This contention is not persuasive. While

investment experience in a "participating" contract can redound to the benefit of the policyholder, the contracts are sold as fixed-dollar obligations. The "dividends" are promoted as such. During the pay-in period, they might be thought of as a reduction of premium.[29] They may very well represent favorable mortality risk experience, particularly where the company's investments are conservative. And the annuity-paying insurance company's investments are doubtless administered in the light of the fixed obligation of the company. The company is not committed by its literature to perform part of the job of a common-stock investment trust.[30] No one has yet tried to follow the academic suggestion of respondent VALIC, and reduce the fixed guarantee of a traditional life annuity to the point of insignificance and make the rest of the return to the contract holder variable, by selling it on a "participating" basis.[31] The comparison of the premium cost of such a contract to its fixed return might well make it unsalable to the public. Even more unpersuasive is the respondents' argument that even in a traditional annuity the policyholder bears the investment risk in the sense that he stands the risk of the company's insolvency. The prevention of in-

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[29] See Mehr and Osler, *op. cit., supra,* at 583; cf. *Fuller* v. *Metropolitan Life Ins. Co.,* 70 Conn. 647, 666, 41 A. 4, 11.

[30] In the traditional form of insurance, the appreciation potential of common stocks is said not to be the predominant reason for an insurer's investing in them. While many States allow investment in them in varying degrees, commentators emphasize that the purpose of such investment is primarily diversification of investment; in certain industries, common stock may be the only sort of available investment. Huebner and Black, *op. cit., supra,* at 505. Of course, the primary investment aim of the traditional insurer is preservation of dollar capital with income. *Id.,* at 507.

[31] VALIC's hypothetical is an annuity based on an investment return of ½% per annum and an average mortality at 110 years.

solvency and the maintenance of "sound" financial condition in terms of fixed-dollar obligations is precisely what traditional state regulation is aimed at. The protection of share interests in a fluctuating, managed fund has received the attention of specific federal legislation. Both are "investment risks" in a sense, but they differ vastly in kind and lend themselves to different regulatory schemes.

Accordingly, while these contracts contain insurance features, they contain to a very substantial degree elements of investment contracts as administered by equity investment trusts. They contain these elements in a way different in kind from the way that insurance and annuity policies did when Congress wrote the exemptions for them in the 1933 Act and the 1940 Act. Since Congress was intending a broad coverage in both these remedial Acts and since these contracts present regulatory problems of the very sort that Congress was attempting to solve by them, I conclude that Congress did not intend to exclude contracts like these by reason of the "insurance" exemptions.

Third. The respondents contend that a reversal of the judgment will put them out of business. The reason given is that if the Investment Company Act of 1940 applies to them, they are probably categorizable under it as open-end management companies,[32] and it is

[32] According to § 5, " 'Open-end company' means a management company [*i. e.*, an investment company other than a unit investment trust or a face-amount certificate company, § 4] which is offering for sale or has outstanding any redeemable security of which it is the issuer." The redeemability of these contracts during the pay-in period would appear to make their issuer come under this definition. Even if the companies were considered closed-end companies, they argue that other provisions of § 18 would pose very difficult problems for them. See § 18 (a).

declared unlawful by § 18 of the Act for an open-end company to have outstanding any "senior security," that is, any security senior to any other class of securities. These companies have capital stock, and the contracts in question would be securities senior to the stock.[33] If one assumes that this is correct, there is of course the possibility that the SEC might use its broad dispensing powers in this regard, and, in any event, the whole point would be of no concern at all if the contracts in question were issued by mutual companies.[34] But in the final analysis, it is not decisive of the issues here that a holding that these con-

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[33] The companies say that this is because their contracts are debt obligations. It is quite doubtful whether the contracts can be described as debts; certainly they are not much more of a debt than a redeemable share in an orthodox open-end company is; here the redemption feature is expressed in outright redeemability during the pay-in period and in liquidation on an annuity basis in the pay-out period. But in any event, whether the contracts are debts or not, they have priority over the companies' stock, and the provisions dealing with senior securities would appear to cover them.

[34] The most basic purpose of the provision might be viewed by the SEC as the protection, in the case of the traditional open-end company, of the investment certificate holders from the creation of securities senior to their interests (as well as preventing, in the interest of their purchasers, the creation of a class of "senior" securities which would be senior only to freely redeemable junior securities). Since it is the senior securities here which are the analogs of open-end investment trust certificates, quite the contrary situation might be thought to be presented. The SEC's dispensing authority in regard to the Investment Company Act is found in § 6 (c), which provides: "The Commission, by rules and regulations upon its own motion, or by order upon application, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title."

tracts are subject to the Federal Acts might require some modification in the business of issuing them. Since these contracts are in fact covered by the Acts, there can be no reason why their issuers should be able to carry on the investment business in a way which Congress has forbidden.

Similarly, it may be conceded freely that this form of investment contract may be one of great potential benefit to the public. So, of course, may be orthodox open-end investment trusts, and they clearly are regulated by federal law. In short, notions that this form of arrangement is a desirable one and that it might be well to allow it to exist for a while immune from federal regulation are not relevant to the matter for decision. Congress regulates by general statutes. The passage of a federal regulatory statute is a delicate balancing of many national legislative interests and political forces. Congress need not go through the initial travail of re-enacting its general regulatory scheme every time a new form of enterprise is introduced, if that new form falls within the scheme's coverage. If there is deemed wise any adjustment of the regulatory scheme in the light of new developments in the subject matter to which it extends, Congress may make it.

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

The issue in these cases is whether Variable Annuity Life Insurance Company of America (VALIC) and The Equity Annuity Life Insurance Company (EALIC) are subject to regulation by the Securities and Exchange Commission under the Securities Act of 1933 and the Investment Company Act of 1940 with respect to their variable annuity business.

Section 3 (a)(8) of the Securities Act, 48 Stat. 74, 76, 15 U. S. C. § 77c (a)(8), provides that the statute shall not apply to:

> "Any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions, of any State or Territory of the United States or the District of Columbia."

Section 3 (c)(3) of the Investment Company Act, 54 Stat. 789, 798, 15 U. S. C. § 80a–3 (c)(3), puts outside the coverage of the Act "[a]ny . . . insurance company," and § 2 (a)(17), 54 Stat. 789, 793, 15 U. S. C. § 80a–2 (a)(17), defines an insurance company as:

> "a company which is organized as an insurance company, whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies, and which is subject to supervision by the insurance commissioner or a similar official or agency of a State; or any receiver or similar official or any liquidating agent for such a company, in his capacity as such."

These two insurance companies are organized under the Life Insurance Act of the District of Columbia, 35 D. C. Code, 1951, §§ 35–301 to 35–803, and are subject to regulation by the Superintendent of Insurance of the District of Columbia, who has approved the annuity policies written by them. At the time of trial VALIC had also qualified to do business in Arkansas, Kentucky, and West Virginia, and its annuity policies had likewise been approved by the insurance departments of those States.[1] Both companies in the District of Columbia,

[1] Since the trial VALIC has also qualified in Alabama and New Mexico, and EALIC in North Dakota.

and VALIC in the other States, offer their policies to the public only through insurance agents duly licensed by the local insurance authority.

Variable annuity policies are a recent development in the insurance business designed to meet inflationary trends in the economy by substituting for annuity payments in fixed-dollar amounts payments in fluctuating amounts, measured ultimately by the company's success in investing the premium payments received from annuitants. One of the early pioneers in this field was Teachers Insurance and Annuity Association, a New York regulated life insurance organization engaged in selling annuities to college personnel. The Association in 1950 made exhaustive studies into the feasibility and soundness of variable annuities. Two years later, it incorporated College Retirement Equities Fund, a companion company under joint management with Teachers Insurance, which, subject to regulation under the New York Insurance Law, commenced offering such annuity contracts in the teaching profession.[2] The first life insurance company to offer such contracts generally appears to have been the Participating Annuity Life Insurance Company, which since 1954 has been selling variable annuity policies under the supervision of the Arkansas insurance authorities. VALIC and EALIC entered the field in 1955 and 1956 respectively.

The characteristics of a typical variable annuity contract have been adumbrated by the majority. It is sufficient to note here that, as the majority concludes, as the two lower courts found, and as the SEC itself recognizes, it may fairly be said that variable annuity contracts contain both "insurance" and "securities" features. It is

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[2] By the end of 1956 the College Retirement Fund had issued such annuities to more than 31,000 individuals, and the value of its annuity units had increased from $10 to $18.51.

certainly beyond question that the "mortality" aspect of these annuities—that is the assumption by the company of the entire risk of longevity—involves nothing other than classic insurance concepts and procedures, and I do not understand how that feature can be said to be "not substantial," determining as it does, apart from options, the commencement and duration of annuity payments to the policyholder. On the other hand it cannot be denied that the investment policies underlying these annuities, and the stake of the annuitants in their success or failure, place the insurance company in a position closely resembling that of a company issuing certificates in a periodic payment investment plan. Even so, analysis by fragmentization is at best a hazardous business, and in this instance has, in my opinion, led the Court to unsound legal conclusions. It is important to keep in mind that these are not cases where the label "annuity" has simply been attached to a securities scheme, or where the offering companies are traveling under false colors, in an effort to avoid federal regulation. The *bona fides* of this new development in the field of insurance is beyond dispute.

The Court's holding that these two companies are subject to SEC regulation stems from its preoccupation with a constricted "color matching" approach to the construction of the relevant federal statutes which fails to take adequate account of the historic congressional policy of leaving regulation of the business of insurance entirely to the States. It would be carrying coals to Newcastle to re-examine here the history of that policy which was fully canvassed in the several opinions of the Justices in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, and which was again implicitly recognized by this Court as recently as last Term when, in *Federal Trade Comm'n* v. *National Casualty Co.*, 357 U. S. 560, we declined to give a niggardly construction to the McCarran

Act. Suffice it to say that in consequence of this Court's decision 90 years ago in *Paul* v. *Virginia,* 8 Wall. 168, and the many cases following it,[3] there had come to be "widespread doubt" prior to the time the Securities and Investment Company Acts were passed "that the Federal Government could enter the field [of insurance regulation] at all." *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.,* 348 U. S. 310, 318; see also *Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408, 414.

I can find nothing in the history of the Securities Act of 1933 which savors in the slightest degree of a purpose to depart from or dilute this traditional federal "hands off" policy respecting insurance regulation. On the contrary, the exemption of insurance from that Act, which is couched in the broadest terms, reflected not merely adherence to tradition but also compliance with a supposed command of the Constitution. In a study of the proposed Act, the Department of Commerce concluded that the legislation could be bottomed on the federal power over commerce because securities did have the independent general commercial existence and value which the *Paul* decision had found lacking in insurance policies. See A Study of the Economic and Legal Aspects of the Proposed Federal Securities Act, reprinted in Hearings before Senate Committee on Banking and Currency on S. 875, 73d Cong., 1st Sess. 312, at 330, and in Hearings before House Committee on Interstate and Foreign Commerce on H. R. 4314, 73d Cong., 1st Sess. 87, at 105. This distinction between securities and insurance, mistaken or not, underlay the passage of the final bill. When the proposed act was considered by the Senate and House Committees, it did not contain an express exemption of

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[3] The cases are collected in *United States* v. *South-Eastern Underwriters Assn., supra,* at 544, n. 18.

insurance. The House Committee explained that the exemption in the final bill (§ 3 (a)(8) of the Act):

> "makes clear what is already implied in the act, namely, that insurance policies are not to be regarded as securities subject to the provisions of the act. The insurance policy and like contracts are not regarded in the commercial world as securities offered to the public for investment purposes. The entire tenor of the act would lead, even without this specific exemption, to the exclusion of insurance policies from the provisions of the act, but the specific exemption is included to make misinterpretation impossible." H. R. Rep. No. 85, 73d Cong., 1st Sess. 15.

That this distinction stemmed from the feared implications of the *Paul* decision appears from the House debates. See 73d Cong., 1st Sess., 77 Cong. Rec. 2936, 2937, 2938, 2946. Moreover, two days after the Senate began consideration of the proposed act, Senator Robinson introduced a resolution (S. J. Res. 51) calling for a constitutional amendment because, in his view, "the National Government at present has no authority whatever over insurance companies." 73d Cong., 1st Sess., 77 Cong. Rec. 3109.

Similarly, I can find nothing in the history of the Investment Company Act of 1940 which points in any way to a change in federal policy on this score. Here tradition, perhaps more than constitutional doubt, explains the exemption of insurance companies from the Act. In hearings before the House Committee, Commissioner Healy of the SEC discussed the "face-amount installment certificates" issued by certain investment companies and often "sold on the basis of the comparison with savings bank deposits and insurance policies." The major factor appearing to distinguish these investment

companies from insurance companies for purposes of federal control was the strict state regulation present over insurance policies but absent over investment certificates. Hearings before House Committee on Interstate and Foreign Commerce on H. R. 10065, 76th Cong., 3d Sess. 61–62. Likewise, in the Senate debates, preservation of state regulation over insurance companies appears as the crucial factor distinguishing them from investment trusts. 76th Cong., 3d Sess., 86 Cong. Rec. 10070. Stating that "the bill has nothing to do with the regulation of insurance companies," Senator Byrnes went on to say: "The platforms of both political parties have urged supervision of insurance by the several States, but not regulation by the Federal Government." *Id.*, at 10071. See also *United States* v. *South-Eastern Underwriters Assn., supra,* at 584, 591–592, n. 12 (dissenting opinion).

In 1944, this Court removed the supposed constitutional basis for exemption of insurance by holding, in *United States* v. *South-Eastern Underwriters Assn., supra,* that the business of insurance was subject to federal regulation under the commerce power. Congress was quick to respond. It forthwith enacted the McCarran Act, 59 Stat. 33, 15 U. S. C. §§ 1011–1015, which on its face demonstrates the purpose "broadly to give support to the existing and future state systems for regulating and taxing the business of insurance," *Prudential Ins. Co.* v. *Benjamin, supra,* at 429, and "to assure that existing state power to regulate insurance would continue." *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co., supra,* at 319. Thus, rather than encouraging Congress to enter the field of insurance, the *South-Eastern* decision spurred reiteration of its undeviating policy of abstention.

In this framework of history the course for us in these cases seems to me plain. We should decline to admit the SEC into this traditionally state regulatory domain.

Admittedly the variable annuity was not in the picture when the Securities and Investment Company Acts were passed. It is a new development combining both substantial insurance and securities features in an experiment designed to accommodate annuity insurance coverage to contingencies of the present day economic climate.[4] This, however, should not be allowed to obscure the fact that Congress intended when it enacted these statutes to leave the future regulation of the business of insurance wholly with the States. This intent, repeatedly expressed in a history of which the Securities and Investment Company Acts were only a part, in my view demands that *bona fide* experiments in the insurance field, even though a particular development may also have securities aspects, be classed within the federal exemption of insurance, and not within the federal regulation of securities.[5] Certainly these statutes breathe no notion of concurrent regulation by the SEC and state insurance authorities. The fact that they do not serves to reinforce the view that the congressional exemption of insurance was but another manifestation of the historic federal policy leaving regulation of the business of insurance exclusively to the States.[6]

It is asserted that state regulation, as it existed when the Securities and Investment Company Acts were passed,

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[4] See Morrissey, Dispute Over the Variable Annuity, 35 Harv. Bus. Rev. 75 (1957).

[5] It is worth observing that in reporting the proposed Securities Act of 1933 the House Committee stated that insurance policies "and like contracts" were to be exempt from federal regulation. See *ante*, p. 98.

[6] In contrast, § 18 of the Securities Act, 48 Stat. 74, 85, 15 U. S. C. § 77r, provides that the Act shall not affect the jurisdiction of state securities commissions, thus recognizing a system of dual regulation where the exemptive provisions are not applicable. The Investment Company Act has a similar provision, § 50. 54 Stat. 789, 846, 15 U. S. C. § 80a–49.

was inadequate to protect annuitants against the risks inherent in the variable annuity and that therefore such contracts should be considered within the orbit of SEC regulation. The Court is agreed that we should not "freeze" the concept of insurance as it then existed. By the same token we should not proceed on the assumption that the thrust of state regulation is frozen. As the insurance business develops new concepts the States adjust and develop their controls. This is in the tradition of state regulation and federal abstention. If the innovation of federal control is nevertheless to be desired, it is for the Congress, not this Court, to effect.

I would affirm.

TAK SHAN FONG *v.* UNITED STATES.

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

No. 110. Argued February 24, 1959.—Decided March 23, 1959.

Petitioner seeks naturalization under § 1 of the Act of June 30, 1953, which provides for the naturalization of aliens who served at least 90 days in the Armed Forces between June 24, 1950, and July 1, 1955, "(1) having been lawfully admitted to the United States for permanent residence, or (2) having been lawfully admitted to the United States, and having been physically present within the United States for a single period of at least one year at the time of entering the Armed Forces." Having been lawfully in the United States for a short period in 1951 on a seaman's 29-day pass, petitioner entered unlawfully on January 27, 1952, and remained through his induction into the Army on May 4, 1953, in which he served until his honorable discharge on May 3, 1955. *Held:* He was not entitled to naturalization, because the statute, properly construed, requires that the entry into the United States which leads to the alien's physical presence for the period preceding his induction into the Army be a lawful entry. Pp. 102–107.

254 F. 2d 4, affirmed.

William B. Mahoney argued the cause and filed a brief for petitioner.

John F. Davis argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *J. F. Bishop.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner, a native and citizen of China, seeks naturalization pursuant to the provisions of an Act of Congress, passed in 1953, designed to facilitate the naturalization of aliens who served in our armed forces during the gen-

eral period of the Korean hostilities.[1] The statute provides for the naturalization of aliens serving at least 90 days in the armed forces after June 24, 1950, and not later than July 1, 1955:

> "(1) having been lawfully admitted to the United States for permanent residence, or (2) having been lawfully admitted to the United States, and having been physically present within the United States for a single period of at least one year at the time of entering the Armed Forces . . . ."

Petitioner first entered the United States on August 24, 1951, at Honolulu on a seaman's 29-day pass, and departed from the country with his ship. On January 27, 1952, petitioner again entered the United States at Newport News, where the vessel on which he was employed was then touching. The exact circumstances of this entry are disputed, but it is conceded on all sides that it was unlawful. Petitioner did not depart with his ship, but remained within the United States. He was apprehended in June 1952 and deportation proceedings were commenced against him; but the proceedings were halted when it became known that on May 4, 1953, he had been inducted into the Army. He served honorably until his discharge on May 3, 1955, and on December 22, 1955, instituted the present proceedings based on the statute to which we have referred.[2] The District Court granted his petition for naturalization, but the Court of Appeals reversed. 254 F. 2d 4. We granted certiorari. 358 U. S. 811.

Congress has shown varying degrees of liberality in granting special naturalization rights to aliens serving in our armed forces at various times. For example, the

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[1] § 1 of the Act of June 30, 1953, c. 162, 67 Stat. 108, 8 U. S. C. (Supp. V) § 1440a.

[2] The statute requires that petitions for naturalization filed under it be filed not later than December 31, 1955.

Immigration and Nationality Act of 1952 allows such rights to those having served honorably in World War I or during the period September 1, 1939, to December 31, 1946, if at the time of their induction or enlistment they simply were physically present in the United States or certain named outlying territories.[3] On the other hand, that Act's general provision allowing aliens with three years' armed service at any time to be naturalized free of certain residence requirements[4] provides no exemption from the requirement that they have been "lawfully admitted to the United States for permanent residence."[5] We must examine the extent to which Congress has made these rights available here, in this statute aimed at service during the Korean hostilities. Petitioner contends that, under clause (2), one year's presence in the United States at the time of induction entitles him to them if at any time theretofore he had been lawfully admitted to the country. He relies on his lawful admittance and brief stay in the country at Honolulu in 1951 as providing this. The Government contends that the lawful admittance must have been the means whereby the alien commenced his year's presence in the country, and that accordingly the lawful Honolulu entry is irrelevant. We are in agreement with the Government's view of the statute.

While perhaps a verbal construction of the statute can be made as not implying any connection between the required lawful admittance and the required year's presence, we think the only fair and natural construction of the words is that one is implied. As distinguished from its policy toward World War I and II service, Congress was not prepared to allow special naturalization

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[3] § 329, 66 Stat. 250, 8 U. S. C. § 1440. See also note 7, *infra*.

[4] § 328, 66 Stat. 249, 8 U. S. C. § 1439.

[5] § 318, 66 Stat. 244, 8 U. S. C. § 1429. The 1953 Act explicitly exempts those who can qualify under its terms from the requirements of § 318.

rights to aliens serving at the time of Korea simply if they entered the service while physically, for any length of time and lawfully or unlawfully, within the United States. Nor was it prepared to make one year's residence alone the condition; it also imposed the requirement of lawful admittance. It would not be a meaningful requirement to attribute to Congress if it could have been satisfied by a lawful entry, followed by departure, before and unconnected with the commencement of the year's presence. We believe that Congress must have been referring to the last entry before the year's presence—the entry into the country which provided the occasion for that presence. Cf. *Bonetti* v. *Rogers,* 356 U. S. 691. Under this construction, clause (2) of the statute requires a "single period" of residence commencing with a lawful admission and continuing for a year thereafter. It does not demand that the alien's continuing status in the country be lawful, but it does make that requirement of the entry which gives rise to his presence.

Such legislative history as is relevant to the meaning of the statute bears out this construction. The Act was passed in the First Session of the Eighty-third Congress, and when the bill that became the Act was first brought to the House floor after Committee consideration during that Session,[6] the member reporting it stated that it was identical with the law that existed during "the war" (presumably World War II)[7] with the exception that

[6] There had been activity within Congress in this direction during the Eighty-second Congress, but no bill was passed. See H. R. Rep. No. 1176, 82d Cong., 1st Sess.; S. Rep. No. 1713, 82d Cong., 2d Sess.

[7] The statute actually in effect during World War II was § 701 of the Nationality Act of 1940, added by Title X of the Second War Powers Act, 1942, 56 Stat. 182. The requirement of lawful admittance, at first made by the Act, was substantially dispensed with through an amendment by the Act of December 22, 1944, c. 662, 58 Stat. 886.

it applied only to aliens who were "legally and lawfully in the United States." 99 Cong. Rec. 2639. This must be read in the context of the House Committee Report's statement that "lawful admission" was a prerequisite to the bill's benefits, and its explanation that it had rejected a proposal of the Justice Department that would have required the presence of the alien at the time of entrance into the armed services also be lawful. The Committee had felt that the alien should not be saddled with "the technicalities involved in connection with the continuance of such [lawful] status at the time of entering the Armed Forces." H. R. Rep. No. 223, 83d Cong., 1st Sess., p. 4. The House bill required only lawful admission and physical presence at the time of entering the service; [8] later the Senate inserted the one year's presence requirement,[9] but we do not perceive any change in the distinction we have set forth above. To us, this indicates that Congress desired that the alien's presence in the country be the consequence of a lawful admission, even though the continuance of his stay be beyond the terms on which he was admitted. It is true that the present statute does not in terms state the nexus between admission and the required period of residence as positively as did a 1932 alien veterans' statute which petitioner urges on us for comparison, and which required that the alien have "resided continuously within the United States

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[8] The bill then extended to "any person, not a citizen, who, after June 24, 1950, and not later than July 1, 1955, has actively served or actively serves, honorably, in the Armed Forces of the United States for a period or periods totaling not less than 30 days and who, having been lawfully admitted to the United States . . . shall have been at the time of entering the Armed Forces within such area . . . ." See 99 Cong. Rec. 2639.

[9] See S. Rep. No. 378, 83d Cong., 1st Sess., p. 4. The alternative now found in clause (1), admission for permanent residence, was also introduced in the Senate.

for at least two years, in pursuance of a legal admission for permanent residence." [10] § 1, Act of May 25, 1932, c. 203, 47 Stat. 165. But, as we have explained, Congress did not wish this Act to imply a requirement that the continuance of the alien's presence here be lawful, and such language might have done so. We find the language it in fact used was apt to draw the lines we have indicated above.

Of course, we must be receptive to the purpose implicit in legislation of this sort, to express the gratitude of the country toward aliens who render service in its armed forces in its defense. But that does not warrant our rationalizing to an ambiguity where fairly considered none exists, or extending the generosity of the legislation past the limits to which Congress was willing to go. The service petitioner has rendered this country might inspire legislative relief in his behalf; but here we take the statute as it stands, and under it the judgment of the Court of Appeals was correct.

Affirmed.

THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE DOUGLAS dissent.

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[10] The provision relates to the period before filing the naturalization petition, rather than before entrance into the service, but this difference does not affect the comparison asserted.

SIMS *v.* UNITED STATES.

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

No. 88. Argued February 26, 1959.—Decided March 23, 1959.

Under § 6331 of the Internal Revenue Code of 1954, a Director of Internal Revenue issued notices of levy directed to a State and served them on petitioner, the State Auditor, seizing the accrued salaries of certain employees of the State against whom the Commissioner of Internal Revenue had assessed income tax deficiencies. Petitioner refused to honor the levies and issued and delivered to the taxpayers warrants for their accrued salaries. The Federal Government then brought this suit against petitioner under § 6332 to recover from him personally the sums he had so paid to the taxpayers in disobedience of the Government's levies. *Held:*

1. Sections 6331 and 6332 authorize a levy on the accrued salaries of the employees of a State to collect federal income taxes. Pp. 110–113.

2. Petitioner, as State Auditor, was a person "obligated with respect to" the accrued and seized salaries, within the meaning of § 6332, and therefore was personally liable for refusing to surrender them to the Government. Pp. 113–114.

252 F. 2d 434, affirmed.

Fred H. Caplan, Assistant Attorney General of West Virginia, argued the cause for petitioner. With him on the brief was *W. W. Barron,* Attorney General of West Virginia.

Melva M. Graney argued the cause for the United States. With her on the brief were *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph Kovner.*

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

The Commissioner of Internal Revenue assessed an income tax deficiency against each of three residents of West Virginia and forwarded the assessment lists to the

Director of Internal Revenue at Parkersburg for collection. The deficiencies remaining unpaid for more than 10 days after demand for payment and the taxpayers being then employed by the State of West Virginia, the Director issued notices of levy directed to the State of West Virginia and served them on petitioner, as the State Auditor, seizing the accrued salaries of the taxpayers pursuant to § 6331 of the 1954 Internal Revenue Code, 26 U. S. C. (Supp. V) § 6331.[1] Petitioner refused to honor the levies and instead issued and delivered payroll warrants to the taxpayers for their then accrued net salaries aggregating $519.71.[2] Thereafter the Government brought this suit in the Federal District Court against petitioner under § 6332 of the 1954 Internal Revenue Code, 26 U. S. C. (Supp. V) § 6332,[3] to recover from

[1] 26 U. S. C. (Supp. V) § 6331, in pertinent part, provides:

"(a) Authority of secretary or delegate.—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax . . . by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer . . . .

"(b) Seizure and sale of property.—The term 'levy' as used in this title includes the power of distraint and seizure by any means. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible)."

[2] The assessment against each of the taxpayers substantially exceeded in amount the accrued salary owing to each at the time of the levies.

[3] 26 U. S. C. (Supp. V) § 6332 provides:

"(a) Requirement.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon

him personally the $519.71 that he had so paid to the taxpayers in disobedience to and defeat of the Government's levies. The District Court rendered judgment for the Government and the Court of Appeals affirmed, 252 F. 2d 434. Certiorari was sought on the grounds that § 6331 does not authorize a levy on the accrued salaries of employees of a State, and that, if it be held that it does, petitioner was not a person "obligated with respect to" the accrued and seized salaries, within the meaning of § 6332, and, therefore, is not personally liable for refusing to surrender them to the Government. We granted the writ to determine those questions. 358 U. S. 809.

Nothing in the Constitution requires that the salaries of state employees be treated any differently, for federal tax purposes, than the salaries of others, *Helvering* v. *Gerhardt,* 304 U. S. 405; *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, and it is quite clear, generally, that accrued salaries are property and rights to prop-

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which a levy has been made, shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

"(b) Penalty for violation.—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

"(c) Person defined.—The term 'person,' as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation."

erty subject to levy.[4] In plain terms, § 6331 provides for the collection of assessed and unpaid taxes "by levy upon all property and rights to property" belonging to a delinquent taxpayer.[5] Pursuant to that statute a regulation was promulgated expressly interpreting and declaring § 6331 to authorize levy on the accrued salaries of employees of a State to enforce collection of any federal tax.[6]

Although not disputing these principles, petitioner advances two arguments in support of his claim that the statutes do not authorize a levy on the accrued salaries of employees of a State. First, he contends that a State is not a "person" within the meaning of § 6332, and, second, he argues that Congress, by specifically authorizing in § 6331 a levy "upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality" thereof, but not similarly specifically authorizing levy upon the accrued salaries or wages of

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[4] *Glass City Bank* v. *United States,* 326 U. S. 265, 268; *United States* v. *Long Island Drug Co.,* 115 F. 2d 983, 986 (C. A. 2d Cir.); 9 Mertens, Law of Federal Income Taxation (Rev.), § 49.205.

[5] The only property exempt from levy is that listed in § 6334 (a) of the 1954 Internal Revenue Code, 26 U. S. C. (Supp. V) § 6334 (a), consisting of certain personal articles and provisions. It does not exempt salaries or wages.

[6] Section 301.6331–1 (a) (4) (ii) of Treasury Regulations relating to Seizure of Property for Collection of Taxes (1954), 26 CFR (revised as of January 1, 1958) § 301.6331–1 (a) (4) (ii), in pertinent part, provides:

"*State and municipal employees.* Accrued salaries, wages, or other compensation of any officer, employee, or elected or appointed official of a State or Territory, or of any agency, instrumentality, or political subdivision thereof, are also subject to levy to enforce collection of any Federal tax."

This Regulation became effective on January 1, 1955, 1955–1 Cum. Bull., p. 195, § 7851, and therefore prior to the service on petitioner of the Government's notices of levy in October 1955.

employees of a State, evinced its intention to exclude the latter from such levies.

Though the definition of "person" in § 6332 does not mention States or any sovereign or political entity or their officers among those it "includes" (Note 3), it is equally clear that it does not *exclude* them. This is made certain by the provisions of § 7701 (b) of the 1954 Internal Revenue Code that "The terms 'includes' and 'including' when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined." 26 U. S. C. (Supp. V) § 7701 (b). Whether the term "person" when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment, *Ohio* v. *Helvering,* 292 U. S. 360, 370; *Georgia* v. *Evans,* 316 U. S. 159, 161. It is clear that § 6332 is stated in all-inclusive terms of general application. "In interpreting federal revenue measures expressed in terms of general application, this Court has ordinarily found them operative in the case of state activities even though States were not expressly indicated as subjects of tax." *Wilmette Park Dist.* v. *Campbell,* 338 U. S. 411, 416, and cases cited. We think that the subject matter, the context, the legislative history, and the executive interpretation, *i. e.,* the legislative environment, of § 6332 make it plain that Congress intended to and did include States within the term "person" as used in § 6332.

Nor is there merit in petitioner's contention that Congress, by specifically providing in § 6331 for levy upon the accrued salaries of federal employees, but not mentioning state employees, evinced an intention to exclude the latter from levy. The explanation of that action by Congress appears quite clearly to be that this Court had held in *Smith* v. *Jackson,* 246 U. S. 388, that a federal disbursing officer might not, in the absence of express congressional authorization, set off an indebtedness of a federal em-

ployee to the Government against the employee's salary, and, pursuant to that opinion, the Comptroller General ruled that an "administrative official served with [notices of levy] would be without authority to withhold any portion of the current salary of such employee in satisfaction of the notices of levy and distraint." 26 Comp. Gen. 907, 912 (1947). It is evident that § 6331 was enacted to overcome that difficulty and to subject the salaries of federal employees to the same collection procedures as are available against all other taxpayers, including employees of a State.

Accordingly we hold that §§ 6331 and 6332 authorize levy upon the accrued salaries of state employees for the collection of any federal tax.

This brings us to petitioner's contention that even if the salaries of state employees are subject to levy, he is not personally liable to the Government for refusing to honor its levies because, contrary to the holding of the courts below, he was not a person "obligated with respect to" the salaries covered thereby. Congress did not define the questioned phrase, nor do we feel called upon here to delimit its scope, for we think it includes, at least, a person who has the sole power to control disposition of the fund, and we also think that, under the West Virginia law, petitioner both had and exercised that power. By a West Virginia statute, 1 W. Va. Code, 1955, § 1031 (1), he was empowered and obligated to deduct and withhold from the salaries of state employees sums "to pay taxes as may be required by an act or acts of the congress of the United States of America"; and, similarly, another West Virginia statute, 2 W. Va. Code, 1955, § 3834 (18), authorizes garnishments to be served upon him to sequester the salaries of state employees. He alone has the obligation and power to issue warrants for the payment of salaries, and state employees entitled to payment for services may enforce their rights by mandamus against him. *State*

ex rel. Board of Governors of West Virginia University v. *Sims,* 133 W. Va. 239, 55 S. E. 2d 505; *State ex rel. Board of Governors of West Virginia University* v. *Sims,* 136 W. Va. 789, 68 S. E. 2d 489; *State ex rel. Board of Governors of West Virginia University* v. *Sims,* 140 W. Va. 64, 82 S. E. 2d 321. By and to the extent of these West Virginia laws petitioner was obligated and empowered in respect to the sequestered salaries. These laws empowered him completely to control the disposition of that fund. He exercised that power by refusing to honor the Government's valid levies and to surrender the fund to the Government. Instead he surrendered the fund to the taxpayers. That action by petitioner resulted in defeat of the Government's valid levies.

Upon these principles four judges who are constantly required to pass upon West Virginia laws have held that, under the law of that State, petitioner is a person who was obligated with respect to the salaries covered by the Government's levies. Their conclusion appears to be founded on reason and authority, and under familiar principles will be accepted here. *Propper* v. *Clark,* 337 U. S. 472, 486–487. Being a person who, under the law of West Virginia, was obligated with respect to the salaries covered by the Government's levies, petitioner is, by § 6332 (b), made personally liable to the Government in a sum equal to the amount, not exceeding the delinquent taxes, which he refused to surrender to the Government but surrendered instead to the taxpayers in defeat of the Government's levies. The judgment of the Court of Appeals was therefore correct and must be

Affirmed.

SPEVACK *v.* STRAUSS ET AL.

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

No. 339. Argued March 5, 1959.—Decided March 23, 1959.

It appearing upon oral argument that in the normal course the fee for petitioner's United States patent must be paid by May 25, 1959, and that the patent will issue shortly after payment of the fee, the case is remanded to the District Court with instructions.

Reported below: 103 U. S. App. D. C. 204, 257 F. 2d 208.

Carleton U. Edwards II and *Joseph Y. Houghton* argued the cause for petitioner. With them on the brief was *Bernard Margolius.*

Leonard B. Sand argued the cause for respondents. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, Lionel Kestenbaum, Loren K. Olson* and *Roland A. Anderson.*

Briefs of *amici curiae* urging reversal were filed by *Elisha Hanson, Arthur B. Hanson* and *Calvin H. Cobb, Jr.* for the American Chemical Society, and by *Carlton S. Dargusch* and *Carlton S. Dargusch, Jr.* for Engineers Joint Council, Inc.

PER CURIAM.

Upon oral argument, it appeared that in the normal course the fee for petitioner's United States patent must be paid by May 25, 1959, and that the patent will issue shortly after payment of the fee. Accordingly, the case is remanded to the District Court and that court is instructed: (1) If petitioner has by May 25, 1959, paid the patent fee for his patent, and has not requested a suspension or delay in the issuance thereof, or has withdrawn any such request theretofore made, to continue the

case and the restraining orders entered herein by THE CHIEF JUSTICE until the patent issues, and then to dismiss the complaint as moot; (2) otherwise, on May 25, 1959, to dismiss the complaint on the ground that, apart from the merits of the controversy, the grant of the extraordinary equitable relief of an injunction at that stage of the proceedings would not be warranted. Upon the fulfillment of either of these conditions, the proceedings heretofore had in the two lower courts are vacated.

PAGE *v.* UNITED STATES.

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

No. 155, Misc. Decided March 23, 1959.

Certiorari granted; judgment vacated; case remanded for further consideration.

Petitioner *pro se.*

Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg and *Kirby W. Patterson* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for certiorari are granted. Upon consideration of the entire record and in view of the suggestions of the Solicitor General in his memorandum, the judgment of the United States Court of Appeals for the Eighth Circuit is vacated and the case is remanded to that court for further consideration, including reconsideration of petitioner's right to appeal *in forma pauperis* from his 1954 conviction on the basis of a transcript of the record at the trial.

JOSEPH ET AL. *v.* INDIANA.

CERTIORARI TO THE SUPREME COURT OF INDIANA.

No. 8. Argued January 19, 1959.—Decided March 23, 1959.

Writ of certiorari dismissed as improvidently granted.
Reported below: 236 Ind. 529, 141 N. E. 2d 109.

William S. Isham, acting under appointment by the Court, 355 U. S. 948, argued the cause and filed a brief for petitioners.

Robert M. O'Mahoney, Deputy Attorney General of Indiana, argued the cause for respondent. With him on the brief were *Edwin K. Steers,* Attorney General, and *Owen S. Boling,* Assistant Attorney General.

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

WOODY *v.* UNITED STATES.

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

No. 135. Argued January 14, 1959.—Decided March 23, 1959.

Judgment affirmed by an equally divided Court.
Reported below: 258 F. 2d 535.

Clarence O. Woolsey, acting under appointment by the Court, 358 U. S. 802, argued the cause and filed a brief for petitioner.

Beatrice Rosenberg argued the cause for the United States. With her on the brief were *Solicitor General Rankin, Assistant Attorney General Anderson* and *Robert G. Maysack.*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

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

CITY OF LOS ANGELES ET AL. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 656. Decided March 23, 1959.

Appeal dismissed for want of a substantial federal question.

Roger Arnebergh, Alan G. Campbell and *Walhfred Jacobson* for appellants.

J. Thomason Phelps for appellees. *Arthur T. George, Francis N. Marshall, John Robert Jones, Alvin H. Pelavin* and *Warren A. Palmer* for the Pacific Telephone & Telegraph Co. et al., appellees.

Briefs of *amici curiae* urging reversal were filed by *John C. Banks, Walter J. Mattison, John C. Melaniphy, J. Elliott Drinard, Claude V. Jones, Charles S. Rhyne* and *J. Parker Connor* for the Member Municipalities of the National Institute of Municipal Law Officers; by *Archie L. Walters, M. Tellefson, John H. Lauten, Henry McClernan* and *Everett M. Glenn* for the Cities of Azusa et al., municipal corporations of the State of California; and by *A. L. Wirin* and *Fred Okrand* for the American Civil Liberties Union of Southern California.

PER CURIAM.

The motion of the Pacific Telephone and Telegraph Company et al. to be added as parties appellee is granted. The motions to dismiss are granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE BLACK is of the opinion that probable jurisdiction should be noted.

HANDFORD *v.* UNITED STATES.

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

No. 578. Decided March 23, 1959.

Certiorari granted; judgment reversed upon consideration of the entire record and the confession of error by the Solicitor General.

Reported below: 260 F. 2d 890.

Julian Webb for petitioner.

Solicitor General Rankin for the United States.

PER CURIAM.

The petition for writ of certiorari is granted. Upon consideration of the entire record and the confession of error by the Solicitor General, the judgment of the United States Court of Appeals for the Fifth Circuit is reversed.

CEPHAS *v.* WEST VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

No. 336, Misc. Decided March 23, 1959.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

W. W. Barron, Attorney General of West Virginia, and *Clement R. Bassett,* Assistant Attorney General, for appellee.

PER CURIAM.

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

BARTKUS *v.* ILLINOIS.

ON REHEARING.

No. 1. Argued November 19, 1957.—Affirmed by an equally divided Court January 6, 1958.—Rehearing granted, judgment vacated and case restored to calendar for reargument May 26, 1958.—Reargued October 21–22, 1958.—Decided March 30, 1959.

Petitioner was tried and acquitted in a Federal District Court for violation of 18 U. S. C. § 2113, which makes it a crime to rob a federally insured bank. On substantially the same evidence, he was later tried and convicted in an Illinois State Court for violation of an Illinois robbery statute. *Held:*

1. The cooperation of federal law enforcement officers with Illinois officials did not violate the Double Jeopardy Clause of the Fifth Amendment. Pp. 122–124.

2. The Fourteenth Amendment does not impliedly extend the first eight amendments to the States. Pp. 124–126.

3. The Illinois prosecution for violation of its own penal law after a prior acquittal for a federal offense, on substantially the same evidence, did not violate the Due Process Clause of the Fourteenth Amendment. Pp. 127–139.

7 Ill. 2d 138, 130 N. E. 2d 187, affirmed.

Walter T. Fisher, acting under appointment by the Court, 352 U. S. 958, reargued the cause and filed a brief on rehearing for petitioner.

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

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Petitioner was tried in the Federal District Court for the Northern District of Illinois on December 18, 1953, for robbery of a federally insured savings and loan asso-

ciation, the General Savings and Loan Association of Cicero, Illinois, in violation of 18 U. S. C. § 2113. The case was tried to a jury and resulted in an acquittal. On January 8, 1954, an Illinois grand jury indicted Bartkus. The facts recited in the Illinois indictment were substantially identical to those contained in the prior federal indictment. The Illinois indictment charged that these facts constituted a violation of Illinois Revised Statutes, 1951, c. 38, § 501, a robbery statute. Bartkus was tried and convicted in the Criminal Court of Cook County and was sentenced to life imprisonment under the Illinois Habitual Criminal Statute. Ill. Rev. Stat., 1951, c. 38, § 602.

The Illinois trial court considered and rejected petitioner's plea of *autrefois acquit*. That ruling and other alleged errors were challenged before the Illinois Supreme Court which affirmed the conviction. 7 Ill. 2d 138, 130 N. E. 2d 187. We granted certiorari because the petition raised a substantial question concerning the application of the Fourteenth Amendment. 352 U. S. 907, 958. On January 6, 1958, the judgment below was affirmed by an equally divided Court. 355 U. S. 281. On May 26, 1958, the Court granted a petition for rehearing, vacated the judgment entered January 6, 1958, and restored the case to the calendar for reargument. 356 U. S. 969.

The state and federal prosecutions were separately conducted. It is true that the agent of the Federal Bureau of Investigation who had conducted the investigation on behalf of the Federal Government turned over to the Illinois prosecuting officials all the evidence he had gathered against the petitioner. Concededly, some of that evidence had been gathered after acquittal in the federal court. The only other connection between the two trials is to be found in a suggestion that the federal sentencing of the accomplices who testified against petitioner in both

trials was purposely continued by the federal court until after they testified in the state trial. The record establishes that the prosecution was undertaken by state prosecuting officials within their discretionary responsibility and on the basis of evidence that conduct contrary to the penal code of Illinois had occurred within their jurisdiction. It establishes also that federal officials acted in cooperation with state authorities, as is the conventional practice between the two sets of prosecutors throughout the country.[1] It does not support the claim that the State of Illinois in bringing its prosecution was merely a tool of the federal authorities, who thereby avoided the prohibition of the Fifth Amendment against a retrial of

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[1] See Proceedings of the Attorney General's Conference on Crime (1934). At the conclusion of the state trial of Bartkus, State's Attorney Gutknecht thus reviewed the cooperation between federal and state officials:

"We have had a number of cases where the state's attorney's office have been cooperating very well with the federal authorities, particularly in the narcotics cases, because in that connection the federal government should have the first authority in handling them because narcotics is a nation-wide criminal organization, and so when I see people going through this town and criticising the County of Cook and the City of Chicago, because of the police, the state's attorney and the judges cooperating with the federal authorities, and giving that as proof of the fact that since we don't take the lead we must be negligent in our duties, I am particularly glad to see a case where the federal authorities came to the state's attorney.

"We are cooperating with the federal authorities and they are cooperating with us, and these statements in this city to the effect that the fact that the federal authorities are in the county is a sign of breakdown in law enforcement in Cook County is utter nonsense.

"The federal authorities have duties and we have duties. We are doing our duty and this is an illustration of it, and we are glad to continue to cooperate with the federal authorities. Give them the first play where it is their duty, as in narcotics, and we take over where our duty calls for us to carry the burden. . . ."

495957 O–59–13

a federal prosecution after an acquittal. It does not sustain a conclusion that the state prosecution was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution.

Since the new prosecution was by Illinois, and not by the Federal Government, the claim of unconstitutionality must rest upon the Due Process Clause of the Fourteenth Amendment. Prior cases in this Court relating to successive state and federal prosecutions have been concerned with the Fifth Amendment, and the scope of its proscription of second prosecutions by the Federal Government, not with the Fourteenth Amendment's effect on state action. We are now called upon to draw on the considerations which have guided the Court in applying the limitations of the Fourteenth Amendment on state powers. We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such.[2] The relevant historical materials have been canvassed by this Court and by legal scholars.[3] These materials demonstrate conclusively that Congress and the members of the legislatures of the ratifying States did not contemplate that the Fourteenth Amendment was a short-hand incorporation of the first eight amendments making them applicable as explicit restrictions upon the States.

Evidencing the interpretation by both Congress and the States of the Fourteenth Amendment is a comparison of the constitutions of the ratifying States with the Federal

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[2] *Hurtado* v. *California,* 110 U. S. 516; *In re Kemmler,* 136 U. S. 436; *Maxwell* v. *Dow,* 176 U. S. 581; *Twining* v. *New Jersey,* 211 U. S. 78; *Palko* v. *Connecticut,* 302 U. S. 319; *Adamson* v. *California,* 332 U. S. 46.

[3] Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5.

Constitution. Having regard only to the grand jury guarantee of the Fifth Amendment, the criminal jury guarantee of the Sixth Amendment, and the civil jury guarantee of the Seventh Amendment, it is apparent that if the first eight amendments were being applied verbatim to the States, ten of the thirty ratifying States would have impliedly been imposing upon themselves constitutional requirements on vital issues of state policies contrary to those present in their own constitutions.[4] Or, to approach the matter in a different way, they would be covertly altering provisions of their own constitutions in disregard of the amendment procedures required by those constitutions. Five other States would have been undertaking procedures not in conflict with but not required by their constitutions. Thus only one-half, or fifteen, of the ratifying States had constitutions in explicit accord with these provisions of the Fifth, Sixth, and Seventh Amendments. Of these fifteen, four made alterations in their constitutions by 1875 which brought them into important conflict with one or more of these provisions of the Federal Constitution. One of the States whose constitution had not included any provision on one of the three procedures under investigation adopted a provision in 1890 which was inconsistent with the Federal Constitution. And so by 1890 only eleven of the thirty ratifying States were in explicit accord with these provisions of the first eight amendments to the Federal Constitution. Four were silent as to one or more of the provisions and fifteen were in open conflict with these same provisions.[5]

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[4] See Appendix, *post*, p. 140, in which are detailed the provisions in the constitutions of the ratifying States and of the States later admitted to the Union which correspond to these federal guarantees in the Fifth, Sixth, and Seventh Amendments.

[5] Cf. *Fox* v. *Ohio*, 5 How. 410, 435, in which, in ruling that the Fifth Amendment was not to be read as applying to the States,

Similarly imposing evidence of the understanding of the Due Process Clause is supplied by the history of the admission of the twelve States entering the Union after the ratification of the Fourteenth Amendment. In the case of each, Congress required that the State's constitution be "not repugnant" to the Constitution of the United States.[6] Not one of the constitutions of the twelve States contains all three of the procedures relating to grand jury, criminal jury, and civil jury. In fact all twelve have provisions obviously different from the requirements of the Fifth, Sixth, or Seventh Amendments. And yet, in the case of each admission, either the President of the United States, or Congress, or both have found that the constitution was in conformity with the Enabling Act and the Constitution of the United States.[7] Nor is there warrant to believe that the States in adopting constitutions with the specific purpose of complying with the requisites of admission were in fact evading the demands of the Constitution of the United States.

Surely this compels the conclusion that Congress and the States have always believed that the Due Process Clause brought into play a basis of restrictions upon the States other than the undisclosed incorporation of the original eight amendments. In *Hurtado* v. *California,* 110 U. S. 516, this Court considered due process in its historical setting, reviewed its development as a concept in Anglo-American law from the time of the Magna Carta until the time of the adoption of the Fourteenth

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Mr. Justice Daniel wrote: "it is neither probable nor credible that the States should have anxiously insisted to ingraft upon the federal constitution restrictions upon their own authority . . . ."

[6] See, *e. g.,* 36 Stat. 569.

[7] See, *e. g.,* 37 Stat. 1728.

Amendment and concluded that it was intended to be a flexible concept, responsive to thought and experience—experience which is reflected in a solid body of judicial opinion, all manifesting deep convictions to be unfolded by a process of "inclusion and exclusion." *Davidson* v. *New Orleans,* 96 U. S. 97, 104. Time and again this Court has attempted by general phrases not to define but to indicate the purport of due process and to adumbrate the continuing adjudicatory process in its application. The statement by Mr. Justice Cardozo in *Palko* v. *Connecticut,* 302 U. S. 319, has especially commended itself and been frequently cited in later opinions.[8] Referring to specific situations, he wrote:

> "In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states." 302 U. S., at 324–325.

About the meaning of due process, in broad perspective unrelated to the first eight amendments, he suggested that it prohibited to the States only those practices "repugnant to the conscience of mankind." 302 U. S., at 323. In applying these phrases in *Palko,* the Court ruled that, while at some point the cruelty of harassment by multiple prosecutions by a State would offend due process, the specific limitation imposed on the Federal Government by the Double Jeopardy Clause of the Fifth Amendment did not bind the States.

Decisions of this Court concerning the application of the Due Process Clause reveal the necessary process of

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[8] See, *e. g., Leland* v. *Oregon,* 343 U. S. 790, 801; *Rochin* v. *California,* 342 U. S. 165, 169; *Bute* v. *Illinois,* 333 U. S. 640, 659.

balancing relevant and conflicting factors in the judicial application of that Clause. In *Chambers* v. *Florida*, 309 U. S. 227, we held that a state conviction of murder was void because it was based upon a confession elicited by applying third-degree methods to the defendant. But we have also held that a second execution necessitated by a mechanical failure in the first attempt was not in violation of due process. *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459. Decisions under the Due Process Clause require close and perceptive inquiry into fundamental principles of our society. The Anglo-American system of law is based not upon transcendental revelation but upon the conscience of society ascertained as best it may be by a tribunal disciplined for the task and environed by the best safeguards for disinterestedness and detachment.

Constitutional challenge to successive state and federal prosecutions based upon the same transaction or conduct is not a new question before the Court though it has now been presented with conspicuous ability.[9] The Fifth

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[9] It has not been deemed relevant to discussion of our problem to consider dubious English precedents concerning the effect of foreign criminal judgments on the ability of English courts to try charges arising out of the same conduct—dubious in part because of the confused and inadequate reporting of the case on which much is based, see the varying versions of *Rex* v. *Hutchinson* found in *Beak* v. *Thyrwhit*, 3 Mod. 194, 87 Eng. Rep. 124 (reported as *Beake* v. *Tyrrell* in 1 Show. 6, 89 Eng. Rep. 411, and as *Beake* v. *Tirrell* in Comberbach 120, 90 Eng. Rep. 379), *Burrows* v. *Jemino*, 2 Strange 733, 93 Eng. Rep. 815 (reported as *Burroughs* v. *Jamineau* in Mos. 1, 25 Eng. Rep. 235, as *Burrows* v. *Jemineau* in Sel. Cas. 70, 25 Eng. Rep. 228, as *Burrows* v. *Jemineau* in 2 Eq. Ca. Abr. 476, and as *Burrows* v. *Jemino* in 22 Eng. Rep. 443), and explained in *Gage* v. *Bulkeley*, Ridg. Cas. 263, 27 Eng. Rep. 824. Such precedents are dubious also because they reflect a power of discretion vested in English judges not relevant to the constitutional law of our federalism.

Amendment's proscription of double jeopardy has been invoked and rejected in over twenty cases of real or hypothetical successive state and federal prosecution cases before this Court. While *United States* v. *Lanza,* 260 U. S. 377, was the first case in which we squarely held valid a federal prosecution arising out of the same facts which had been the basis of a state conviction, the validity of such a prosecution by the Federal Government has not been questioned by this Court since the opinion in *Fox* v. *Ohio,* 5 How. 410, more than one hundred years ago.

In *Fox* v. *Ohio* argument was made to the Supreme Court that an Ohio conviction for uttering counterfeit money was invalid. This assertion of invalidity was based in large part upon the argument that since Congress had imposed federal sanctions for the counterfeiting of money, a failure to find that the Supremacy Clause precluded the States from punishing related conduct would expose an individual to double punishment. Mr. Justice Daniel, writing for the Court (with Mr. Justice McLean dissenting), recognized as true that there was a possibility of double punishment, but denied that from this flowed a finding of pre-emption, concluding instead that both the Federal and State Governments retained the power to impose criminal sanctions, the United States because of its interest in protecting the purity of its currency, the States because of their interest in protecting their citizens against fraud.

In some eight state cases decided prior to *Fox* the courts of seven States had discussed the validity of successive state and federal prosecutions. In three, Missouri,[10] North Carolina,[11] and Virginia,[12] it had been said that there would be no plea in bar to prevent the second prosecution.

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[10] *Mattison* v. *State,* 3 Mo. *421.

[11] *State* v. *Brown,* 2 N. C. *100.

[12] *Hendrick* v. *Commonwealth,* 5 Leigh (Va.) 707.

Discussions in two cases in South Carolina were in conflict—the earlier opinion [13] expressing belief that there would be a bar, the later,[14] without acknowledging disagreement with the first, denying the availability of a plea in bar. In three other States, Vermont,[15] Massachusetts,[16] and Michigan,[17] courts had stated that a prosecution by one government would bar prosecution by another government of a crime based on the same conduct. The persuasiveness of the Massachusetts and Michigan decisions is somewhat impaired by the precedent upon which they relied in their reasoning. In the Supreme Court case cited in the Massachusetts and Michigan cases, *Houston* v. *Moore,* 5 Wheat. 1, there is some language to the effect that there would be a bar to a second prosecution by a different government. 5 Wheat., at 31. But that language by Mr. Justice Washington reflected his belief that the state statute imposed state sanctions for violation of a federal criminal law. 5 Wheat., at 28. As he viewed the matter, the two trials would not be of similar crimes arising out of the same conduct; they would be of the same crime. Mr. Justice Johnson agreed that if the state courts had become empowered to try the defendant for the federal offense, then such a state trial would bar a federal prosecution. 5 Wheat., at 35. Thus *Houston* v. *Moore* can be cited only for the presence of a bar in a case in which the second trial is for a violation of the very statute whose violation by the same conduct has already been tried in the courts of another government empowered to try that question.[18]

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[13] *State* v. *Antonio,* 2 Treadway's Const. Rep. (S. C.) 776.

[14] *State* v. *Tutt,* 2 Bailey (S. C.) 44.

[15] *State* v. *Randall,* 2 Aikens (Vt.) 89.

[16] *Commonwealth* v. *Fuller,* 8 Metcalf (Mass.) 313.

[17] *Harlan* v. *People,* 1 Douglass' Rep. (Mich.) 207.

[18] Mr. Justice Story's dissenting opinion in *Houston* v. *Moore,* 5 Wheat. 1, 47, displays dislike of the possibility of multiple prosecu-

The significance of this historical background of decisions prior to *Fox* is that it was, taking a position most favorable to advocates of the bars of *autrefois acquit* and *autrefois convict* in cases like that before this Court, totally inconclusive. Conflicting opinions concerning the applicability of the plea in bar may manifest conflict in conscience. They certainly do not manifest agreement that to permit successive state and federal prosecutions for different crimes arising from the same acts would be repugnant to those standards of outlawry which offend the conception of due process outlined in *Palko*. (It is worth noting that *Palko* sustained a first degree murder conviction returned in a second trial after an appeal by the State from an acquittal of first degree murder.) The early state decisions had clarified the issue by stating the opposing arguments. The process of this Court's response to the Fifth Amendment challenge was begun in *Fox* v. *Ohio,* continued in *United States* v. *Marigold,* 9 How. 560, and was completed in *Moore* v. *Illinois,* 14 How. 13. Mr. Justice Grier, writing for the Court in *Moore* v. *Illinois,* gave definitive statement to the rule which had been evolving:

> "An offence, in its legal signification, means the transgression of a law." 14 How., at 19.
>
> "Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both." 14 How., at 20.
>
> "That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot

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tions, *id.*, at 72, but also suggests the possibility that under some circumstances a state acquittal might not bar a federal prosecution, *id.*, at 74–75.

> be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other." *Ibid.*

In a dozen cases decided by this Court between *Moore* v. *Illinois* and *United States* v. *Lanza* this Court had occasion to reaffirm the principle first enunciated in *Fox* v. *Ohio*.[19] Since *Lanza* the Court has five times repeated the rule that successive state and federal prosecutions are not in violation of the Fifth Amendment.[20] Indeed Mr. Justice Holmes once wrote of this rule that it "is too plain to need more than statement." [21] One of the post-*Lanza* cases, *Jerome* v. *United States*, 318 U. S. 101, involved the same federal statute under which Bartkus was indicted and in *Jerome* this Court recognized that successive state and federal prosecutions were thereby made possible because all States had general robbery statutes. Nonetheless, a unanimous Court, as recently as 1943, accepted as unquestioned constitutional law that such successive prosecutions would not violate the proscription of double

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[19] *United States* v. *Cruikshank*, 92 U. S. 542; *Coleman* v. *Tennessee*, 97 U. S. 509; *Ex parte Siebold*, 100 U. S. 371; *United States* v. *Arjona*, 120 U. S. 479; *Cross* v. *North Carolina*, 132 U. S. 131; *In re Loney*, 134 U. S. 372; *Pettibone* v. *United States*, 148 U. S. 197; *Crossley* v. *California*, 168 U. S. 640; *Sexton* v. *California*, 189 U. S. 319; *Matter of Heff*, 197 U. S. 488; *Grafton* v. *United States*, 206 U. S. 333; *Ponzi* v. *Fessenden*, 258 U. S. 254.

[20] *Hebert* v. *Louisiana*, 272 U. S. 312; *Westfall* v. *United States*, 274 U. S. 256; *Puerto Rico* v. *The Shell Co.*, 302 U. S. 253; *Jerome* v. *United States*, 318 U. S. 101; *Screws* v. *United States*, 325 U. S. 91.

[21] *Westfall* v. *United States*, 274 U. S. 256, 258.

jeopardy included in the Fifth Amendment. 318 U. S., at 105.[22]

The lower federal courts have of course been in accord with this Court.[23] Although some can be cited only in

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[22] In a chapter in Handbook on Interstate Crime Control, a book prepared in 1938 by the Interstate Commission on Crime, Gordon Dean, then Special Executive Assistant to the Attorney General of the United States, wrote:

"Mention should also be made of the National Bank Robbery statute. This statute punishes robberies of national banks, banks which are members of the Federal Reserve System, and banks the funds of which are insured by the Federal Deposit Insurance Corporation. And here again there has been no usurpation by the federal government. The states still may prosecute any robbery of any bank within their jurisdiction, and they frequently do. There have been several cases in the last few years where men have been convicted both under the state and federal law for robbing the same bank. In fact, there have been cases where men have been tried under the law of one jurisdiction, acquitted, and on the same facts tried under the law of the other sovereignty and convicted. Bank robbers know today that 'flight,' their most valuable weapon, has, under the operation of the National Bank Robbery statute, proved quite impotent. The bank robbery rate has been cut in half, and there has been a fine relation between state and federal agencies in the apprehension and trial of bank robbers." *Id.*, at 114.

[23] *McKinney* v. *Landon,* 209 F. 300 (C. A. 8th Cir.); *Morris* v. *United States,* 229 F. 516 (C. A. 8th Cir.); *Vandell* v. *United States,* 6 F. 2d 188 (C. A. 2d Cir.); *United States* v. *Levine,* 129 F. 2d 745 (C. A. 2d Cir.); *Serio* v. *United States,* 203 F. 2d 576 (C. A. 5th Cir.); *Jolley* v. *United States,* 232 F. 2d 83 (C. A. 5th Cir.); *Smith* v. *United States,* 243 F. 2d 877 (C. A. 6th Cir.); *Rios* v. *United States,* 256 F. 2d 173 (C. A. 9th Cir.); *United States* v. *Amy,* 24 Fed. Cas. No. 14,445 (C. C. Va.); *United States* v. *Given,* 25 Fed. Cas. No. 15,211 (C. C. Del.); *United States* v. *Barnhart,* 22 F. 285 (C. C. Ore.); *United States* v. *Palan,* 167 F. 991 (C. C. S. D. N. Y.); *United States* v. *Wells,* 28 Fed. Cas. No. 16,665 (D. C. Minn.); *United States* v. *Casey,* 247 F. 362 (D. C. S. D. Ohio); *United States* v. *Holt,* 270 F. 639 (D. C. N. Dak.); *In re*

that they follow the decisions of this Court, others manifest reflection upon the issues involved and express reasoned approval of the two-sovereignty principle. In *United States* v. *Barnhart,* 22 F. 285, the Oregon Circuit Court was presented with a case just the obverse of the present one: the prior trial and acquittal was by a state court; the subsequent trial was by a federal court. The Circuit Court rejected defendant's plea of *autrefois acquit,* saying that the hardship of the second trial might operate to persuade against the bringing of a subsequent prosecution but could not bar it.

The experience of state courts in dealing with successive prosecutions by different governments is obviously also relevant in considering whether or not the Illinois prosecution of Bartkus violated due process of law. Of the twenty-eight States which have considered the validity of successive state and federal prosecutions as against a challenge of violation of either a state constitutional double-jeopardy provision or a common-law evidentiary rule of *autrefois acquit* and *autrefois convict,* twenty-seven have refused to rule that the second prose-

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Morgan, 80 F. Supp. 810 (D. C. N. D. Iowa); *United States* v. *Mandile,* 119 F. Supp. 266 (D. C. E. D. N. Y.). Of the many prohibition cases in the lower federal courts only *United States* v. *Holt* has been included; its inclusion is meant to represent that body of cases and is particularly justified by its careful reasoning concerning the entire question of dual sovereignties and double jeopardy. It is believed that the list contains most of the nonprohibition cases in the lower federal courts discussing and favoring the rule that trial in one jurisdiction does not bar prosecution in another for a different offense arising from the same act. Three lower federal court cases have been found questioning the validity of the rule: *Ex parte Houghton,* 7 F. 657, 8 F. 897 (D. C. Vt.); *In re Stubbs,* 133 F. 1012 (C. C. W. D. Wash.); *United States* v. *Candelaria,* 131 F. Supp. 797 (D. C. S. D. Cal.).

cution was or would be barred.[24] These States were not bound to follow this Court and its interpretation of the Fifth Amendment. The rules, constitutional, statutory, or common law which bound them, drew upon the same

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[24] STATES DENYING THE BAR.

Arizona. *Henderson* v. *State*, 30 Ariz. 113, 244 P. 1020 (despite a limited statutory bar, holding successive federal and state prosecutions permitted where one is for possession and the other for transportation).

Arkansas. *State* v. *Duncan*, 221 Ark. 681, 255 S. W. 2d 430.

California. *People* v. *McDonnell*, 80 Cal. 285, 22 P. 190; *People* v. *Candelaria*, 139 Cal. App. 2d 432, 294 P. 2d 120; *People* v. *Candelaria*, 153 Cal. App. 2d 879, 315 P. 2d 386 (these two *Candelaria* cases indicate that the California statutory bar, a statute of the kind discussed below, prevents a state robbery prosecution after a federal robbery prosecution, but not a state burglary prosecution in the same circumstances).

Georgia. *Scheinfain* v. *Aldredge*, 191 Ga. 479, 12 S. E. 2d 868; *Bryson* v. *State*, 27 Ga. App. 230, 108 S. E. 63.

Illinois. *Hoke* v. *People*, 122 Ill. 511, 13 N. E. 823.

Indiana. *Heier* v. *State*, 191 Ind. 410, 133 N. E. 200; *Dashing* v. *State*, 78 Ind. 357.

Iowa. *State* v. *Moore*, 143 Iowa 240, 121 N. W. 1052.

Kentucky. *Hall* v. *Commonwealth*, 197 Ky. 179, 246 S. W. 441.

Louisiana. *State* v. *Breaux*, 161 La. 368, 108 So. 773, aff'd *per cur.*, 273 U. S. 645.

Maine. See *State* v. *Gauthier*, 121 Me. 522, 529–531, 118 A. 380, 383–385.

Massachusetts. *Commonwealth* v. *Nickerson*, 236 Mass. 281, 128 N. E. 273.

Michigan. *In re Illova*, 351 Mich. 204, 88 N. W. 2d 589.

Minnesota. *State* v. *Holm*, 139 Minn. 267, 166 N. W. 181.

Missouri. *In re January*, 295 Mo. 653, 246 S. W. 241.

New Hampshire. *State* v. *Whittemore*, 50 N. H. 245.

New Jersey. *State* v. *Cioffe*, 130 N. J. L. 160, 32 A. 2d 79.

New York. *People* v. *Welch*, 141 N. Y. 266, 36 N. E. 328.

North Carolina. See *State* v. *Brown*, 2 N. C. *100, 101.

Oregon. *State* v. *Frach*, 162 Ore. 602, 94 P. 2d 143.

[*Footnote 24 continued on p. 136.*]

experience as did the Fifth Amendment, but were and are of separate and independent authority.

Not all of the state cases manifest careful reasoning, for in some of them the language concerning double jeopardy is but offhand dictum. But in an array of state cases there may be found full consideration of the arguments supporting and denying a bar to a second prosecution. These courts interpreted their rules as not proscribing a second prosecution where the first was by a different government and for violation of a different statute.

With this body of precedent as irrefutable evidence that state and federal courts have for years refused to bar a second trial even though there had been a prior trial by another government for a similar offense, it would be disregard of a long, unbroken, unquestioned course of impressive adjudication for the Court now to rule that due process compels such a bar. A practical justification for rejecting such a reading of due process also com-

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Pennsylvania. See *Commonwealth ex rel. O'Brien* v. *Burke*, 171 Pa. Super. 273, 90 A. 2d 246.

South Carolina. *State* v. *Tutt*, 2 Bailey 44.

Tennessee. *State* v. *Rhodes*, 146 Tenn. 398, 242 S. W. 642; *State* v. *Rankin*, 4 Coldw. 145.

Vermont. *State* v. *O'Brien*, 106 Vt. 97, 170 A. 98.

Virginia. *Jett* v. *Commonwealth*, 18 Gratt. (59 Va.) 933.

Washington. *State* v. *Kenney*, 83 Wash. 441, 145 P. 450.

West Virginia. *State* v. *Holesapple*, 92 W. Va. 645, 115 S. E. 794. See *Moundsville* v. *Fountain*, 27 W. Va. 182, 197–198.

Wyoming. See *In re Murphy*, 5 Wyo. 297, 304–309, 40 P. 398, 399–401.

STATE RAISING THE BAR.

Florida. *Burrows* v. *Moran*, 81 Fla. 662, 89 So. 111 (this case may be limited to the interpretation given by the Florida court to the Eighteenth Amendment. See *Strobhar* v. *State*, 55 Fla. 167, 180–181, 47 So. 4, 9).

mends itself in aid of this interpretation of the Fourteenth Amendment. In *Screws* v. *United States,* 325 U. S. 91, defendants were tried and convicted in a federal court under federal statutes with maximum sentences of a year and two years respectively. But the state crime there involved was a capital offense. Were the federal prosecution of a comparatively minor offense to prevent state prosecution of so grave an infraction of state law, the result would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines. It would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States.[25]

Some recent suggestions that the Constitution was in reality a deft device for establishing a centralized government are not only without factual justification but fly in the face of history. It has more accurately been shown that the men who wrote the Constitution as well as the citizens of the member States of the Confederation were fearful of the power of centralized government and sought to limit its power. Mr. Justice Brandeis has written that separation of powers was adopted in the Constitution "not to promote efficiency but to preclude the exercise of arbitrary power." [26] Time has not lessened the concern of the Founders in devising a federal system which would likewise be a safeguard against arbitrary government.

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[25] Illinois had an additional and unique interest in Bartkus beyond the commission of this particular crime. If Bartkus was guilty of the crime charged he would be an habitual offender in Illinois and subject to life imprisonment. The Illinois court sentenced Bartkus to life imprisonment on this ground.

[26] *Myers* v. *United States,* 272 U. S. 52, 240, 293 (dissenting opinion).

The greatest self-restraint is necessary when that federal system yields results with which a court is in little sympathy.

The entire history of litigation and contention over the question of the imposition of a bar to a second prosecution by a government other than the one first prosecuting is a manifestation of the evolutionary unfolding of law. Today a number of States have statutes which bar a second prosecution if the defendant has been once tried by another government for a similar offense.[27] A study of the cases under the New York statute,[28] which is typical of these laws, demonstrates that the task of determining when the federal and state statutes are so much alike that a prosecution under the former bars a prosecution under the latter is a difficult one.[29] The proper solution of that problem frequently depends upon a judgment of the gravamen of the state statute. It depends also upon an understanding of the scope of the bar that has been historically granted in the State to prevent successive state prosecutions. Both these problems are ones with which the States are obviously more competent to deal than is this Court. Furthermore, the rules resulting will intimately affect the efforts of a State to develop a rational and just body of criminal law in the protection of its citizens. We ought not to utilize the Fourteenth Amend-

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[27] Some fifteen such statutes are listed in Tentative Draft No. 5 of the American Law Institute's Model Penal Code (1956), p. 61.

[28] N. Y. Penal Code § 33 and N. Y. Code Crim. Proc. § 139.

[29] *People ex rel. Liss* v. *Superintendent of Women's Prison*, 282 N. Y. 115, 25 N. E. 2d 869; *People* v. *Mangano*, 269 App. Div. 954, 57 N. Y. S. 2d 891 (2d Dept.) aff'd *sub nom. People* v. *Mignogna*, 296 N. Y. 1011, 73 N. E. 2d 583; *People* v. *Spitzer*, 148 Misc. 97, 266 N. Y. S. 522 (Sup. Ct.); *People* v. *Parker*, 175 Misc. 776, 25 N. Y. S. 2d 247 (Kings County Ct.); *People* v. *Eklof*, 179 Misc. 536, 41 N. Y. S. 2d 557 (Richmond County Ct.); *People* v. *Adamchesky*, 184 Misc. 769, 55 N. Y. S. 2d 90 (N. Y. County Ct.).

ment to interfere with this development. Finally, experience such as that of New York may give aid to Congress in its consideration of adoption of similar provisions in individual federal criminal statutes or in the federal criminal code.[30]

Precedent, experience, and reason alike support the conclusion that Alfonse Bartkus has not been deprived of due process of law by the State of Illinois.

Affirmed.

[For dissenting opinion of MR. JUSTICE BLACK, see *post*, p. 150.]

[For dissenting opinion of MR. JUSTICE BRENNAN, see *post*, p. 164.]

[30] In specific instances Congress has included provisions to prevent federal prosecution after a state prosecution based upon similar conduct. See, *e. g.*, 18 U. S. C. § 2117 (burglary of vehicle of transportation carrying interstate or foreign shipments).

APPENDIX TO OPINION OF THE COURT.

[r] Year of ratification of the Fourteenth Amendment.
[c] Year of adoption of constitution in effect on date of ratification or admission.
[ad] Year of admission to the Union.

	FIFTH AMENDMENT "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."	SIXTH AMENDMENT "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."	SEVENTH AMENDMENT "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."
STATES LISTED IN PROCLAMATION OF RATIFICATION			
Connecticut. 1866.[r] 1818.[c]	Art. I, § 9, gives right to grand jury indictment only if crime is punishable by death or imprisonment for life.	Art. I, § 9, similar.	Art. I, § 21: "The right of trial by jury shall remain inviolate."
New Hampshire. 1866.[r] 1792.[c]	Silent.	Art. XVI guarantees jury trial only in capital cases.	Art. XX similar, but amendments to Part II, § 77, ratified in 1852, permitted trial by Justices of the Peace in cases under one hundred dollars.
Tennessee. 1866.[r] 1834.[c]	Art. I, § 14, similar.	Art. I, §§ 9, 14, similar.	Art. I, § 6, similar.
New Jersey. 1866.[r] 1844.[c]	Art. I, § 9, similar.	Art. I, § 8, similar.	Art. I, § 7, preserves jury right except that legislature may authorize trial by jury of six when the amount in controversy is less than fifty dollars.

Oregon. 1866.[r] 1857.[c]	Silent.	Art. I, § 11, similar.	Art. I, § 18, similar.
Vermont. 1866.[r] 1793.[c]	Silent.	Chap. I, Art. 10, similar.	Chap. I, Art. 12, similar.
New York. 1867.[r] 1846.[c]	Art. I, § 6, similar.	Art. I, § 2, similar.	Art. I, § 2, similar.
Ohio. 1867.[r] 1851.[c]	Art. I, § 10, similar. See Fairman, p. 97.*	Art. I, § 10, similar.	Art. I, § 5, similar.
Illinois. 1867.[r] 1848.[c]	Art. XIII, § 10, similar. Constitution of 1870 provided that the grand jury could be abolished in all cases. Art. II, § 8.	Art. XIII, § 9, similar.	Art. XIII, § 6, similar. Constitution of 1870 provided that legislature could provide for jury of less than twelve in civil cases before Justices of the Peace. Art. II, § 5.
West Virginia. 1867.[r] 1861–63.[c]	Art. II, § 1, similar.	Art. II, § 8, similar.	Art. II, § 7, similar. Constitution of 1872 provided that legislature could establish jury of six in trials before Justices of the Peace. Art. III, § 13. Such judges were given jurisdiction to try cases up to three hundred dollars. Art. VIII, § 28.

*Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (hereinafter cited as Fairman).

	FIFTH AMENDMENT "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."	SIXTH AMENDMENT "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."	SEVENTH AMENDMENT "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."
STATES LISTED IN PROCLAMATION OF RATIFICATION—Continued			
Kansas. 1867.[r] 1859.[c]	Silent. See Fairman, p. 101.	Bill of Rights, § 10, similar.	Bill of Rights, § 5, similar.
Maine. 1867.[r] 1819.[c]	Art. I, § 7, similar.	Art. I, § 6, similar.	Art. I, § 20, similar.
Nevada. 1867.[r] 1864.[c]	Art. I, § 8, similar.	Art. I, § 3, similar.	Art. I, § 3, provides for a three-fourths vote of the jury in civil cases.
Missouri. 1867.[r] 1865.[c]	Art. I, § 24, similar. In the Constitution of 1875 it is provided that nine of the twelve men on the grand jury may indict. Art. II, § 28.	Art. I, § 18, similar. The Constitution of 1875 permits juries of less than twelve in courts not of record, Art. II, § 28, and does not specify the limits of the jurisdiction of such courts.	Art. I, § 17, similar. The Constitution of 1875 permits juries of less than twelve in courts not of record, Art. II, § 28, and does not specify the limits of the jurisdiction of such courts.
Indiana. 1867.[r] 1851.[c]	Art. VII, § 17: "The General Assembly may modify or abolish the Grand Jury system." See Fairman, p. 106.	Art. I, § 13, similar.	Art. I, § 20, similar.

Minnesota. 1867.[r] 1857.[c]	Silent.	Art. I, § 6, similar.	Art. I, § 4, similar. But in 1890 the constitution was amended to permit the legislature to provide for a five-sixths verdict after not less than six hours' debate.
Rhode Island. 1867.[r] 1842.[c]	Art. I, § 7, similar.	Art. I, § 10, similar.	Art. I, § 15, similar.
Wisconsin. 1867.[r] 1848.[c]	Art. I, § 8, similar. In 1870 the constitution was amended to permit prosecutions without a grand jury indictment. Amendments, Art. I. See Fairman, pp. 110–111.	Art. I, § 7, similar.	Art. I, § 5, similar.
Pennsylvania. 1867.[r] 1838.[c]	Art. IX, § 10, similar.	Art. IX, § 9, similar.	Art. IX, § 6, similar.
Michigan. 1867.[r] 1850.[c]	Silent. See Fairman, pp. 115–116.	Art. VI, § 28, permits juries of less than twelve in courts not of record. The constitution does not specify the limits of the jurisdiction of such courts.	Art. VI, § 27, similar.
Massachusetts. 1867.[r] 1780.[c]	Silent.	First Part, Art. XII, restricts jury right to trial of cases involving "capital or infamous punishment."	First Part, Art. XV, similar.

	FIFTH AMENDMENT "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."	SIXTH AMENDMENT "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."	SEVENTH AMENDMENT "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."
STATES LISTED IN PROCLAMATION OF RATIFICATION—Continued			
Nebraska. 1867.[r] 1866–67.[c]	Art. I, § 8, similar. The Constitution of 1875 provided that the legislature could abolish the grand jury system. Art. I, § 10. See Fairman, pp. 123–124.	Art. I, § 7, similar.	Art. I, § 5, permits legislature to authorize juries of less than twelve in "inferior courts." In the Constitution of 1875 the provision was altered to read in "courts inferior to the district court." Art. I, § 6. County courts, which are such inferior tribunals, were given jurisdiction up to one thousand dollars by the Constitution of 1875. Art. VI, § 16. See Fairman, pp. 122–123.
Iowa. 1868.[r] 1857.[c]	Art. I, § 11, similar. An amendment in 1884 permitted prosecutions without indictment.	Art. I, § 10, similar.	Art. I, § 9, authorizes juries of less than twelve "in inferior courts."
Arkansas. 1868.[r] 1868.[c]	Art. I, § 9, similar.	Art. I, § 8, similar.	Art. I, § 6, similar.
Florida. 1868.[r] 1868.[c]	Art. I, § 9, similar.	Art. I, § 4, similar.	Art. I, § 4, similar.

North Carolina. 1868.[r] 1868.[c]	Art. I, § 12, similar.	Art. I, § 13, similar.	Art. I, § 19, may limit the guarantee to "controversies at law respecting property."
South Carolina. 1868.[r] 1868.[c]	Art. I, § 19, similar.	Art. I, §§ 13, 14, similar.	Art. I, § 11, similar.
Louisiana. 1868.[r] 1868.[c]	Title I, Art. 6, permits prosecutions to be begun by indictment or information. See Fairman, p. 127.	Title I, Art. 6, similar. In Constitution of 1879 it is provided that where "penalty is not necessarily imprisonment at hard labor or death" the legislature may provide for a jury of less than twelve. Art. 7.	No provision in Bill of Rights. Title IV, Art. 87, indicates that at least up to one hundred dollars no jury trial need be provided. In Constitution of 1879 the legislature is empowered to provide for less than unanimous verdicts. Art. 116.
Alabama. 1868.[r] 1867.[c]	Art. I, § 10, similar.	Art. I, § 8, similar.	Art. I, § 13, similar.
Georgia. 1868.[r] 1868.[c]	Silent.	Art. I, § 7, appears to be similar. But Art. V, § 4, cl. 5, states that offenses before a District Judge shall be tried to a jury of seven. Art. V, § 4, cl. 2, defines the jurisdiction of District Courts; they try all crimes not punishable with death or imprisonment in the penitentiary.	Art. V, § 13, appears to be similar. But Art. V, § 3, cl. 3, states that the Superior Court can render judgment without jury "in all civil cases founded on contract, where an issuable defence is not filed on oath."

	FIFTH AMENDMENT "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."	SIXTH AMENDMENT "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."	SEVENTH AMENDMENT "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."
STATES RATIFYING AFTER PROCLAMATION OF RATIFICATION			
Virginia. 1869.[r] 1864.[c]	Silent.	Art. I, § 8, similar.	Art. I, § 11, similar.
Mississippi. 1870.[r] 1868.[c]	Art. I, § 31, similar.	Art. I, § 7, similar.	Art. I, § 12, similar.
Texas. 1870.[r] 1868.[c]	Art. I, § 8, permits institution of criminal proceedings on indictment or information.	Art. I, §§ 8, 12, similar.	Art. V, § 16, similar.
STATES ADMITTED TO THE UNION AFTER THE RATIFICATION OF THE FOURTEENTH AMENDMENT			
Colorado. 1876.[ad] 1876.[c]	Art. II, § 23, provides grand jury shall have only twelve, nine of whom can indict. It also provides that: "The general assembly may change, regulate, or abolish the grand-jury system."	Art. II, §§ 16, 23, similar.	Art. II, § 23, permits legislature to set the size of the jury at less than twelve.

North Dakota. 1889.[ad] 1889.[c]	Art. I, § 8, guarantees indictment for felonies, but also states that the legislature may abolish the grand-jury system.	Art. I, § 7, similar.	Art. I, § 7, limits its guarantee to courts of record, but the delineation of jurisdiction is not clear.
Montana. 1889.[ad] 1889.[c]	Art. III, § 8, permits prosecution by information and provides that if a grand jury be established it shall have seven persons, five of whom can indict.	Art. III, §§ 16, 23. The latter section provides that in criminal actions not amounting to a felony a two-thirds vote is sufficient to convict.	Art. III, § 23, provides for a two-thirds verdict. Furthermore the jury in a Justice's court is composed of not more than six persons. Such courts have jurisdiction up to three hundred dollars. Art. VIII, § 20.
South Dakota. 1889.[ad] 1889.[c]	Art. VI, § 10, provides for institution of criminal actions by information or indictment and permits the legislature to abolish the grand jury entirely.	Art. VI, §§ 6, 7, similar.	Art. VI, § 6, permits legislature to provide for three-fourths vote. In courts not of record juries of less than twelve are permitted.
Washington. 1889.[ad] 1889.[c]	Art. I, § 25, sanctions the use of information to initiate criminal proceedings.	Art. I, § 21, similar.	Art. I, § 21, provides for a three-fourths verdict in courts of record and for juries of less than twelve in courts not of record.
Idaho. 1890.[ad] 1889.[c]	Art. I, § 8, provides for institution of criminal actions by information or indictment.	Art. I, § 7, provides that for misdemeanors a five-sixths verdict can convict.	Art. I, § 7, provides for a three-fourths verdict.

	FIFTH AMENDMENT "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."	SIXTH AMENDMENT "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."	SEVENTH AMENDMENT "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."
STATES ADMITTED TO THE UNION AFTER THE RATIFICATION OF THE FOURTEENTH AMENDMENT—Continued			
Wyoming. 1890.[ad] 1889.[c]	Art. I, § 13, continues grand jury until otherwise provided. Art. I, § 9, provides that the grand jury will be composed of twelve, nine of whom can indict. The legislature is empowered to change or abolish the grand-jury system.	Art. I, § 9, similar.	Art. I, § 9, permits the legislature to establish juries of less than twelve.
Utah. 1896.[ad] 1895.[c]	Art. I, § 13, offers alternatives: the charge may be brought before a committing magistrate and if the accused is held by such magistrate he may be tried on information; the alternative is indictment, but by a grand jury of seven, five to indict.	Art. I, § 10, preserves traditional jury only in capital cases. In other prosecutions, if in courts of general jurisdiction, there shall be a jury of eight; if in courts of inferior jurisdiction, there shall be a jury of four.	Art. I, § 10, provides that in courts of general jurisdiction trial shall be to a jury of eight, verdict by three-fourths vote. In courts of inferior jurisdiction trial is to a jury of four, verdict by three-fourths vote.
Oklahoma. 1907.[ad] 1907.[c]	Art. II, § 17, permits prosecution by indictment or information. Art. II, § 18, provides that a grand jury, if any, is to be composed of twelve jurors, nine needed to indict.	Art. II, § 19, requires unanimous verdict in felony cases, but only three-fourths in trial of other crimes. Inferior courts are established with juries of six.	Art. II, § 19, provides for a three-fourths verdict.

Arizona. 1912.[ad] 1910.[c]	Art. II, § 30, permits initiation of criminal proceedings by either information or indictment.	Art. II, § 23, permits juries of less than twelve in courts not of record. Art. VI, §§ 6, 10, may indicate legislature can vest such courts with jurisdiction over all misdemeanors.	Art. II, § 23, provides that the legislature may establish a three-fourths verdict in courts of record and juries of less than twelve in courts not of record.
New Mexico. 1912.[ad] 1911.[c]	Art. II, § 14, permits initiation of criminal proceedings by either information or indictment. If by indictment, grand jury must have at least twelve jurors; if there are twelve jurors, eight can indict, if more than twelve, a majority can indict.	Art. II, § 12, similar.	Art II, § 12, permits the legislature to provide for a less-than-unanimous vote. In cases triable by courts lower than the District Courts (Justices of the Peace can be given jurisdiction up to two hundred dollars, Art. VI, § 26), the legislature can establish juries of six.
Alaska. 1959.[ad] 1958.[c]	Art. I, § 8, guarantees grand jury, but the grand jury is of twelve, a majority of whom can indict.	Art. I, § 11, permits legislature to provide for juries of between six and twelve in courts not of record, and does not specify jurisdictional limits of such courts.	Art. I, § 16, provides for a jury only if more than two hundred and fifty dollars is involved. Furthermore, the verdict in such cases is to be by three-fourths vote if the legislature so desires.

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

Petitioner, Bartkus, was indicted in a United States District Court for bank robbery. He was tried by a jury and acquitted. So far as appears the trial was conducted fairly by an able and conscientious judge. Later, Bartkus was indicted in an Illinois state court for the same bank robbery. This time he was convicted and sentenced to life imprisonment. His acquittal in the federal court would have barred a second trial in any court of the United States because of the provision in the Fifth Amendment that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." The Court today rejects Bartkus' contention that his state conviction after a federal acquittal violates the Fourteenth Amendment to our Constitution. I cannot agree.

The Court's holding further limits our already weakened constitutional guarantees against double prosecutions. *United States* v. *Lanza,* 260 U. S. 377, decided in 1922, allowed federal conviction and punishment of a man who had been previously convicted and punished for the identical acts by one of our States. Today, for the first time in its history, this Court upholds the state conviction of a defendant who had been *acquitted* of the same offense in the federal courts. I would hold that a federal trial following either state acquittal or conviction is barred by the Double Jeopardy Clause of the Fifth Amendment. *Abbate* v. *United States, post,* p. 201 (dissenting opinion). And, quite apart from whether that clause is as fully binding on the States as it is on the Federal Government, see *Adamson* v. *California,* 332 U. S. 46, 68 (dissenting opinion), I would hold that Bartkus' conviction cannot stand. For I think double prosecutions for the same offense are so contrary to the spirit of our free country that they violate even the prevailing view of the

Fourteenth Amendment, expressed in *Palko* v. *Connecticut,* 302 U. S. 319.[1]

The Fourteenth Amendment, this Court said in *Palko,* does not make all of the specific guarantees of the Bill of Rights applicable to the States. But, the Court noted, some of "the privileges and immunities" of the Bill of Rights, "have been taken over . . . and brought within the Fourteenth Amendment by a process of absorption." 302 U. S., at 326. The Court indicated that incorporated in due process were those "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." 302 U. S., at 325.[2] It then held that a statute allowing a State to appeal in a criminal case did not violate such fundamental principles. But it expressly left open the question of whether "the state [could be] permitted after a trial free from error to try the accused over again." 302 U. S., at 328. That question is substantially before us today.

Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into

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[1] While I participated in the Court's holding and opinion in *Palko* I have since expressed my disagreement with both, as has MR. JUSTICE DOUGLAS. *Adamson* v. *California,* 332 U. S. 46, 68 (dissenting opinion). See also *Rochin* v. *California,* 342 U. S. 165, 174, 177 (concurring opinions); *Hoag* v. *New Jersey,* 356 U. S. 464, 477, 480, n. 5 (dissenting opinion).

[2] The Court expressed the same thought in various other ways. The crucial principles were termed those "implicit in the concept of ordered liberty," 302 U. S., at 325; those without which it would be impossible "to maintain a fair and enlightened system of justice," *ibid.;* or without which "neither liberty nor justice would exist," *id.,* at 326; those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," and those whose absence creates "a hardship so acute and shocking that our polity will not endure it." *Id.,* at 328.

Greek and Roman times.[3] Even in the Dark Ages, when so many other principles of justice were lost, the idea that one trial and one punishment were enough remained alive through the canon law and the teachings of the early Christian writers.[4] By the thirteenth century it seems to have been firmly established in England,[5] where it came

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[3] See Bonner, Lawyers and Litigants in Ancient Athens, 195; 1 Potter, Grecian Antiquities (1808), 194; Radin, Roman Law, 475, n. 28; 2 Sherman, Roman Law in the Modern World (3d ed. 1937), 488–489; Berner, Non bis in idem, 3 Archiv für Preussisches Strafrecht (1855), 472; Digest of Justinian: Digest 48.2.7.2, translated in 11 Scott, The Civil Law, 17, as "The governor should not permit the same person to be again accused of crime of which he has been acquitted."

[4] The canon law opposition to double trials stemmed from a reading given by St. Jerome in 391 A. D. to I Nahum 9 (Douay version), "there shall not rise a double affliction." (In the King James version, I Nahum 9, is given as "affliction shall not rise up the second time.") Jerome drew from this the rule that God does not punish twice for the same act. See 25 Migne, Patrologia Latina (1845), 1238. This maxim found its way into church canons as early as 847 A. D. and was subsequently given as, "Not even God judges twice for the same act." See Brooke, The English Church and the Papacy, 205; 2 Maitland, Collected Papers (Fisher ed. 1911), Essay, Henry II and the Criminous Clerks, 239; 1 Pollock and Maitland, History of English Law (2d ed. 1899), 448–449; Poole, Domesday Book to Magna Carta, 206. See also Berner, *op. cit., supra,* note 3, emphasizing the Roman antecedents of the canon law rule.

[5] See 2 Bracton, De Legibus et Consuetudinibus Angliae (Woodbine ed. 1922), 391, 397, applying the concept even to acquittals in trial by battle. Cf. 2 Hawkins, Pleas of the Crown (4th ed. 1762), 368–379; 2 Staundeforde, Les Plees Del Corone (rev. ed. 1583), 105–108.

In the twelfth century avoidance of double punishment was a major element in the celebrated controversy between St. Thomas Becket and King Henry II. Henry wanted clerics who had been convicted of crimes in church courts turned over to lay tribunals for their punishment. Whether Becket was in fact correct in his assertions that Henry's proposals would result in double punishment for the clerics has been much debated by historians. In all events,

to be considered as a "universal maxim of the common law." [6] It is not surprising, therefore, that the principle was brought to this country by the earliest settlers as part of their heritage of freedom,[7] and that it has been

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Henry's plan was abandoned after Becket's murder. See Brooke, *op. cit., supra,* note 4, at 190–214; 2 Maitland, *op. cit., supra,* note 4; 1 Pollock and Maitland, *op. cit., supra,* note 4, at 447–456; Poole, *op. cit., supra,* note 4, at 203–218.

[6] 2 Cooley's Blackstone (4th ed. 1899), *335, 336. See also 2 Staundeforde, *op. cit., supra,* note 5, at 105–108; Lambert, Crompton and Dalton, Manuall or Analecta (rev. ed. 1642), 69–70; 3 Coke, Institutes (6th ed. 1680), 213–214; 2 Hawkins, *op. cit., supra,* note 5, at 368–379. One commentator has stated that the concept was borrowed by English law from the canon law doctrine of criminal procedure. Radin, Anglo-American Legal History, 228.

In 1487 an exception was made in the rule by a statute dealing with the "Authority of the Court of Star Chamber," 3 Hen. 7, c. 1. At the time criminal proceedings could be brought in two ways, by government indictment and by the parties who suffered injury from the crime. 3 Hen. 7, c. 1, provided that in "Death or Murder" cases a defendant acquitted or attainted under government prosecution could be tried again on charges brought by "the Wife, or next Heir to him so slain." The Act was apparently never broadened and was given an extremely narrow construction. See Hawkins, *op. cit., supra,* note 5, at 373–374, 377–379. See also Staundeforde, *op. cit., supra,* note 5, at 106–108. It soon fell into disuse, and the legal profession was greatly shocked when, in 1818, the statute was relied on to justify the retrial of a defendant who had previously been acquitted. After many maneuvers, which included upholding the defendant's right to trial by battle, a second acquittal was obtained, and the loophole in the "universal rule" against double trials was formally plugged by Parliament. See Radin, Anglo-American Legal History, 226–227, n. 24; Kirk, "Jeopardy" During the Period of the Year Books, 32 U. Pa. L. Rev. 602, 608–609.

[7] The Body of Liberties of Massachusetts (1641), clause 42, reads, "No man shall be twise sentenced by Civill Justice for one and the same Crime, offence, or Trespasse." See also The Laws and Liberties of Massachusetts (1648) (Farrand ed. 1929) 47, "everie Action . . . in *criminal* Causes shall be . . . entred in the *rolls* of everie Court . . . that such Actions be not afterwards brought again to

recognized here as fundamental again and again.[8] Today it is found, in varying forms, not only in the Federal Constitution, but in the jurisprudence or constitutions of every State, as well as most foreign nations.[9] It has, in fact, been described as a part of all advanced systems of law [10] and as one of those universal principles "of reason, justice, and conscience, of which Cicero said: 'Nor is it one thing at Rome and another at Athens, one now and another in the future, but among all nations it is the same.' " [11] While some writers have explained the opposition to double prosecutions by emphasizing the injustice inherent in two punishments for the same act,[12] and others have stressed the dangers to the innocent from allowing the full power of the state to be brought against them

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the vexation of any man." Similarly the pleas of former conviction and acquittal were recognized in colonial Virginia. Scott, Criminal Law in Colonial Virginia, 81–82, 102.

[8] See, *e. g., Ex parte Lange,* 18 Wall. 163; *Green* v. *United States,* 355 U. S. 184, 198 (majority and dissenting opinions); *Commonwealth* v. *Olds,* 5 Litt. Rep. (Ky.) 137 (1824); *State* v. *Cooper,* 13 N. J. L. 361, 370 (1833).

[9] All but five States recognize the principle in their constitutions. Each of these five prohibits double jeopardy as part of its common law. See *Brock* v. *North Carolina,* 344 U. S. 424, 429, 435 (dissenting opinion); American Law Institute, Double Jeopardy (1935), 61–72.

The maxim "non bis in idem" is found throughout the civil law. See Batchelder, Former Jeopardy, 17 Am. L. Rev. 735. See also Berner, Non bis in idem, 3 Archiv für Preussisches Strafrecht (1855), 472; Küssner, Non bis in idem, *id.,* at 198; Donnedieu de Vabres, Droit Criminel (3d ed. 1947), 886–887; It. Codice di Procedura Penale, Art. 90, 579 (Ludus ed. 1955). But cf. Radin, Anglo-American Legal History, 228.

[10] American Law Institute, Double Jeopardy (1935), Introductory note, p. 7.

[11] Batchelder, Former Jeopardy, 17 Am. L. Rev. 735.

[12] See, *e. g., Ex parte Lange,* 18 Wall. 163, 168–169.

in two trials,[13] the basic and recurring theme has always simply been that it is wrong for a man to "be brought into Danger for the same Offence more than once." [14] Few principles have been more deeply "rooted in the traditions and conscience of our people."

The Court apparently takes the position that a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State. Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp. If double punishment is what is feared, it hurts no less for two "Sovereigns" to inflict it than for one. If danger to the innocent is emphasized, that danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials, than when one of these "Sovereigns" proceeds alone. In each case, inescapably, a man is forced to face danger twice for the same conduct.

The Court, without denying the almost universal abhorrence of such double prosecutions, nevertheless justifies the practice here in the name of "federalism." This, it seems to me, is a misuse and desecration of the concept. Our Federal Union was conceived and created "to establish Justice" and to "secure the Blessings of Liberty," not to destroy any of the bulwarks on which both freedom and justice depend. We should, therefore, be suspicious of any supposed "requirements" of "federalism" which result in obliterating ancient safeguards. I have been shown nothing in the history of our Union, in the writings of its Founders, or elsewhere, to indicate that individual rights deemed essential by both State and Nation were to

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[13] See, *e. g., Commonwealth* v. *Olds,* 5 Litt. Rep. (Ky.) 137, 139 (1824); *State* v. *Cooper,* 13 N. J. L. 361, 370–371 (1833); 2 Tucker, Constitution of the United States, 675.

[14] 2 Hawkins, *op. cit., supra,* note 5, at 372. See also *id.,* at 377.

be lost through the combined operations of the two governments. Nor has the Court given any sound reason for thinking that the successful operation of our dual system of government depends in the slightest on the power to try people twice for the same act.

Implicit in the Court's reliance on "federalism" is the premise that failure to allow double prosecutions would seriously impair law enforcement in both State and Nation. For one jurisdiction might provide minor penalties for acts severely punished by the other and by accepting pleas of guilty shield wrongdoers from justice. I believe this argument fails on several grounds. In the first place it relies on the unwarranted assumption that State and Nation will seek to subvert each other's laws. It has elsewhere been persuasively argued that most civilized nations do not and have not needed the power to try people a second time to protect themselves even when dealing with foreign lands.[15] It is inconceivable to me, as it was to the Constitutional Court of South Carolina in 1816, that "If this prevails among nations who are strangers

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[15] Grant, The *Lanza* Rule of Successive Prosecutions, 32 Col. L. Rev. 1309; Grant, Successive Prosecutions by State and Nation, 4 U. C. L. A. L. Rev. 1; Developments in the Law—Conspiracy, 72 Harv. L. Rev. 920, 968, n. 347. Cf. *Feldman* v. *United States*, 322 U. S. 487, 494 (dissenting opinion); *Knapp* v. *Schweitzer*, 357 U. S. 371, 382 (dissenting opinion). In England the doctrine that a foreign acquittal is a good plea in bar seems to antedate the American Revolution. See *Rex* v. *Hutchinson*, as reported in *Beak* v. *Thyrwhit*, 3 Mod. 194, 87 Eng. Rep. 124 (1689), and *Burrows* v. *Jemino*, 2 Str. 733, 93 Eng. Rep. 815 (1726), but compare the report of the same case in *Gage* v. *Bulkeley*, Ridg. T. H. 263, 27 Eng. Rep. 824 (1744); *Rex* v. *Roche*, 1 Leach 134, 135n, 168 Eng. Rep. 169, 169n (1775). Cf. *Rex* v. *Thomas*, 1 Sid. 179, 82 Eng. Rep. 1043; 1 Lev. 118, 83 Eng. Rep. 326; 1 Keb. 663, 83 Eng. Rep. 1172 (1664); 2 Hawkins, *op. cit.*, *supra*, note 5, at 372. See also *Rex* v. *Aughet*, 26 Cox C. C. 232, 238 (C. C. A. 1918); 10 Halsbury, The Laws of England (3d ed. 1955), 405.

to each other, [it could] fail to [prevail] with us who are so intimately bound by political ties." *State* v. *Antonio,* 2 Treadway's Const. Rep. (S. C.) 776, 781. Cf. *Testa* v. *Katt,* 330 U. S. 386.

The Court's argument also ignores the fact that our Constitution allocates power between local and federal governments in such a way that the basic rights of each can be protected without double trials. The Federal Government is given power to act in limited areas only, but in matters properly within its scope it is supreme. It can retain exclusive control of such matters, or grant the States concurrent power on its own terms. If the States were to subvert federal laws in these areas by imposing inadequate penalties, Congress would have full power to protect the national interest, either by defining the crime to be punished and establishing minimum penalties applicable in both state and federal courts, or by excluding the States altogether. Conversely, in purely local matters the power of the States is supreme and exclusive. State courts can and should, therefore, protect all essentially local interests in one trial without federal interference. Cf. *Rutkin* v. *United States,* 343 U. S. 130, 139 (dissenting opinion). In areas, however, where the Constitution has vested power in the Federal Government the States necessarily act only to the extent Congress permits, and it is no infringement on their basic rights if Congress chooses to fix penalties smaller than some of them might wish. In fact, this will rarely occur, for Congress is not likely to use indirect means to limit state power when it could accomplish the same result directly by pre-empting the field.[16]

[16] See, *e. g., Hines* v. *Davidowitz,* 312 U. S. 52. Cf. *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468. Significantly, *United States* v. *Lanza,* 260 U. S. 377, involved the only situation where the Court's argument may have had some slight validity. For that case was

Ultimately the Court's reliance on federalism amounts to no more than the notion that, somehow, one act becomes two because two jurisdictions are involved. Hawkins, in his Pleas of the Crown, long ago disposed of a similar contention made to justify two trials for the same offense by different counties as "a mere Fiction or Construction of Law, which shall hardly take Place against a Maxim made in Favour of Life." [17] It was discarded as a dangerous fiction then, it should be discarded as a dangerous fiction now.

To bolster its argument that successive state and federal prosecutions do not violate basic principles of justice, the Court cites many cases. It begins with eight early state decisions which, it says, "clarified the issue by stating opposing arguments." Four of these cases held that prosecution by one government must bar subsequent prosecutions elsewhere.[18] Two of the remaining four refused to hold that concurrent jurisdiction could exist since they feared that such a holding might bring about two trials for the same offense, a result they considered too shocking to tolerate. "This is against natural justice," said the North Carolina Superior Court in 1794, "and therefore I cannot believe it to be law." [19] The seventh case cited is an inconclusive discussion coming from a State whose highest court had previously stated

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concerned with a prohibition violation, and the Eighteenth (Prohibition) Amendment could be taken to have established an area of concurrent state and national power where the Federal Government was not supreme. See *Pennsylvania* v. *Nelson*, 350 U. S. 497, 500.

[17] 2 Hawkins, *op. cit., supra*, note 5, at 370. See also 2 Staundeforde, *op. cit., supra*, note 5, at 105–106.

[18] *State* v. *Antonio*, 2 Treadway's Const. Rep. (S. C.) 776 (1816); *State* v. *Randall*, 2 Aikens (Vt.) 89 (1827); *Harlan* v. *People*, 1 Doug. Rep. (Mich.) 207 (1843); *Commonwealth* v. *Fuller*, 8 Met. (Mass.) 313 (1844).

[19] *State* v. *Brown*, 2 N. C. *100, 101 (1794). See also *Mattison* v. *State*, 3 Mo. *421 (1834).

unequivocally that a bar against double prosecutions would exist.[20] Thus only one of these early state cases actually approves the doctrine the Court today advances, and that approval is in dicta.[21] Significantly, the highest court of the same State later expressed the view that such double trials would virtually never occur in our country.[22]

The Court relies mainly, however, on a later line of decisions starting with *Fox* v. *Ohio*, 5 How. 410. Most of these, like *Fox* itself, involved only the question of whether both State and Federal Governments could make the same conduct a crime. Although some, in dicta, admitted the possibility that double prosecutions might result from such concurrent power, others did not discuss the question.[23] Many, especially among the earlier cases, pointed out that double punishment violates the genius of our

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[20] *State* v. *Tutt*, 2 Bailey (S. C.) 44 (1830). Compare *State* v. *Antonio*, 2 Treadway's Const. Rep. (S. C.) 776 (1816).

[21] *Hendrick* v. *Commonwealth*, 5 Leigh (Va.) 707 (1834).

[22] *Jett* v. *Commonwealth*, 18 Gratt. (59 Va.) 933, 947, 959 (1867).

[23] See, *e. g.*, *State* v. *Duncan*, 221 Ark. 681, 255 S. W. 2d 430; *Dashing* v. *State*, 78 Ind. 357; *State* v. *Gauthier*, 121 Me. 522, 118 A. 380; *Commonwealth* v. *Nickerson*, 236 Mass. 281, 128 N. E. 273; *State* v. *Holm*, 139 Minn. 267, 166 N. W. 181; *State* v. *Whittemore*, 50 N. H. 245; *State* v. *Frach*, 162 Ore. 602, 94 P. 2d 143; *Commonwealth ex rel. O'Brien* v. *Burke*, 171 Pa. Super. 273, 90 A. 2d 246; *Jett* v. *Commonwealth*, 18 Gratt. (59 Va.) 933. See also *State* v. *Tutt*, 2 Bailey (S. C.) 44; *State* v. *Brown*, 2 N. C. *100. Dicta can, of course, be found which runs against the Court's holding. See, *e. g.*, *Nielsen* v. *Oregon*, 212 U. S. 315, 320, where this Court said: "Where an act is . . . prohibited and punishable by the laws of both States, the one first acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality in both States, so that one convicted or acquitted in the courts of the one State cannot be prosecuted for the same offense in the courts of the other." And *United States* v. *Furlong*, 5 Wheat. 184, 197, "Robbery on the seas is . . . within the criminal jurisdiction of all nations . . . and there can be no doubt that the plea of *autre fois acquit* would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State."

free country and therefore would never occur. As Chief Justice Taney, on circuit, said in one of them "Yet in all civilized countries it is recognized as a fundamental principle of justice that a man ought not to be punished twice for the same offence; and if this party had been punished . . . in the state tribunal, the court would have felt it to be its duty to suspend sentence, and to represent the facts to the president, to give him an opportunity of . . . granting a pardon." [24] While a limited number of cases after *Fox* are cited in which a double conviction was upheld, in several of these the second court was so troubled by the result that only nominal sentences were imposed.[25] In fact, before *United States* v. *Lanza,* 260 U. S. 377 (1922), where this Court upheld and encouraged the practice, the cases of actual double punishment found are so few, in relation to the great mass of criminal cases decided, that one can readily discern an instinctive unwillingness to impose such hardships on defendants.[26]

Despite its exhaustive research, the Court has cited only three cases before *Lanza* where a new trial after an *acquittal* was upheld. In one of these, *United States* v. *Barnhart,* 22 F. 285, the state court in which the defendant had been acquitted did not have jurisdiction of the action. The Federal Circuit Court relied on this lack of jurisdiction in allowing a retrial, but made

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[24] *United States* v. *Amy,* 24 Fed. Cas. No. 14,445, at 811. See also *Fox* v. *Ohio,* 5 How. 410, 435; *United States* v. *Wells,* 28 Fed. Cas. 522, No. 16,665; *Jett* v. *Commonwealth,* 18 Gratt. (59 Va.) 933, 947.

[25] See, *e. g., United States* v. *Palan,* 167 F. 991, 992–993, "to punish a man twice for the same offence shocks the sense of justice." See also *United States* v. *Holt,* 270 F. 639, 642–643.

[26] The Court also relies on cases arising since *Lanza* where fear of that holding caused tight construction of federal laws to avoid double prosecutions. See *Jerome* v. *United States,* 318 U. S. 101; *Screws* v. *United States,* 325 U. S. 91. Cf. *Pennsylvania* v. *Nelson,* 350 U. S. 497, 509. These cases can hardly be thought to approve the result they sought to avoid.

an alternate holding based on the same general arguments used by the Court today.[27] The *Barnhart* opinion also intimated that the first trial may have been a sham.[28] Sham trials, as well as those by courts without jurisdiction, have been considered by courts and commentators not to be jeopardy, and might therefore not bar subsequent convictions.[29] In the second case cited by the Court, the state conviction followed acquittal by a federal court-martial at a time when, as the state court seemed to recognize, a military trial was thought by many not to be a trial for the purpose of double jeopardy even when both trials were conducted by the same "Sovereign." [30] The third case relied on, a 1915 decision from the State of Washington, is the only one of the three where it can fairly be said that a defendant acquitted in a proper

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[27] The case involved the killing of an Indian by white men on an Indian reservation. The court said: "The defendants have never been tried for the offense charged in this indictment. For either, the state court before which they were tried had no jurisdiction in the premises, and then the proceeding set forth in the pleas was a nullity; or if it had, it was an offense against the law of the state and not the United States." 22 F., at 291. The court was correct in its belief that the state court had no jurisdiction. See *Williams* v. *Lee*, 358 U. S. 217. The decision was on a demurrer to a plea of former acquittal and it does not appear whether the federal jury convicted.

[28] The court noted, "No white man was ever hung for killing an Indian, and no Indian tried for killing a white man ever escaped the gallows." 22 F., at 289.

[29] See, *e. g.*, *United States* v. *Ball*, 163 U. S. 662, 669; *Edwards* v. *Commonwealth*, 233 Ky. 356, 25 S. W. 2d 746. Cf. *United States* v. *Mason*, 213 U. S. 115, 120, 125. See also 2 Hawkins, *op. cit.*, *supra*, note 5, at 370.

[30] *State* v. *Rankin*, 4 Cold. (Tenn.) 145, 157 (1867). The *Rankin* court cited an account of a federal court-martial following acquittal by Florida territorial courts. Similarly, *United States* v. *Cashiel*, 25 Fed. Cas. 318, No. 14,744 (1863), upheld a federal prosecution following prosecution by the United States military authorities.

jury trial was subsequently tried again by a jury and convicted.[31]

One may, I think, infer from the fewness of the cases that retrials after acquittal have been considered particularly obnoxious, worse even, in the eyes of many, than retrials after conviction.[32] I doubt, in fact, if many practices which have been found to violate due process can boast of so little actual support. Yet it is on this meager basis that the Court must ultimately rest its finding that Bartkus' retrial does not violate fundamental principles "rooted in the traditions and conscience of our peoples." Nor are these scattered and dubious cases unchallenged, for, balanced against them, we have a firm holding by this Court sustaining an extremely narrow construction of a federal statute in order to make a state acquittal conclusive in the federal courts and thereby avoid the evil approved today. *United States* v. *Mason,* 213 U. S. 115. That case, as well as the "sacred duty . . . to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman," *Ex parte Lange,* 18 Wall. 163, 178, should make us doubly hesitant to encourage so blatant a violation of constitutional policies against double trials by giving an "illiberal construction . . . to the words of the fundamental law in which they are embodied." *Ibid.*

Since *Lanza* people have apparently become more accustomed to double trials, once deemed so shocking, just

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[31] *State* v. *Kenney,* 83 Wash. 441, 145 P. 450.

[32] See, *e. g., Commonwealth* v. *Olds,* 5 Litt. Rep. (Ky.) 137, 139; *State* v. *Cooper,* 13 N. J. L. 361, 370–371. See also Iowa Const., Art. I, § 12; Mich. Const., Art. II, § 14; Mo. Const., Art. I, § 19; N. H. Const., Pt. First Art. 16; N. J. Const., Art. I, ¶ 11; R. I. Const., Art. I, § 7; Tex. Const., Art. I, § 14. The Federal Bill of Rights did not, of course, differentiate between retrials after acquittal and retrials after conviction; it banned both.

as they might, in time, adjust themselves to all other violations of the Bill of Rights should they be sanctioned by this Court. The Court is therefore able to find a 1943 state case, as well as four federal cases in the last five years, in which a conviction following acquittal was sustained.[33] Thus this practice, which for some 150 years was considered so undesirable that the Court must strain to find examples, is now likely to become a commonplace. For, after today, who will be able to blame a conscientious prosecutor for failing to accept a jury verdict of acquittal when he believes a defendant guilty and knows that a second try is available in another jurisdiction and that such a second try is approved by the Highest Court in the Land? Inevitably, the victims of such double prosecutions will most often be the poor and the weak in our society, individuals without friends in high places who can influence prosecutors not to try them again. The power to try a second time will be used, as have all similar procedures, to make scapegoats of helpless, political, religious, or racial minorities and those who differ, who do not conform and who resist tyranny. See *Chambers* v. *Florida,* 309 U. S. 227, 236.

There are some countries that allow the dangerous practice of trying people twice. I am inserting below a recent news item about a man who was tried, convicted, sentenced to prison and then was tried again, convicted and sentenced to death.[34] Similar examples are not hard

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[33] *New Jersey* v. *Cioffe,* 130 N. J. L. 160, 32 A. 2d 79 (1943); *Serio* v. *United States,* 203 F. 2d 576 (1953); *Jolley* v. *United States,* 232 F. 2d 83 (1956); *Smith* v. *United States,* 243 F. 2d 877 (1957); *Rios* v. *United States,* 256 F. 2d 173 (1958).

[34] The New York Times for October 22, 1958, p. 4, col. 6, carried the following item under the Moscow date line:

"A 19-year-old 'stilyag' (zoot-suiter) was re-tried and sentenced to death following public protests that the original ten to twenty-five-

to find in lands torn by revolution or crushed by dictatorship. I had thought that our constitutional protections embodied in the Double Jeopardy and Due Process Clauses would have barred any such things happening here. Unfortunately, last year's holdings by this Court in *Ciucci* v. *Illinois,* 356 U. S. 571, and *Hoag* v. *New Jersey,* 356 U. S. 464, and today's affirmance of the convictions of Bartkus and Abbate cause me to fear that in an important number of cases it can happen here.

I would reverse.

MR. JUSTICE BRENNAN, whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, dissenting.

Bartkus was tried and acquitted in a Federal District Court of robbing a federally insured savings and loan association in Cicero, Illinois. He was indicted for the same robbery by the State of Illinois less than three weeks later, and subsequently convicted and sentenced to life imprisonment. The single issue in dispute at both trials was whether Bartkus was the third participant in the robbery along with two self-confessed perpetrators of the crime.

The Government's case against Bartkus on the federal trial rested primarily upon the testimony of two of the robbers, Joseph Cosentino and James Brindis, who con-

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year term imposed for killing a militiaman during a robbery was too lenient, the newspaper Komsomolskaya Pravda said today.

"The condemned youth was Victor Shanshkin, leader of a gang of four youths who tried to break into a Moscow store last May, according to the newspaper of the Young Communist Organization.

"He pumped seven bullets into the militiaman, who tried to prevent the robbery.

"The four escaped, but were later arrested and sentenced to prison terms ranging from ten to twenty-five years. The sentences aroused widespread public protests.

"At the second trial, held recently, Shanshkin was sentenced to die. The other three, all under 20 years of age, were ordered to serve prison terms ranging from ten to twenty years."

fessed their part in the crime and testified that Bartkus was their confederate. The defense was that Bartkus was getting a haircut in a barber shop several miles away at the time the robbery was committed. The owner of the barber shop, his son and other witnesses placed Bartkus in the shop at the time. The federal jury in acquitting Bartkus apparently believed the alibi witnesses and not Cosentino and Brindis.

The federal authorities were highly displeased with the jury's resolution of the conflicting testimony, and the trial judge sharply upbraided the jury for its verdict. See some of his remarks printed in *United States* v. *Vasen,* 222 F. 2d 3, 9–10 (dissenting opinion). The federal authorities obviously decided immediately after the trial to make a second try at convicting Bartkus, and since the federal courthouse was barred to them by the Fifth Amendment, they turned to a state prosecution for that purpose. It is clear that federal officers solicited the state indictment, arranged to assure the attendance of key witnesses, unearthed additional evidence to discredit Bartkus and one of his alibi witnesses, and in general prepared and guided the state prosecution. Thus the State's Attorney stated at the state trial: "I am particularly glad to see a case where the federal authorities came to see the state's attorney." And Illinois conceded with commendable candor on the oral argument in this Court "that the federal officers did instigate and guide this state prosecution" and "actually prepared this case." Indeed, the State argued the case on the basis that the record showed as a matter of "fair inference" that the case was one in which "federal officers bring to the attention of the state prosecuting authority the commission of an act and furnish and provide him with evidence of defendant's guilt."

I think that the record before us shows that the extent of participation of the federal authorities here constituted this state prosecution actually a second federal

prosecution of Bartkus. The federal jury acquitted Bartkus late in December 1953. Early in January 1954 the Assistant United States Attorney who prosecuted the federal case summoned Cosentino to his office. Present also were the FBI agent who had investigated the robbery and the Assistant State's Attorney for Cook County who later prosecuted the state case. The Assistant State's Attorney said to Cosentino, "Look, we are going to get an indictment in the state court against Bartkus, will you testify against him?" Cosentino agreed that he would. Later Brindis also agreed to testify. Although they pleaded guilty to the federal robbery charge in August 1953, the Federal District Court postponed their sentencing until after they testified against Bartkus at the state trial, which was not held until April 1954. The record does not disclose what sentences were imposed after they testified at the state trial or whether sentences have yet been imposed. Both Cosentino and Brindis were also released on bail pending the state trial, Brindis on his own recognizance.

In January, also, an FBI agent who had been active in the federal prosecution purposefully set about strengthening the proofs which had not sufficed to convict Bartkus on the federal trial. And he frankly admitted that he "was securing it [information] for the federal government," although what he gathered had "gone to the state authorities." These January efforts of the agent were singularly successful and may well have tipped the scales in favor of conviction. He uncovered a new witness against Bartkus, one Grant Pursel, who had been enlarged on bail pending his sentencing on his plea of guilty to an indictment for violation of the Mann Act. Pursel testified that "about two weeks after the federal trial, in the first part of January," the FBI agent sought him out to discuss an alleged conversation between Pursel and Bart-

kus during September 1953 when both were in jail awaiting their respective federal trials. Pursel's testimony at the state trial, that Bartkus had told him he participated in the robbery, was obviously very damaging. Yet, indicative of the attitude of the federal officials that this was actually a federal prosecution, the FBI agent arranged no interview between Pursel and any state authority. The first time that Pursel had any contact whatsoever with a state official connected with the case was the morning that he testified. And as in the case of Cosentino and Brindis, Pursel's sentencing was postponed until after he testified against Bartkus at the state trial. Here too the record does not disclose what sentence was imposed or whether any has yet been imposed.

Also within a month after the federal acquittal the FBI agent sought out the operator of the barber shop who had placed Bartkus in his shop at the time of the robbery. The barber testified at both federal and state trials that Bartkus entered his shop before 4 o'clock, about which time the robbery was committed. The agent testified as a rebuttal witness for the State that the barber had told him in January that it might have been after 4:30 o'clock when Bartkus entered the shop. And the significance of the federal participation in this prosecution is further evidenced by the Assistant State's Attorney's motion at the beginning of the trial, which was granted over defense objection, to permit the FBI agent to remain in the courtroom throughout the trial although other witnesses were excluded.

The Court, although not finding such to be the case here, apparently acknowledges that under certain circumstances it would be necessary to set aside a state conviction brought about by federal authorities to avoid the prohibition of the Fifth Amendment against a second federal prosecution. Our task is to determine how much

the federal authorities must participate in a state prosecution before it so infects the conviction that we must set it aside. The test, I submit, must be fashioned to secure the fundamental protection of the Fifth Amendment "that the . . . [Federal Government] with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . ." *Green* v. *United States,* 355 U. S. 184, 187. Under any test based upon these principles, this conviction cannot stand. In allowing the use of federal resources to bring about this second try at Bartkus, the Court denies Bartkus the protection which the Fifth Amendment assures him. Given the fact that there must always be state officials involved in a state prosecution, I cannot see how there can be more complete federal participation in a state prosecution than there was in this case. I see no escape from the conclusion that this particular state trial was in actuality a second federal prosecution—a second federal try at Bartkus in the guise of a state prosecution. If this state conviction is not overturned, then, as a practical matter, there will be no restraints on the use of state machinery by federal officers to bring what is in effect a second federal prosecution.

To set aside this state conviction because infected with constitutional violations by federal officers implies no condemnation of the state processes as such. The conviction is set aside not because of any infirmities resulting from fault of the State but because it is the product of unconstitutional federal action. I cannot grasp the merit of an argument that protection against federal oppression in the circumstances shown by this record would do violence to the principles of federalism. Of course, coopera-

tion between federal and state authorities in criminal law enforcement is to be desired and encouraged, for cooperative federalism in this field can indeed profit the Nation and the States in improving methods for carrying out the endless fight against crime. But the normal and healthy situation consists of state and federal officers cooperating to apprehend lawbreakers and present the strongest case against them at a single trial, be it state or federal. Cooperation in order to permit the Federal Government to harass the accused so as to deny him his protection under the Fifth Amendment is not to be tolerated as a legitimate requirement of federalism. The lesson of the history which wrought the Fifth Amendment's protection has taught us little if that shield may be shattered by reliance upon the requirements of federalism and state sovereignty to sustain this transparent attempt of the Federal Government to have two tries at convicting Bartkus for the same alleged crime. What happened here was simply that the federal effort which failed in the federal courthouse was renewed a second time in the state courthouse across the street. Not content with the federal jury's resolution of conflicting testimony in Bartkus' favor, the federal officers engineered this second prosecution and on the second try obtained the desired conviction. It is exactly this kind of successive prosecution by federal officers that the Fifth Amendment was intended to prohibit. This Court has declared principles in clearly analogous situations which I think should control here. In *Rea* v. *United States*, 350 U. S. 214, the Court held that an injunction should issue against a federal agent's transference of illegally obtained evidence to state authorities for use as the basis of a state charge. If the federal courts have power to defeat a state prosecution by force of their supervision of federal officers, surely the federal courts have power to defeat a state

prosecution transparently employed by federal authorities in violation of the Fifth Amendment. In *Knapp* v. *Schweitzer,* 357 U. S. 371, 380, we declared: "Of course the Federal Government may not take advantage of . . . the States' autonomy in order to evade the Bill of Rights." See also *Feldman* v. *United States,* 322 U. S. 487, 494; cf. *Byars* v. *United States,* 273 U. S. 28. These principles require, I think, that we set aside this state conviction.

SERVICE STORAGE & TRANSFER CO., INC., *v.* VIRGINIA.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 92. Argued February 26, 1959.—Decided March 30, 1959.

Petitioner, a motor carrier authorized by the Interstate Commerce Commission to transport commodities between Bluefield, W. Va., and various points in Virginia and West Virginia, was fined by Virginia for carrying certain allegedly intrastate shipments without complying with a Virginia statute governing intrastate operations. The shipments in question were from Virginia points to other Virginia points but were routed through petitioner's main terminal in Bluefield, W. Va., in accordance with petitioner's usual practice regarding less-than-truckload shipments. Subsequently, the Interstate Commerce Commission rendered an opinion construing petitioner's certificate as authorizing Virginia-to-Virginia traffic routed through Bluefield, W. Va. *Held:* The interpretation of petitioner's interstate certificate should have been litigated before the Interstate Commerce Commission under § 204 (c) of the Interstate Commerce Act before the State attempted to fine petitioner for allegedly unlawful operations, and the judgment sustaining the fine is reversed. Pp. 172–179.

(a) To sustain the fines here assessed by the State would be tantamount to a partial suspension of petitioner's federally granted certificate contrary to 49 U. S. C. § 312. Pp. 176–177.

(b) Interpretations of federal certificates of this character should be made in the first instance by the authority issuing the certificates. Pp. 177–178.

(c) *Eichholz* v. *Public Service Comm'n,* 306 U. S. 268, distinguished. Pp. 178–179.

(d) If the State believes that petitioner's operation is not bona fide interstate but is merely a subterfuge to escape its jurisdiction, it can file a complaint with the Interstate Commerce Commission under § 204 (c). P. 179.

199 Va. 797, 102 S. E. 2d 339, reversed.

495957 O–59–16

Francis W. McInerny argued the cause and filed a brief for petitioner.

Robert D. McIlwaine, III, argued the cause for respondent. On the brief were *A. S. Harrison, Jr.,* Attorney General of Virginia, and *Reno S. Harp, III,* Assistant Attorney General.

Austin L. Roberts, Jr. and *R. Everette Kreeger* filed a brief for the National Association of Railroad and Utilities Commissioners, as *amicus curiae,* urging affirmance.

MR. JUSTICE CLARK delivered the opinion of the Court.

Petitioner, an interstate motor carrier certificated by the Interstate Commerce Commission, but without a permit from Virginia allowing intrastate operations, was fined $5,000 by the State Corporation Commission for carrying 10 shipments of freight alleged to have been of an intrastate character and, therefore, in violation of Chapter 12, Title 56, of the Code of Virginia.[1] The shipments in question originated at Virginia points and were destined to Virginia points but were routed through Bluefield, West Virginia, where petitioner maintains its main terminal. They were transported in a vehicle with freight destined to points outside of Virginia. Upon arrival at Bluefield the freight destined to Virginia was removed and consolidated with freight coming to the

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[1] Va. Code, 1950, § 56–278, provides:

"No common carrier by motor vehicle or restricted common carrier by motor vehicle not herein exempted shall engage in intrastate operation on any highway within the State without first having obtained from the Commission a certificate of public convenience and necessity authorizing such operation, and a statement of the State Highway Commission that the law applicable to the proposed route or routes has been complied with as to size, weight, and type of vehicles to be used, and a like statement as to any increase in size, weight, and type of vehicles proposed to be operated by the applicant after such application is granted."

terminal from non-Virginia origins. It then moved back into Virginia to its destinations. The Corporation Commission found that the routes thus employed through Bluefield were a subterfuge to evade state law. The Virginia Court of Appeals agreed but directed that the fine be reduced to $3,500 because of a failure of the Commonwealth's case on three of the shipments. 199 Va. 797, 102 S. E. 2d 339. Petitioner pleads that Virginia's interpretation of its operations conflicts with its interstate certificate as well as an interpretation thereof by the Interstate Commerce Commission. It claims that respondent was without power thus to impose criminal sanctions on its certificated interstate operations. We granted certiorari, 358 U. S. 810, to test out the conflicting contentions. We agree with the petitioner that under the facts here the interpretation of petitioner's interstate commerce certificate should first be litigated before the Interstate Commerce Commission under the provision of § 204 (c) of the Interstate Commerce Act, 49 U. S. C. § 304 (c).[2]

Petitioner operates its truck lines in parts of Virginia and West Virginia. Its activity is carried on under a certificate of convenience and necessity issued by the Interstate Commerce Commission. The petitioner's pres-

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[2] That section provides:

(c) "Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this chapter, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint." 49 U. S. C. § 304 (c).

ent I. C. C. certificate is a combination of its original 1941 certificate and a second certificate issued in 1943 upon its purchase of the operating rights of another carrier. Neither it nor its predecessor held a certificate from the State Corporation Commission authorizing any intrastate carriage. It is authorized under the relevant parts of its interstate certificate to transport general commodities as a motor common carrier in interstate commerce:

> "Between Bluefield, Va., Bluefield, W. Va., and points and places within five miles of Bluefield, W. Va.
> "Between Bluefield, Va., and points and places within five miles of Bluefield, Va., and those within five miles of Bluefield, W. Va., respectively, on the one hand, and, on the other, points and places in that part of Virginia and West Virginia within 75 miles of that territory. Between Bluefield, W. Va., on the one hand, and, on the other, points and places in West Virginia, that part of Virginia west of U. S. Highway 29 and south of U. S. Highway 60 including points and places on the indicated portions of the highways specified, and that part of Virginia north of U. S. Highway 60 which is within 80 miles of Bluefield, W. Va."

Petitioner's method of operation is uncontradicted in the record. It maintains its headquarters in Bluefield, West Virginia, and terminal points in Virginia at Bristol and Roanoke. Its main activity is the movement of freight of less-than-truckload shipments. In order to gather the shipments and, by combining them, make up a full truck load it operates "peddler runs" from its Virginia terminals which serve as pick ups for freight in the vicinity. All of the traffic is directed through the Bluefield, West Virginia, terminal. About three percent of the traffic consists of shipments destined from one Virginia point to another while the remainder is directed

from points within to those outside that State. The freight gathered by the "peddler runs" is combined at a terminal and placed in an "over the road" tractor trailer unit and carried to Bluefield, West Virginia. There it is broken down and combined with other shipments received from all of the other runs of petitioner. That part destined to points in and around Bluefield is delivered locally through "peddler runs" operated from that terminal. The remainder is sorted out for forwarding to the terminal nearest its destination and is "filed out" by "over the road" operation. Upon arrival at the latter terminal it is delivered by "peddler runs" to its local destination.

The Commonwealth's criminal case is bottomed on shipments the origin and final destination of which are in Virginia. While it stipulated that all of these shipments were routed through Bluefield, West Virginia, and were, therefore, on their face interstate shipments,[3] Virginia takes the position that they were clearly intrastate in character because had they been moved over direct routes none would ever have left the Commonwealth. It contends that petitioner's circuitous and unnecessarily long routes were a mere subterfuge to escape intrastate regulation and evade its jurisdiction. Aside from the testimony of highway officers as to the actual shipments, none of which is disputed, the Commonwealth's evidence consisted solely of maps substantiating its position that petitioner's routes were circuitous and often long, sometimes exceeding twice the shortest possible route. However, it offered no direct evidence of bad faith on the part of petitioner in moving its traffic through Bluefield, West Virginia.

On the other hand, petitioner offered the testimony of its manager and others as to the bona fides of its opera-

[3] 49 U. S. C. § 303 (10) defines "interstate commerce" as including "commerce . . . between places in the same State through another State, ..." 49 Stat. 544.

tion. It proved that it and its predecessor-operator had been carrying on its business in Virginia in a similar manner for many years and that it enjoyed certificates from the Interstate Commerce Commission authorizing its operations. Petitioner admits that some of its routes are circuitous but claims this is because of its method of gathering less-than-truckload shipments regardless of final destination and routing them through its "gateway" terminal at Bluefield where they are assorted according to final destination. It stands uncontradicted that its operation is not only practical, efficient and profitable, but also that the creation of this "flow of traffic" is a time-saver to the shipper since there is less time lost waiting for the making up of a full truck load. It also claims a unique service for less-than-truckload shipments of central Virginians who ship commodities to southwest Virginia and Kentucky and who otherwise would suffer long delays on deliveries or would be obliged to ship by special truck at higher rates. While these considerations are not controlling, they throw light on petitioner's claim of bona fides.

In *Castle* v. *Hayes Freight Lines,* 348 U. S. 61, 63–64 (1954), we observed that "Congress in the Motor Carrier Act adopted a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce." We pointed out that 49 U. S. C. § 312 provides "that all certificates, permits or licenses issued by the Commission 'shall remain in effect until suspended or terminated as herein provided' . . . . Under these circumstances, it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate." To uphold the criminal fines here assessed would be tantamount to a partial suspension of petitioner's federally granted certificate. Even though the questioned operations constitute only a minor, *i. e.,* three percent, portion of the petitioner's business, that

portion is nevertheless entitled to the same protection as are the other operations which are conducted under the certificate. In fact, the method of handling is identical and the freight is often transported in the same vehicle. The certificate on its face covers the whole operation. In fact, in 1953, in approving the acquisition of petitioner by another carrier, the I. C. C. expressly approved the very type of operation now being carried on. In its unpublished report, the Commission noted:

> "Under its existing authority, Service Storage may lawfully perform a cross-haul service under a combination of its radial rights by operating, for example, between points in West Virginia within 75 miles of the base area, on the one hand, and, on the other, points in Virginia on and west of U. S. Highway 29 and on the south of U. S. Highway 60, and points in the three Kentucky counties provided such operations under a combination of the various rights are routed through Bluefield as a gateway." MC–F–5361, *Smith's Transfer Corporation of Staunton, Va.—Control—Service Storage and Transfer Company, Inc.,* 59 M. C. C. 803 (report not published.)

It appears clear that interpretations of federal certificates of this character should be made in the first instance by the authority issuing the certificate and upon whom the Congress has placed the responsibility of action. The Commission has long taken this position. Compare *Atlantic Freight Lines, Inc.,* v. *Pennsylvania Public Utility Comm'n,* 163 Pa. Super. 215, 60 A. 2d 589, with *Atlantic Freight Lines, Inc.—Petition for Declaratory Order,* 51 M. C. C. 175. The wisdom of such a practice is highlighted by the facts of this case. Between the close of the hearing, and the announcement of the Virginia Commission's decision, Service petitioned the I. C. C. for a declaratory order interpreting its certificate. The

Commonwealth, although it had notice of the I. C. C. proceeding, elected not to participate. After the Virginia Commission had found petitioner to be operating in intrastate commerce and fined it for such operation, the I. C. C. issued an opinion, 71 M. C. C. 304, in which it construed petitioner's certificate as authorizing Virginia-to-Virginia traffic routed through Bluefield, West Virginia.[4] This was but a reaffirmation of its prior interpretation of the certificate. 59 M. C. C. 803, *supra*. Such conflicts can best be avoided if the interpretation of I. C. C. certificates is left to the Interstate Commerce Commission.

Nor is *Eichholz* v. *Public Service Comm'n,* 306 U. S. 268 (1939) to the contrary. There Missouri revoked a carrier's interstate permit because it crossed state lines into Kansas City, Kansas, for the sole purpose of *creating* an interstate operation. Eichholz, however, had no certificate from the Interstate Commerce Commission, and this Court's opinion was premised on this fact rather than that the interstate operations were merely a subterfuge and hence not bona fide. The words of Chief Justice Hughes there clearly distinguish that case from the present:

> "When the [Missouri] Commission revoked the permit, the Interstate Commerce Commission had not acted upon appellant's application under the Federal

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[4] In its declaratory opinion the Commission noted:

"In the absence of any showing that petitioner's use of its authorized route is a subterfuge to avoid State regulation, or other than a logical and normal operation through the carrier's headquarters, we are of the opinion that petitioner's operations, in the manner described, constitute bona fide transportation in interstate commerce.

. . . . . .

"We find that the operations described between points in Virginia through Bluefield, W. Va., are bona fide operations in interstate commerce within the authority granted to petitioner in certificate No. MC—30471." *Service Storage & Transfer Co., Inc.—Petition for Declaratory Order,* 71 M. C. C. 304, 306.

> Motor Carrier Act and meanwhile the authority of the state body to take appropriate action under the state law to enforce reasonable regulations of traffic upon the state highways had not been superseded." 306 U. S., at 273.

Eichholz followed naturally from the holding of the Court in *Welch Co.* v. *New Hampshire,* 306 U. S. 79 (1939), that the enactment of the Motor Carrier Act did not, without more, supersede all reasonable state regulation, the latter continuing in effect until the Interstate Commerce Commission acted on the same subject matter. That it has admittedly done here.

Finally, the Commonwealth is not helpless to act. If it believes that petitioner's operation is not bona fide interstate but is merely a subterfuge to escape its jurisdiction, it can avail itself of the remedy Congress has provided in the Act. Section 204 (c), *supra,* note 2, authorizes the filing of a "complaint in writing to the Commission by any . . . State board . . . [that] any . . . carrier . . ." has abused its certificate. See also *Castle* v. *Hayes Freight Lines, supra.* Thus the possibility of a multitude of interpretations of the same federal certificate by several States will be avoided and a uniform administration of the Act achieved.

The judgment is

Reversed.

THE MONROSA ET AL. *v.* CARBON BLACK EXPORT, INC.

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

No. 178. Argued March 3–4, 1959.—Decided March 30, 1959.

Respondent, a Delaware corporation, brought a libel in admiralty in a Federal District Court in Texas for damage to a shipment of goods during an ocean voyage from Houston and New Orleans to various Italian ports. The libel was *in rem* against the ship, then in the port of Houston on another voyage, and *in personam* against its owner, an Italian corporation. After requiring a bond to secure whatever judgment might finally be rendered, the District Court declined jurisdiction on the ground that the parties had agreed by a provision in the bill of lading that controversies regarding cargo damage should be settled only in the courts of Genoa, Italy. The Court of Appeals reversed, finding the provision in the bill of lading inapplicable to libels *in rem* and declining to enforce its terms as to the libel *in personam*. *Held:*

1. The bill of lading provision cannot be construed to include libels *in rem* and accordingly the libel *in rem* was properly maintainable. Pp. 182–183.

2. This case does not afford an appropriate instance to pass upon the extent to which effect can be given to such stipulations in ocean bills of lading not to resort to the courts of this country, and the writ of certiorari is dismissed as improvidently granted. Pp. 183–184.

254 F. 2d 297, writ of certiorari dismissed.

E. D. Vickery argued the cause for petitioners. With him on the brief was *George W. Renaudin.*

Joseph T. McGowan argued the cause for respondent. With him on the brief was *Carl G. Stearns.*

Henry N. Longley filed a brief for the American Institute of Marine Underwriters, as *amicus curiae,* urging affirmance.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The respondent, Carbon Black Export, Inc., a Delaware corporation, brought a libel in admiralty in the District Court for the Southern District of Texas for damage sustained to a shipment of carbon black during an ocean voyage from Houston and New Orleans to various Italian ports. The libel was one *in rem* against the vessel in question, the S. S. *Monrosa,* then in the port of Houston on another voyage, and *in personam* against the *Monrosa*'s owner, Navigazione Alta Italia, an Italian corporation. The latter filed an appearance in response to the libel *in personam,* and, as owner of the vessel, filed a claim to it, and prayed to defend the libel *in rem.* In respect to the libel *in rem,* a stipulation to abide the decree, in the penal sum of $100,000, was filed by the claimant and the National Surety Company, its surety, and approved by the present respondent. Navigazione Alta Italia then moved that the District Court decline jurisdiction over the cause, on the grounds that the parties had agreed, by a provision in the bills of lading covering the shipment, that controversies in regard to cargo damage should be settled only in the courts of Genoa, Italy. The District Court granted the motion, subject to the filing of a bond by Navigazione Alta Italia in the sum of $100,000 to respond to whatever judgment might finally be rendered on the cause of action in question. The Court of Appeals for the Fifth Circuit reversed. It found the provision in the bill of lading in terms inapplicable to suits *in rem,* and it declined to enforce its terms to require a dismissal of the libel *in personam.* 254 F. 2d 297. We granted certiorari, 358 U. S. 809, because of an indicated conflict in principle between the Fifth Circuit's views as to enforceability of such provisions and those taken by the Second Circuit, primarily in *William H. Muller & Co.* v. *Swedish American Line Ltd.,* 224 F. 2d 806.

We do not believe that this case affords us an appropriate instance to pass upon the extent to which effect can be given to such stipulations in ocean bills of lading not to resort to the courts of this country. The provision in this case was one of many printed provisions in a form bill of lading prepared by the carrier and presented by it for use in shipments on its vessel. It reads:

> "27.—ALSO, that no legal proceedings may be brought against the Captain or Shipowners or their Agents in respect to any loss of or damage to any goods herein specified except in Genoa, it being understood and agreed that every other Tribunal in the place or places where the goods were shipped or landed is incompetent, not withstanding that the ship may be legally represented there."

We find ourselves in agreement with the views of the Court of Appeals below that this clause should not be read as limiting the maintenance of an action *in rem,* cf. *The Maggie Hammond,* 9 Wall. 435, 449–450, against the vessel to enforce a maritime lien for proper carriage. The initial words are particularly appropriate to a restriction of the clause to *in personam* actions, and the rest of the language is intelligible on this premise.* In accord-

*We note that in another place the bill of lading makes specific recognition of suits both *in rem* and *in personam.* Clause 35 provides:

"35.—In any event the Carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered. Suit shall not be deemed brought until jurisdiction shall have been obtained over the Carrier and/or the ship by service of process or by an agreement to appear."

While the first sentence is verbatim from § 3 (6) of the Carriage of Goods by Sea Act, 49 Stat. 1209, 46 U. S. C. § 1303 (6), the language nevertheless reinforces the fact that if both categories of suit were to be included under Clause 27, apt words to accomplish this were readily available, and were in fact used in another clause of the bill.

ance with the familiar rule in such circumstances, we will not stretch the language when the party drafting such a form contract has not included a provision it easily might have. *The Caledonia,* 157 U. S. 124, 137; *The Majestic,* 166 U. S. 375, 386; *Compania de Navigacion La Flecha* v. *Brauer,* 168 U. S. 104, 118. Considerations involved in construing exemptions from carriers' liability provided by Acts of Congress are, we think, quite different. See *Consumers Import Co.* v. *Kabushiki Kaisha Kawasaki Zosenjo,* 320 U. S. 249. It is a form contract, not a statute, that we construe here.

Accordingly, after oral argument, we have concluded that the Court of Appeals was correct in holding that the libel *in rem* was properly maintainable. Both parties approved a secured stipulation to release the vessel from seizure under the libel, in an amount substantially the same as the recovery demanded by the libellant. This same amount the District Court denominated as proper security against a recovery elsewhere. We need not conjure up doubts in this regard that the parties never expressed. While the parties were entitled to have the judgments of the courts below as to whether the libel *in personam* was also maintainable, we do not believe it a proper exercise of our discretionary jurisdiction to pass on that aspect of the case, which alone presents the question which led us to grant certiorari. It appears that in any event the respondent will be able to try its claim in the District Court.

In the light of these circumstances, which "were not . . . fully apprehended at the time certiorari was granted," *Ferguson* v. *Moore-McCormack Lines, Inc.,* 352 U. S. 521, 559 (separate opinion), the writ of certiorari will be dismissed as improvidently granted. *Rice* v. *Sioux City Memorial Park Cemetery, Inc.,* 349 U. S. 70, 75; *Goins* v. *United States,* 306 U. S. 622; *Moor* v. *Texas & New Orleans R. Co.,* 297 U. S. 101; *Southern Power Co.*

v. *North Carolina Public Service Co.*, 263 U. S. 508. Cf. *Hammerstein* v. *Superior Court of California*, 341 U. S. 491, 492; *McCarthy* v. *Bruner*, 323 U. S. 673; *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 392–393; *Tyrrell* v. *District of Columbia*, 243 U. S. 1. Examination of a case on the merits, on oral argument, may bring into "proper focus" a consideration which, though present in the record at the time of granting the writ, only later indicates that the grant was improvident. See *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, *supra*, at 73. While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the extent to which these bill of lading provisions may be given effect by our courts can await a day when the issue is posed less abstractly.

Writ of certiorari dismissed.

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

I cannot agree with the Court's view that Clause 27 of the bill of lading, fixing Genoa, Italy, as the forum for legal proceedings in respect of loss or damage to the goods shipped, applies only to actions *in personam*, and not to actions *in rem*. The Court's reading of the clause imputes to the parties the drawing of a distinction the purpose of which is impossible to grasp. As this Court said in *Consumers Import Co.* v. *Kabushiki Kaisha Kawasaki Zosenjo*, 320 U. S. 249, 253, in referring to an earlier case, "The Court said that 'To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles.' The riddle after more than half a century

repeated to us in different context does not appear to us to have improved with age."

Apart from this, however, I see no justification for our not reaching the question of the validity of Clause 27 with respect to *in personam* actions, an issue which still remains in the case even on the Court's view that the clause does not embrace *in rem* proceedings. That question, of course, presents no constitutional issue which we should strive to avoid, but is only one of ordinary commercial admiralty law. It is the only question which led us to take this case for review. And the issue has been fully briefed and argued by the parties. To be sure, it is possible that this question is not of great importance to the litigants if the *in rem* action can in any case go forward in Texas. But the very fact that respondent chose to institute and continue actions both *in personam* and *in rem* shows that it was not content to rely solely on the vessel's surety, and cautions against our now gratuitously treating the *in personam* action as purely academic. Moreover, review by certiorari, as Chief Justice Hughes once put it, is "in the interest of the law, its appropriate exposition and enforcement, not in the mere interest of the litigants." *

Furthermore, I do not think this can be called a case where the circumstances presently confronting us "were not manifest or fully apprehended at the time certiorari was granted." See *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 559 (separate opinion). The question of the construction of the clause, and that of its validity, were both fully discussed by the parties in their certiorari papers. Indeed, it was apparent on the surface of things that we might find ourselves in the very position we now are, since the Court of Appeals had itself found Clause 27 inapplicable to *in rem* proceedings and had then gone on

*S. Rep. No. 711, 75th Cong., 1st Sess., p. 39.

to consider the validity of the clause as related to *in personam* actions.

Avoidance of decision now on a question which is obviously bound to recur seems to me to be both unsatisfactory and unsound judicial administration. The course which the Court has taken serves only to leave the lower federal courts in confusion and uncertainty and to make it necessary for us to mortgage our future and constantly mounting calendars with a question which we could and should decide today. As the Court has not spoken on that question it would be inappropriate for me to express my own view upon it.

ABBATE ET AL. *v.* UNITED STATES.

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

No. 7. Argued October 22, 1958.—Decided March 30, 1959.

Indicted in an Illinois State Court for violating an Illinois statute making it a crime to conspire to injure or destroy the property of another, petitioners pleaded guilty, and each was sentenced to three months' imprisonment. Thereafter, because of the same conspiracy, they were indicted, tried and convicted in a Federal District Court for violating 18 U. S. C. § 371 by conspiring to violate 18 U. S. C. § 1362, which forbids the injury or destruction of communications facilities "operated or controlled by the United States." *Held:* Their federal prosecution was not barred under the Double Jeopardy Clause of the Fifth Amendment by their earlier conviction in the State Court. *United States* v. *Lanza,* 260 U. S. 377. Pp. 187–196.

247 F. 2d 410, affirmed.

Charles A. Bellows argued the cause and filed a brief for petitioners.

Leonard B. Sand argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Carl H. Imlay.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

During a strike against the Southern Bell Telephone and Telegraph Company, the petitioners and one McLeod were solicited in Chicago, Illinois, by a union official, Shelby, to dynamite facilities of the telephone company located in the States of Mississippi, Tennessee, and Louisiana. The four men met in Chicago where Shelby gave the petitioners and McLeod the plans of the facilities to

495957 O–59–17

be dynamited and instructed them as to the method to be used. After Shelby left Chicago the petitioners told McLeod that they would not go through with the plan. McLeod, however, obtained dynamite and went to Mississippi to destroy telephone company facilities located there. The petitioners thereupon disclosed the plot to the telephone company and the Chicago police.

The petitioners, with Shelby and McLeod, were subsequently indicted by the State of Illinois for violating an Illinois statute making it a crime to conspire to injure or destroy the property of another.[1] The indictment describes the property as "communication facilities belonging to the Southern Bell Telephone & Telegraph Company" and "belonging to the American Telephone and Telegraph Company." The petitioners entered pleas of guilty to the indictment and were each sentenced to three months' imprisonment.

Thereafter indictments were returned in the United States District Court for the Southern District of Mississippi against the petitioners and Shelby, and also against one Perry who pointed out to McLeod the property to be dynamited. This indictment does not refer to the facilities as belonging to the telephone companies, but charges the offense of violating 18 U. S. C. § 371 [2] by conspiring

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[1] 38 Smith-Hurd Ill. Stat. Ann. (1957 Supp.) § 139 provides in pertinent part: "If any two or more persons conspire or agree together . . . with the fraudulent or malicious intent wrongfully and wickedly to injure the . . . property of another . . . they shall be deemed guilty of a conspiracy . . . ." The statute applies to conspiracies within Illinois to destroy property outside the State. See *People* v. *Buckminster*, 282 Ill. 177, 118 N. E. 497.

[2] 18 U. S. C. § 371 provides in pertinent part: "If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

to destroy, contrary to 18 U. S. C. § 1362,[3] "certain works, property and material known as coaxial repeater stations and micro-wave towers . . . located in the States of Mississippi, Tennessee and Louisiana . . . which were essential and integral parts of systems and means of communication operated and controlled by the United States." McLeod confessed to his part in the conspiracy and testified on the federal trial to petitioners' acts of participation in the conspiracy. These same acts were the basis of the Illinois convictions. The Government also introduced proof that the Strategic Air Command, the Civil Aeronautics Administration, the Navy and other federal agencies have the exclusive use of some of the circuits within the coaxial cables carried by the repeater stations and micro-wave towers that were to be destroyed. The federal jury found the four defendants guilty as charged. On appeal the Fifth Circuit Court of Appeals reversed the convictions of Shelby and Perry for error in the admission of evidence, but affirmed the convictions of the petitioners, 247 F. 2d 410. We granted certiorari limited to consideration of the claim that the federal prosecutions, based on the same acts as were the prior state convictions, placed petitioners twice in jeopardy contrary to the Fifth Amendment, 355 U. S. 902.

In *Bartkus* v. *Illinois, ante,* p. 121, also decided today, the order of the prosecutions was the reverse of the order in this case. Here the federal prosecution came after the Illinois convictions. Thus this case squarely raises the question whether a federal prosecution of defendants already prosecuted for the same acts by a State subjects

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[3] The relevant part of 18 U. S. C. § 1362 is as follows: "Whoever willfully or maliciously injures or destroys any of the . . . property . . . of any . . . telephone, or cable, line, station, or system, or other means of communication, operated or controlled by the United States . . . ." is guilty of a crime.

those defendants "for the same offense to be twice put in jeopardy of life or limb" in violation of the Fifth Amendment.[4]

We do not write on a clean slate in deciding this question. As early as 1820 in *Houston* v. *Moore,* 5 Wheat. 1, it was recognized that this issue would arise from the concurrent application of state and federal laws.[5] During the following three decades a number of state courts reached differing conclusions as to whether a state prosecution would bar a subsequent federal prosecution of the same person for the same acts.[6] Against this background this Court thoroughly considered the question in three cases between 1847 and 1852. In *Fox* v. *Ohio,* 5 How. 410, the petitioner had been convicted of passing a counterfeit coin of the United States within the State of Ohio in violation of a state statute. She contended that the Fifth Amendment prohibited successive state and federal prosecutions for the same acts, and therefore that a prosecution under the Ohio statute would prevent federal authorities from prosecuting the same act under the federal counterfeiting laws. Thus, the argument continued, the Court should declare the Ohio statute unconstitutional under the

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[4] The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." The circumstances of this case do not require us to consider the suggestion in the Government's brief that "no state prosecution can preclude the federal government from enforcing federal law." For example, there is nothing in this record to indicate any federal participation in the Illinois prosecution.

[5] Justice Johnson, in another case at the same Term, recognized the related problem of the scope to be given the plea of *autrefois acquit* when based on an acquittal by the courts of another country. *United States* v. *Furlong,* 5 Wheat. 184, 197.

[6] Compare, *e. g., Mattison* v. *State,* 3 Mo. *421, and *Hendrick* v. *Commonwealth,* 5 Leigh (Va.) 707, with *e. g., State* v. *Randall,* 2 Aikens (Vt.) 89, and *Harlan* v. *People,* 1 Douglass' Rep. (Mich.) 207.

Supremacy Clause in order to preserve the effectiveness of federal law enforcement. *Houston* v. *Moore* and some of the leading state authorities bearing on whether the Fifth Amendment applied to successive state and federal prosecutions were argued to the Court. All members of the Court agreed that the Fifth Amendment would not prohibit a federal prosecution even though based on the same act of passing the counterfeit coin that resulted in the state prosecution. There was a division, however, as to what disposition of the case was required by this conclusion. The majority reasoned that since the Ohio prosecution would not render the Federal Government powerless to enforce its counterfeit laws there was no basis for declaring the Ohio statute unconstitutional under the Supremacy Clause. Mr. Justice McLean, dissenting, thought that since "the punishment under the State law would be no bar to a prosecution under the law of Congress," 5 How., at 439, this undesirable result should be avoided by declaring the state statute unconstitutional, for, he said, "Nothing can be more repugnant . . . than two punishments for the same act," *id.*, at 440. Three years later, in *United States* v. *Marigold*, 9 How. 560, a unanimous Court affirmed a conviction under the federal counterfeiting statute that was discussed in *Fox*. The Court, in holding that a state and a federal statute could both apply to the same conduct, accepted the conclusion of *Fox* that "the same act might . . . constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either . . . ." 9 How., at 569.

The third case, *Moore* v. *Illinois,* 14 How. 13, gave clear expression to the emerging principle that the Fifth Amendment did not apply to a federal prosecution subsequent to a state prosecution of the same person for the same acts. That case involved a conviction of Moore

under an Illinois statute for harboring an escaped slave. A federal statute outlawed the same act as an interference with the rights of the owner of the slave. Moore urged that the Illinois statute was void "as it subjects the delinquent to a double punishment for a single offence," 14 How., at 19. The Court rejected this argument, saying:

> "Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. . . . That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other; consequently, this court has decided, in the case of Fox *v.* The State of Ohio, . . . that a State may punish the offence of uttering or passing false coin, as a cheat or fraud practised on its citizens; and, in the case of the United States *v.* Marigold, . . . that Congress, in the proper exercise of its authority, may punish the same act as an offence against the United States." 14 How., at 20.

Justice McLean again dissented on the ground of his dissent in *Fox,* namely, that the state law should be declared invalid for the very reason that "the conviction and punishment under the State law would be no bar to a prosecution under the law of Congress." *Id.,* at 21.

The reasoning of the Court in these three cases was subsequently accepted by this Court, in dictum, in the follow-

ing cases: *United States* v. *Cruikshank,* 92 U. S. 542, 550; *Coleman* v. *Tennessee,* 97 U. S. 509, 518; *Ex parte Siebold,* 100 U. S. 371, 389; *United States* v. *Arjona,* 120 U. S. 479, 487; *Cross* v. *North Carolina,* 132 U. S. 131, 139; *In re Loney,* 134 U. S. 372, 375; *Pettibone* v. *United States,* 148 U. S. 197, 209; *Crossley* v. *California,* 168 U. S. 640, 641; *Sexton* v. *California,* 189 U. S. 319, 322–323; *Matter of Heff,* 197 U. S. 488, 507; *Grafton* v. *United States,* 206 U. S. 333, 353–354; *Southern R. Co.* v. *Railroad Comm'n of Indiana,* 236 U. S. 439, 445; and *McKelvey* v. *United States,* 260 U. S. 353, 358–359. Typical of the statements adopting the principle is that of Chief Justice Taney, on circuit, in *United States* v. *Amy,* 24 Fed. Cas. No. 14,445 (C. C. D. Va. 1859), at p. 811, that "from the nature of our government, the same act may be an offence against the laws of the United States and also of a state, and be punishable in both."

Culminating this development was *United States* v. *Lanza,* 260 U. S. 377, where the issue was directly presented to this Court. Lanza was convicted by the State of Washington for "manufacturing, transporting, and having in possession" a quantity of liquor in violation of a state statute. He was subsequently convicted in a Federal District Court of violating the Volstead Act, 41 Stat. 305, for performing the same acts with regard to the same liquor. The Court held that the prior state conviction did not bar the federal prosecution. It pointed out that the State could constitutionally make Lanza's acts criminal under its original powers reserved by the Tenth Amendment, and the Federal Government could constitutionally prohibit the acts under the Eighteenth Amendment. Thus this case presented the situation hypothesized in *Fox* v. *Ohio* and other early cases; two sovereigns had, within their constitutional authority, prohibited the same acts, and each was punishing a breach of its pro-

hibition. A unanimous Court, in an opinion by Chief Justice Taft, held:

> "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.
>
> "It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the Federal Government, . . . and the double jeopardy therein forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority." 260 U. S., at 382.

The *Lanza* principle has been accepted without question in *Hebert* v. *Louisiana,* 272 U. S. 312, also a Volstead Act case, and in the following cases in this Court arising under other statutes: *Westfall* v. *United States,* 274 U. S. 256, 258; *Puerto Rico* v. *The Shell Co.,* 302 U. S. 253, 264–266; *Jerome* v. *United States,* 318 U. S. 101, 105; *Screws* v. *United States,* 325 U. S. 91, 108. And see *California* v. *Zook,* 336 U. S. 725, 752–753, 758 (dissenting opinion). Similarly, *Lanza* has been considered in many cases in the Courts of Appeals to have established the general principle that a federal prosecution is not barred by a prior state prosecution of the same person for the same acts.[7]

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[7] See, *e. g., Rios* v. *United States,* 256 F. 2d 173 (C. A. 9th Cir. 1958); *Smith* v. *United States,* 243 F. 2d 877 (C. A. 6th Cir. 1957); *Jolley* v. *United States,* 232 F. 2d 83 (C. A. 5th Cir. 1956); *United States* v. *Levine,* 129 F. 2d 745 (C. A. 2d Cir. 1942).

Petitioner asks us to overrule *Lanza*. We decline to do so. No consideration or persuasive reason not presented to the Court in the prior cases is advanced why we should depart from its firmly established principle. On the contrary, undesirable consequences would follow if *Lanza* were overruled. The basic dilemma was recognized over a century ago in *Fox* v. *Ohio*. As was there pointed out, if the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered. For example, the petitioners in this case insist that their Illinois convictions resulting in three months' prison sentences should bar this federal prosecution which could result in a sentence of up to five years. Such a disparity will very often arise when, as in this case, the defendants' acts impinge more seriously on a federal interest than on a state interest. But no one would suggest that, in order to maintain the effectiveness of federal law enforcement, it is desirable completely to displace state power to prosecute crimes based on acts which might also violate federal law. This would bring about a marked change in the distribution of powers to administer criminal justice, for the States under our federal system have the principal responsibility for defining and prosecuting crimes. See *Screws* v. *United States,* 325 U. S. 91, 109; *Jerome* v. *United States,* 318 U. S. 101, 104–105. Thus, unless the federal authorities could somehow insure that there would be no state prosecutions for particular acts that also constitute federal offenses, the efficiency of federal law enforcement must suffer if the Double Jeopardy Clause prevents successive state and federal prosecutions. Needless to say, it would be highly impractical for the federal authorities to attempt to keep informed of all state prosecutions which might bear on federal offenses.

The conclusion is therefore compelled that the prior Illinois conviction of the petitioners did not bar the instant federal prosecution.

Affirmed.

By MR. JUSTICE BRENNAN.

The Government, in its brief and on oral argument in this case, urged that the judgment of the Court of Appeals should be affirmed on an alternative ground to that upon which the Court rests the decision. The Government argued that it was unnecessary to delimit the application of the Double Jeopardy Clause of the Fifth Amendment to successive state and federal prosecutions of the same acts beyond holding that the clause does not apply when those prosecutions, as in this case, are under statutes which require different evidence for a conviction and which protect different interests. The contention is that in this case additional evidence is necessary to convict under the federal statute, namely, proof that federal property was knowingly to be destroyed, and that the two statutes are designed to protect different interests, the state statute to protect "the sanctity of privately-owned property" and the federal statute to prevent injury to "means of communication, operated or controlled by the United States." The gist of the argument is that two prosecutions are not "for the same offense" within the meaning of the Fifth Amendment when they are based upon the violation of two statutes designed to vindicate different governmental interests and requiring different evidence to support convictions. Although the Court considered that it was unnecessary to discuss this suggested ground for decision, I consider its implications to be so disturbing as to require comment.[1] I cannot escape

[1] "It cannot be suggested that in cases where the author is the mere instrument of the Court he must forego expression of his own con-

the fact that this reasoning would apply equally if each of two successive *federal* prosecutions based on the same acts was brought under a different *federal* statute, and each statute was designed to protect a different federal interest. Indeed, the Government supports its argument by citing *Blockburger* v. *United States,* 284 U. S. 299; *Gore* v. *United States,* 357 U. S. 386; and *Pinkerton* v. *United States,* 328 U. S. 640, cases which involved only federal prosecutions, and *Hoag* v. *New Jersey,* 356 U. S. 464, which involved successive prosecutions by the same State. The argument then obviously is that the mere fact that there are two statutes which vindicate different interests and require different evidence of itself means that the Fifth Amendment does not prohibit successive prosecutions of the same acts under the respective statutes.

However, whatever the case under the Fourteenth Amendment as to successive state prosecutions, *Hoag* v. *New Jersey, supra,* or under the Fifth Amendment as to consecutive federal sentences imposed upon one trial, *e. g., Gore* v. *United States, supra,* I think it clear that successive federal prosecutions of the same person based on the same acts are prohibited by the Fifth Amendment even though brought under federal statutes requiring different evidence and protecting different federal interests. It is true that this Court has said: "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger* v. *United States,* 284 U. S. 299, 304. But, so far as appears, neither this "same evi-

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victions." *Wheeling Steel Corp.* v. *Glander,* 337 U. S. 562, 576 (separate opinion). See also *Helvering* v. *Davis,* 301 U. S. 619, 639–640.

dence" test nor a "separate interests" test has been sanctioned by this Court under the Fifth Amendment except in cases in which consecutive sentences were imposed on conviction of several offenses at one trial.[2] The accused, although punished separately and cumulatively for various aspects of a single transaction, is subject to only one prosecution and one trial. If the Government attempted multiple prosecutions of the same offenses, an entirely different constitutional issue would be presented, cf. *Hoag* v. *New Jersey,* 356 U. S., at 467. The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to mar-

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[2] *Gavieres* v. *United States,* 220 U. S. 338, upheld a prosecution for insulting a public officer despite a prior prosecution for indecent behavior in public based on essentially the same acts. However, that decision was an interpretation of a congressional statute against double jeopardy applicable to the Philippine Islands, a territory "with long-established legal procedures that were alien to the common law." *Green* v. *United States,* 355 U. S. 184, 197. It has not been considered an authoritative interpretation of the constitutional provision. *Green* v. *United States, supra;* see *Hoag* v. *New Jersey,* 356 U. S. 464, 478, n. 3 (dissenting opinion). *Flemister* v. *United States,* 207 U. S. 372, decided under the same statute, involved two prosecutions of two different assaults on two police officers at two different times, although in "one continuing attempt to defy the law." *Burton* v. *United States,* 202 U. S. 344, was decided on a demurrer, the Court holding that the pleadings did not necessarily show that a count in a second indictment alleging the receipt of a bribe from a corporation charged the same offense as a count in a prior indictment alleging the receipt of a bribe from a named person who was an officer of the corporation. In *United States* v. *Adams,* 281 U. S. 202, the defendant had attempted to conceal an embezzlement by making false entries in bank books and, at a later date, by falsifying a report. A federal statute prohibited both such falsifications. Although both falsifications were attempts to conceal the same embezzlement, the statute outlawed the falsifications themselves, and thus the Court held that since they were made at different times and in different circumstances each could be prosecuted separately.

shal the resources and energies necessary for his defense more than once for the same alleged criminal acts. "The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . ." *Green* v. *United States,* 355 U. S. 184, 187. In short, "The prohibition is not against being twice punished, but against being twice put in jeopardy. . . ." *United States* v. *Ball,* 163 U. S. 662, 669.

Obviously separate prosecutions of the same criminal conduct can be far more effectively used by a prosecutor to harass an accused than can the imposition of consecutive sentences for various aspects of that conduct. It is always within the discretion of the trial judge whether to impose consecutive or concurrent sentences, whereas, unless the Fifth Amendment applies, it would be solely within the prosecutor's discretion to bring successive prosecutions based on the same acts, thereby requiring the accused to defend himself more than once. Furthermore, separate prosecutions, unlike multiple punishments based on one trial, raise the possibility of an accused acquitted by one jury being subsequently convicted by another for essentially the same conduct.[3] See *Hoag* v. *New Jersey, supra;* cf. *Ciucci* v. *Illinois,* 356 U. S. 571. Thus to per-

[3] The Double Jeopardy Clause of the Fifth Amendment applies in the same manner to a prosecution following a prior conviction as it does to a prosecution following a prior acquittal. See *Ex parte Lange,* 18 Wall. 163, 169, 172; *United States* v. *Ball,* 163 U. S. 662, 669. This is consistent with the fact that, although *autrefois acquit* and *autrefois convict* were separate pleas in bar in the English law, they have historically been given the same scope. See 4 Blackstone Commentaries *335–336; 2 Hawkins, Pleas of the Crown (8th ed. 1824), pp. 515–529.

mit the Government statutorily to multiply the number of offenses resulting from the same acts, and to allow successive prosecutions of the several offenses, rather than merely the imposition of consecutive sentences after one trial of those offenses, would enable the Government to "wear the accused out by a multitude of cases with accumulated trials." *Palko* v. *Connecticut,* 302 U. S. 319, 328. Repetitive harassment in such a manner goes to the heart of the Fifth Amendment protection.[4] This protection cannot be thwarted either by the "same evidence" test or because the conduct offends different federal statutes protecting different federal interests. The prime consideration is the protection of the accused from the harassment of successive prosecutions, and not the justification for or policy behind the statutes violated by the accused. If the same acts violate different federal statutes protecting separate federal interests those interests can be adequately protected at a single trial by the imposition of separate sentences for each statute violated. See, *e. g., Bell* v. *United States,* 349 U. S. 81, 82–83; *Gore* v. *United States,* 357 U. S. 386.

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[4] The doctrine of collateral estoppel may not provide adequate protection. Of course, it will be of no help to an accused who has been previously convicted. But even if he has previously been acquitted, the doctrine may be of little help because in many cases it cannot be ascertained whether the controlling factual issues in the second prosecution were necessarily resolved in the prior trial. See *Hoag* v. *New Jersey,* 356 U. S. 464, 471–472; *United States* v. *Dockery,* 49 F. Supp. 907; *United States* v. *Halbrook,* 36 F. Supp. 345. Furthermore, the protection of an essentially procedural concept such as collateral estoppel, see *Hoag* v. *New Jersey, supra,* at 471, is less substantial than the constitutional protection of the Double Jeopardy Clause. For example, a second trial that placed the accused in double jeopardy could be collaterally attacked, whereas query whether the failure to apply collateral estoppel could be challenged by a post-conviction motion for relief. See *Sunal* v. *Large,* 332 U. S. 174, 178–179.

The holding of the Court in *In re Nielsen,* 131 U. S. 176, establishes the governing principle. The defendant in that case, a Mormon with more than one wife, had been convicted of violating a congressional statute, applicable to the territory of Utah, which prohibited males from cohabiting with more than one woman. Subsequently he was prosecuted and convicted of adultery in violation of another congressional statute, the second prosecution being based on the same acts as the prior conviction. Despite the fact that it was necessary to prove a fact in the second prosecution not necessary for the first conviction, *i. e.,* that the defendant was married to another woman, and that a different federal interest was protected by each statute, the Court held that the second prosecution unconstitutionally put the defendant twice in jeopardy for the same offense.

In short, though the Court in *Gore* has found no violence to the guarantee against double jeopardy when the same acts are made to do service for several convictions *at one trial,* I think not mere violence to, but virtual extinction of, the guarantee results if the Federal Government may try people over and over again for the same criminal conduct just because each trial is based on a different federal statute protecting a separate federal interest.

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

Petitioners, Abbate and Falcone, were convicted in an Illinois State Court of conspiracy to blow up certain property located in Mississippi and adjoining States. After receiving prison sentences in Illinois they were indicted and convicted of the same conspiracy in the Federal District Court of Mississippi and again sentenced to prison. The Court now affirms their second sentences over the contention that the federal conviction violates the double jeopardy provision of the Fifth Amendment.

In support of its affirmance, the Court points to *United States* v. *Lanza,* 260 U. S. 377. In that case, this Court sustained Lanza's conviction for handling liquor contrary to federal law, after Lanza had been convicted under state law of handling the same liquor at the same time and place. Some writers have explained *Lanza* as justified by the broad language of the Prohibition Amendment which was then in effect and which gave the States and the Federal Government concurrent power to control liquor traffic.[1] The Court's opinion, in *Lanza,* however, seemed rather to rely on dicta in a number of past cases in this Court. These had assumed that identical conduct of an accused might be prosecuted twice, once by a State and once by the Federal Government, because the "offense" punished by each is in some, meaningful, sense different. The legal logic used to prove one thing to be two is too subtle for me to grasp. See, generally, *Bartkus* v. *Illinois, ante,* p. 150 (dissenting opinion).[2]

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[1] U. S. Const., Amend. XVIII. See, *e. g.,* Note 55, Col. L. Rev. 83, 89, n. 38. *Lanza* is severely criticized in Grant, The *Lanza* Rule of Successive Prosecutions, 32 Col. L. Rev. 1309; Grant, Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons, 4 U. C. L. A. L. Rev. 1.

[2] The Court today seems to rely on the argument, also made in *Lanza,* 260 U. S., at 385, that failure to allow federal prosecutions after state trials might endanger federal law. States, the argument runs, might establish minor punishments for conduct which violates United States statutes. Criminals could then plead guilty in state courts and be safe from federal justice. Whatever the merits of the argument in the context of the Eighteenth Amendment, it can have no validity here. As we pointed out in *Bartkus* v. *Illinois, ante,* p. 150 (dissenting opinion), if Congress has power to make certain conduct a federal crime, it also has power to protect the national interest. It can take exclusive jurisdiction over the crime or, if it wishes to allow the States concurrent power, it can define the offense and set minimum penalties which would be applicable in both state and federal courts. In addition, should the state trial prove to be a

I am also not convinced that a State and the Nation can be considered two wholly separate sovereignties for the purpose of allowing them to do together what, generally, neither can do separately.[3] In the first place, I cannot conceive that our States are more distinct from the Federal Government than are foreign nations from each other.[4] And it has been recognized that most free countries have accepted a prior conviction elsewhere as a bar to a second trial in their jurisdiction.[5] In the second place, I believe the Bill of Rights' safeguard against double jeopardy was intended to establish a broad national policy against federal courts trying or punishing a man a second time after acquittal or conviction in any court. It is just as much an affront to human dignity and just as dangerous to human freedom for a man to be punished twice for the same offense, once by a State and once by the United States, as it would be for one of these two Governments to throw him in prison twice for the offense. Perhaps a belief that this is true was responsible for the fact that a proposed amendment to the Double Jeopardy Clause was rejected in our First Congress while the Bill of Rights was being considered. If that amendment had been

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sham, it might be that no jeopardy could be shown and that a subsequent federal trial would be constitutional. See, *e. g., Edwards* v. *Commonwealth,* 233 Ky. 356, 25 S. W. 2d 746. Cf. *United States* v. *Mason,* 213 U. S. 115, 125. It therefore appears that federal laws can easily be safeguarded without requiring defendants to undergo double prosecutions.

[3] Almost all of the States have constitutional provisions similar to the Double Jeopardy Clause of the Federal Constitution. See *Brock* v. *North Carolina,* 344 U. S. 424, 429, 435 (dissenting opinion).

[4] Cf. *Testa* v. *Katt,* 330 U. S. 386.

[5] See Grant, The *Lanza* Rule of Successive Prosecutions, 32 Col. L. Rev. 1309; Grant, Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons, 4 U. C. L. A. L. Rev. 1.

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adopted the Clause apparently would have barred double prosecutions for "the same offense" only if brought under "any law of the United States." 1 Annals of Cong., 753 (1789).[6] I fear that this limitation on the scope of the Double Jeopardy Clause, which Congress refused to accept, is about to be firmly established as the constitutional rule by the Court's holding in this case and in *Bartkus* v. *Illinois, ante,* p. 121.

I would reverse both convictions.

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[6] At the time the amendment was offered the Double Jeopardy Clause under discussion read: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." 1 Annals of Cong., 434 (1789). If the amendment had passed the clause would have read: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence by any law of the United States." *Id.,* at 753.

FRIEDMAN *v.* UNITED STATES ET AL.

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

No. 675. Decided March 30, 1959.

168 F. Supp. 815, affirmed.

Irving D. Friedman and *Sol Friedman* for appellant.

Solicitor General Rankin and *Robert W. Ginnane* for the United States and the Interstate Commerce Commission, appellees. *Joseph H. Wright* and *Erle J. Zoll, Jr.* for railroad appellees.

PER CURIAM.

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

TEITELBAUM *v.* CALIFORNIA.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 678. Decided March 30, 1959.

Appeal dismissed and certiorari denied.
Reported below: 163 Cal. App. 2d 184, 329 P. 2d 157.

Morris Lavine for appellant.

Stanley Mosk, Attorney General of California, *William E. James,* Assistant Attorney General, and *Herschel T. Elkins,* Deputy Attorney General, 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 certiorari, certiorari is denied.

TURNER ET AL. *v.* KANSAS.

APPEAL FROM THE SUPREME COURT OF KANSAS.

No. 688. Decided March 30, 1959.

Appeal dismissed for want of a substantial federal question.
Reported below: 183 Kan. 496, 328 P. 2d 733.

Marvin E. Lewis for appellants.

PER CURIAM.

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

KLOR'S, INC., *v.* BROADWAY-HALE STORES, INC., ET AL.

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

No. 76. Argued February 25–26, 1959.—
Decided April 6, 1959.

Petitioner, which operates a retail store selling radios, television sets, refrigerators and other household appliances, brought this action for treble damages under § 4 of the Clayton Act against respondents, a chain of department stores and 10 national manufacturers and their distributors, alleging that the manufacturers and distributors conspired among themselves and with the chain of department stores either not to sell to petitioner or to do so only at discriminatory prices and highly unfavorable terms, in violation of §§ 1 and 2 of the Sherman Act, and that this had seriously damaged petitioner. Respondents did not deny these allegations but moved for summary judgment and dismissal of the complaint for failure to state a cause of action. They filed affidavits that there were hundreds of other retailers selling the same and competing appliances in the same community and contended that the controversy was a "purely private quarrel" between petitioner and the chain of department stores, which did not amount to a "public wrong" proscribed by the Sherman Act. *Held:* Petitioner's allegations clearly showed a group boycott, which is forbidden by the Sherman Act, and respondents' affidavits provided no defense to the charges. Pp. 208–214.

(a) A group boycott is not to be tolerated merely because the victim is only one merchant whose business is so small that his destruction makes little difference to the economy. P. 213.

(b) Monopoly can as surely thrive by the elimination of small businessmen, one at a time, as it can by driving them out in large groups. P. 213.

255 F. 2d 214, reversed and cause remanded.

Maxwell Keith argued the cause for petitioner. With him on the brief was *Irvin Goldstein.*

Moses Lasky argued the cause for respondents. On the brief were *Mr. Lasky* for Broadway-Hale Stores, Inc.; *Herbert W. Clark* for Admiral Corporation et al.; *Robert E. Burns* and *Joseph S. Wright* for Zenith Radio Corp.; *Alvin H. Pelavin* for Whirlpool-Seeger Corporation; *David B. Gideon* for H. R. Basford Co.; *Francis R. Kirkham* for Radio Corporation of America; *H. W. Glensor* for Leo J. Meyberg Co.; *Nat Schmulowitz* and *Peter S. Sommer* for Emerson Radio & Phonograph Corp. et al.; *Marion B. Plant* for Philco Corporation et al.; *Boice Gross* for Rheem Manufacturing Co.; *Everett A. Mathews* for General Electric Co. et al.; and *Philip S. Ehrlich* for Olympic Radio & Television, Inc., et al., respondents.

Philip Elman argued the cause for the United States, as *amicus curiae*, urging reversal. On the brief were *Solicitor General Rankin, Assistant Attorney General Hansen, Robert A. Bicks, Charles H. Weston* and *Henry Geller.*

Mr. Justice Black delivered the opinion of the Court.

Klor's, Inc., operates a retail store on Mission Street, San Francisco, California; Broadway-Hale Stores, Inc., a chain of department stores, operates one of its stores next door. The two stores compete in the sale of radios, television sets, refrigerators and other household appliances. Claiming that Broadway-Hale and 10 national manufacturers and their distributors have conspired to restrain and monopolize commerce in violation of §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2, Klor's brought this action for treble damages and injunction in the United States District Court.[1]

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[1] Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of

In support of its claim Klor's made the following allegations: George Klor started an appliance store some years before 1952 and has operated it ever since either individually or as Klor's, Inc. Klor's is as well equipped as Broadway-Hale to handle all brands of appliances. Nevertheless, manufacturers and distributors of such well-known brands as General Electric, RCA, Admiral, Zenith, Emerson and others [2] have conspired among themselves and with Broadway-Hale either not to sell to Klor's or to sell to it only at discriminatory prices and highly unfavorable terms. Broadway-Hale has used its "monopolistic" buying power to bring about this situation. The business of manufacturing, distributing and selling household appliances is in interstate commerce. The concerted refusal to deal with Klor's has seriously handicapped its ability to compete and has already caused it a great loss of profits, goodwill, reputation and prestige.

The defendants did not dispute these allegations, but sought summary judgment and dismissal of the complaint for failure to state a cause of action. They submitted unchallenged affidavits which showed that there were

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trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." Section 2 of the Act reads, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ." Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, states, "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained. . . ."

[2] The appliance manufacturers named in the complaint are: Admiral Corp., Emerson Radio and Phonograph Corp., General Electric Co., Olympic Radio and Television, Inc., Philco Corp., Rheem Manufacturing Co., Radio Corp. of America, Tappan Stove Co., Whirlpool Corp., Zenith Radio Corp.

hundreds of other household appliance retailers, some within a few blocks of Klor's who sold many competing brands of appliances, including those the defendants refused to sell to Klor's. From the allegations of the complaint, and from the affidavits supporting the motion for summary judgment, the District Court concluded that the controversy was a "purely private quarrel" between Klor's and Broadway-Hale, which did not amount to a "public wrong proscribed by the [Sherman] Act." On this ground the complaint was dismissed and summary judgment was entered for the defendants. The Court of Appeals for the Ninth Circuit affirmed the summary judgment. 255 F. 2d 214. It stated that "a violation of the Sherman Act requires conduct of defendants by which the public is or conceivably may be ultimately injured." 255 F. 2d, at 233. It held that here the required public injury was missing since "there was no charge or proof that by any act of defendants the price, quantity, or quality offered the public was affected, nor that there was any intent or purpose to effect a change in, or an influence on, prices, quantity, or quality . . . ." *Id.*, at 230. The holding, if correct, means that unless the opportunities for customers to buy in a competitive market are reduced, a group of powerful businessmen may act in concert to deprive a single merchant, like Klor, of the goods he needs to compete effectively. We granted certiorari to consider this important question in the administration of the Sherman Act. 358 U. S. 809.

We think Klor's allegations clearly show one type of trade restraint and public harm the Sherman Act forbids, and that defendants' affidavits provide no defense to the charges. Section 1 of the Sherman Act makes illegal any contract, combination or conspiracy in restraint of trade, and § 2 forbids any person or combination from monopolizing or attempting to monopolize any part of

interstate commerce. In the landmark case of *Standard Oil Co.* v. *United States,* 221 U. S. 1, this Court read § 1 to prohibit those classes of contracts or acts which the common law had deemed to be undue restraints of trade and those which new times and economic conditions would make unreasonable. *Id.,* at 59–60. The Court construed § 2 as making "the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof . . . ." *Id.,* at 61. The effect of both sections, the Court said, was to adopt the common-law proscription of all "contracts or acts which it was considered had a monopolistic tendency . . ." and which interfered with the "natural flow" of an appreciable amount of interstate commerce. *Id.,* at 57, 61; *Eastern States Lumber Assn.* v. *United States,* 234 U. S. 600, 609. The Court recognized that there were some agreements whose validity depended on the surrounding circumstances. It emphasized, however, that there were classes of restraints which from their "nature or character" were unduly restrictive, and hence forbidden by both the common law and the statute. 221 U. S., at 58, 65.[3] As to these classes of restraints, the Court noted, Congress had determined its own criteria of public harm and it was not for the courts to decide whether in an individual case injury had actually occurred. *Id.,* at 63–68.[4]

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[3] See also *United States* v. *American Tobacco Co.,* 221 U. S. 106, 179, where the Court noted that the statute forbade all "acts or contracts or agreements or combinations . . . which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade . . . ."

[4] See also *United States* v. *Trenton Potteries Co.,* 273 U. S. 392, 395–401; *Radovich* v. *National Football League,* 352 U. S. 445, 453–454. In this regard the Sherman Act should be contrasted with § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended,

Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category.[5] They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality." *Fashion Originators' Guild* v. *Federal Trade Comm'n,* 312 U. S. 457, 466, 467–468. Cf. *United States* v. *Trenton Potteries Co.,* 273 U. S. 392. Even when they operated to lower prices or temporarily to stimulate competition they were banned. For, as this Court said in *Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U. S. 211, 213, "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." Cf. *United States* v. *Patten,* 226 U. S. 525, 542.

Plainly the allegations of this complaint disclose such a boycott. This is not a case of a single trader refusing to deal with another,[6] nor even of a manufacturer and a dealer agreeing to an exclusive distributorship. Alleged

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15 U. S. C. § 45 (b), which requires that the Commission find "that a proceeding by it . . . would be to the interest of the public" before it issues a complaint for unfair competition. See *Federal Trade Comm'n* v. *Klesner,* 280 U. S. 19, 27. But cf. *Fashion Originators' Guild* v. *Federal Trade Comm'n,* 312 U. S. 457, 466–467.

[5] See, *e. g., Eastern States Lumber Assn.* v. *United States,* 234 U. S. 600; *Binderup* v. *Pathe Exchange, Inc.,* 263 U. S. 291; *Fashion Originators' Guild* v. *Federal Trade Comm'n,* 312 U. S. 457; *Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U. S. 211, 214; *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594, 625; *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1, 5.

[6] Compare *United States* v. *Colgate & Co.,* 250 U. S. 300, with *United States* v. *Schrader's Son, Inc.,* 252 U. S. 85; *United States* v. *Bausch & Lomb Optical Co.,* 321 U. S. 707, 719–723; *Lorain Journal Co.* v. *United States,* 342 U. S. 143.

in this complaint is a wide combination consisting of manufacturers, distributors and a retailer. This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants' products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale, and in some instances forbids them from selling to it on any terms whatsoever. It interferes with the natural flow of interstate commerce. It clearly has, by its "nature" and "character," a "monopolistic tendency." As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy.[7] Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations "which 'tend to create a monopoly,' " whether "the tendency is a creep-

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[7] The court below relied heavily on *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, in reaching its conclusion. While some language in that case can be read as supporting the position that no restraint on trade is prohibited by § 1 of the Sherman Act unless it has or is intended to have an effect on market prices, such statements must be considered in the light of the fact that the defendant in that case was a labor union. The Court in *Apex* recognized that the Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives. See *United States* v. *Hutcheson*, 312 U. S. 219; *Allen Bradley Co.* v. *Local 3, International Brotherhood of Electrical Workers*, 325 U. S. 797. Moreover, cases subsequent to *Apex* have made clear that an effect on prices is not essential to a Sherman Act violation. See, *e. g.*, *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U. S. 457, 466.

ing one" or "one that proceeds at full gallop." *International Salt Co.* v. *United States,* 332 U. S. 392, 396.

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

Reversed.

MR. JUSTICE HARLAN, believing that the allegations of the complaint are sufficient to entitle the petitioner to go to trial, and that the matters set forth in respondents' affidavits are not necessarily sufficient to constitute a defense irrespective of what the petitioner may be able to prove at the trial, concurs in the result.

PARSONS ET AL. *v.* SMITH, FORMER COLLECTOR OF INTERNAL REVENUE.

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

No. 218. Argued March 4, 1959.—Decided April 6, 1959.*

Under contracts with the owners of coal-bearing lands, which were terminable by the owners on short notice without cause, petitioners strip mined coal for the owners and received for their services a fixed price per ton of coal extracted and delivered. Petitioners were not entitled to keep or sell any of the coal but were required to deliver all they mined to the owners. *Held:* Petitioners were not entitled to percentage depletion deductions under §§ 23 (m) and 114 (b)(4) of the Internal Revenue Code of 1939 on the amounts received by them for their strip mining operations, since they had no capital investment or economic interest in the coal in place. Pp. 216–226.

255 F. 2d 595, 599, affirmed.

Sherwin T. McDowell argued the cause for petitioners in No. 218. With him on the brief were *William R. Spofford* and *Charles I. Thompson, Jr.*

David Berger argued the cause for petitioners in No. 305. With him on the brief was *Leon H. Kline.*

Howard A. Heffron argued the causes for respondent. On the brief were *Solicitor General Rankin, Assistant Attorney General Rice, Daniel M. Friedman* and *Marvin W. Weinstein.*

Edgar J. Goodrich and *Lipman Redman* filed a brief for the Estate of John Schumacher, as *amicus curiae,* urging reversal.

Frederick Bernays Wiener and *Le Roy Katz* filed a brief in No. 218 for Paragon Jewel Coal Co., Inc., as *amicus curiae,* urging affirmance.

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*Together with No. 305, *Huss et al.* v. *Smith, Former Collector of Internal Revenue,* also on certiorari to the same Court.

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

These tax refund cases present the question whether petitioners, Parsons in No. 218 and Huss in No. 305, are entitled to an allowance for depletion on amounts received by them under contracts with the owners of coal-bearing lands for the strip mining of coal from those lands and the delivery of it to the landowners. The cases were heard by the same courts below. The District Court ruled that petitioners had no depletable interest in the coal in place and rendered judgment for the respondent—collector in each case. The Court of Appeals affirmed both judgments. 255 F. 2d 595, 599. Because of an asserted conflict with the principles applicable under the decisions of this Court, we granted certiorari in both cases. 358 U. S. 814.

The pertinent facts in each case were found by the District Court and are not challenged here. In substance, they are as follows:

PARSONS, No. 218. Petitioners were members of a partnership ("Parsons") which, until the transactions involved here, was primarily engaged in road building. Rockhill Coal Co. ("Rockhill") owned bituminous coal-bearing lands in Pennsylvania. Much of the coal was located relatively near the surface and was therefore removable by the strip mining process.[1] In 1942 Parsons expressed a desire to strip mine coal from Rockhill's lands, but it refused to sign the written contract offered because the firm did not wish to be bound by a contract "which would take a long time, since, if an opportunity opened up, [it] wanted to go back to road building." It was then agreed that Parsons would, and it did, proceed under

[1] Strip mining is done from the surface of the earth. In general, it is performed by stripping off the earth, known as overburden, which lies over the coal and then removing the coal so uncovered.

an oral agreement. Under that agreement Parsons was to strip mine coal from such sites and seams, within a generally described area of Rockhill's lands, as were designated by Rockhill. Parsons was to furnish at its own expense all of the equipment, facilities and labor which it thought necessary to strip mine and deliver the coal to Rockhill's cars at a fixed point. For each ton of coal so mined and delivered Rockhill was to pay Parsons a stated amount of money.[2] Parsons was not authorized to keep or sell any of the coal but was required to deliver all that was mined to Rockhill. The agreement was not for a definite term, nor did it obligate Parsons to mine the tract to exhaustion, but, to the contrary, it was agreed that "if Parsons or Rockhill wanted to quit, all that was necessary to terminate the arrangement was the giving of a ten-day notice." However, if Rockhill thus canceled the agreement and if "Parsons had previously gone to the expense of removing the overburden (thereby performing the heavy part of the work, as well as meeting wages and expenses in so doing), then Parsons would have the privilege of taking out the coal [so uncovered] and of being paid for it [even though] this took more than ten days." Operations continued under the agreement without notice of termination until August 1, 1950, when Parsons gave Rockhill notice that it would "quit" the work on September 1, 1950, and it ceased these operations on or near that date. Large amounts of strippable coal still remained on the tract and strip mining thereon was continued by another contractor. Parsons' investment in equipment used in the work ran from a low in 1943 of $60,000 to a high in 1947 of $250,000. The equipment was movable

[2] It was contemplated by the parties that in the event of an increase in the union labor wage scale the amount per ton to be paid to Parsons would be increased and on several occasions it was increased to cover higher costs for both labor and material used in the work.

and there is no evidence that it was not usable elsewhere or for other purposes.

HUSS, No. 305. Petitioners were members of a partnership ("Huss") engaged in the business of strip mining coal. Philadelphia and Reading Coal & Iron Co. ("Reading") owned anthracite coal-bearing lands in Schuylkill County, Pennsylvania. Much of the coal was so located that it could be removed by strip mining. In 1944 Reading and Huss entered into a written contract [3] under which Huss undertook to strip mine the coal from such areas, within a generally described tract of Reading's land, as might be designated by Reading and that was not lying deeper than a prescribed distance from the surface. Huss was to furnish at its own expense all of the equipment, facilities and labor necessary to mine and deliver the coal to Reading's colliery. For each ton of coal so mined and delivered Reading was to pay Huss a stated sum.[4] That sum was agreed to be in "full compensation for the full performance of all work and for the furnishing of all material, labor, power, tools, machinery, implements and equipment required for the work." Huss was not authorized to keep or sell any of the coal. The contract was expressly terminable by Reading at any time upon 30 days' written notice "without specifying any reason therefor" and without liability for "any loss of anticipated profits or any other damages whatever." This right of termination was not exercised. Operations continued under the contract until July 1947, by which time

[3] During the tax years involved, which were 1944 to 1947, other like contracts were entered into by the parties, but they were all identical, except for areas covered and prices per ton to be paid to Huss, and it will therefore be unnecessary to treat with them individually.

[4] The contract provided, however, that in the event of an increase in the union labor wage scale the amount per ton to be paid to Huss would be, and on several occasions during the operation it was, increased sufficiently to cover increased labor costs.

Huss had mined most of the strippable coal on the lands covered by the contract that lay within the stipulated distance from the surface, and the contract was then canceled by mutual agreement. Huss' investment in equipment used in the work ran from a low in 1944 of $100,000 to a high in 1947 of $500,000. All of the equipment was movable and usable elsewhere in strip mining and some of it was usable for other purposes.

Whether a deduction from gross income shall be permitted for depletion of mineral deposits, or any interest therein, is entirely a matter of grace.[5] We therefore must look, first, to the provisions and purposes of the statutes and to the decisions construing them to see what interests are permitted a deduction for depletion, and, next, to the contracts involved to see whether they gave to petitioners such an interest.

The applicable statutes are §§ 23 (m) and 114 (b) (4)(A) of the Internal Revenue Code of 1939, 26 U. S. C. (1952 ed.) § 23 (m) and 26 U. S. C. (1946 ed.) § 114 (b) (4)(A). Section 23 (m) directs that a reasonable allowance for depletion shall be made "in the case of mines, . . . according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary," and that "[i]n the case of leases the deductions shall be equitably apportioned between the lessor and lessee." And § 114(b) (4)(A) provides that the allowance shall be, "in the case of coal mines, 5 percentum . . . of the gross income from [mining][6] the property during the taxable year, exclud-

[5] *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362, 366; *Anderson* v. *Helvering*, 310 U. S. 404, 408; *Commissioner* v. *Southwest Exploration Co.*, 350 U. S. 308, 312.

[6] Section 114 (b)(4)(B) provided that "the term 'gross income from the property' means the gross income from mining." 26 U. S. C. (1946 ed.) § 114 (b)(4)(B).

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ing . . . any rents or royalties paid or incurred by the taxpayer in respect of the property."

The purpose of the deduction for depletion is plain and has been many times declared by this Court. "It is permitted in recognition of the fact that the mineral deposits are wasting assets and is intended as compensation to the owner for the part used up in production." *Helvering* v. *Bankline Oil Co.,* 303 U. S. 362, 366. And see *United States* v. *Ludey,* 274 U. S. 295, 302; *Helvering* v. *Elbe Oil Land Development Co.,* 303 U. S. 372, 375; *Anderson* v. *Helvering,* 310 U. S. 404, 408; *Kirby Petroleum Co.* v. *Commissioner,* 326 U. S. 599, 603. "[The depletion] exclusion is designed to permit a recoupment of the owner's capital investment in the minerals so that when the minerals are exhausted, the owner's capital is unimpaired." *Commissioner* v. *Southwest Exploration Co.,* 350 U. S. 308, 312. Save for its application only to gross income from mineral deposits and standing timber, the purpose of "the deduction for depletion does not differ from the deduction for depreciation." *United States* v. *Ludey,* 274 U. S., at 303. In short, the purpose of the depletion deduction is to permit the owner of a capital interest in mineral in place to make a tax-free recovery of that depleting capital asset.

Although the sentence in § 23 (m) that "In the case of leases the deductions shall be equitably apportioned between the lessor and lessee" presupposes "that the deductions may be allowed in other cases" (*Palmer* v. *Bender,* 287 U. S. 551, 557), the statute "must be read in the light of the requirement of apportionment of a single depletion allowance" (*Helvering* v. *Twin Bell Oil Syndicate,* 293 U. S. 312, 321), for two or more persons "cannot be entitled to depletion on the same income" (*Commissioner* v. *Southwest Exploration Co.,* 350 U. S. 308, 309). It follows that if petitioners are entitled to a depletion allowance on the amounts earned under their contracts,

the amounts allowable to the landowners for the depletion of their coal deposits would be correspondingly reduced.

Dealing specifically with the problem of what interests in mineral deposits were permitted a deduction for depletion under the practically identical predecessors of §§ 23 (m) and 114, this Court said in *Palmer* v. *Bender*, 287 U. S. 551, 557: "The language of the statute is broad enough to provide, at least, for every case in which the taxpayer has acquired, by investment, any interest in the oil in place, and secures, by any form of legal relationship, income derived from the extraction of the oil, to which he must look for a return of his capital." The Court further said that the deduction is not "dependent upon the particular legal form of the taxpayer's interest in the property to be depleted, [and that] [i]t is enough if . . . he has retained a right to share in the oil produced. If so he has an *economic interest* in the oil, in place, which is depleted by production." [7] *Ibid.* (Emphasis added.) The Court went on to hold that lessees of oil producing properties, by reserving from an assignment a royalty of "one-eighth of all the oil produced and saved," retained

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[7] The principles declared in the *Palmer* case have been recognized and applied by every subsequent decision of this Court that has treated with the subject.

Helvering v. *Bankline Oil Co.*, 303 U. S. 362, 367, literally adopted the language of the *Palmer* case upon the point.

In *Helvering* v. *O'Donnell*, 303 U. S. 370, 371, it was said: "The question is whether respondent had an interest, that is, a capital investment, in the oil and gas in place. . . . *Palmer* v. *Bender*, 287 U. S. 551, 557; *Helvering* v. *Twin Bell Oil Syndicate*, 293 U. S. 312, 321; *Thomas* v. *Perkins*, 301 U. S. 655, 661; *Helvering* v. *Bankline Oil Co., supra.*"

Helvering v. *Elbe Oil Land Development Co.*, 303 U. S. 372, 375–376, declared that "The words 'gross income from the property,' as used in the statute governing the allowance for depletion, mean gross income received from the operation of the oil and gas wells by one

an economic interest in the oil in place and were therefore entitled to an allowance for depletion against their gross income from that interest.

Five years later, in 1938, the Court in *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362, reaffirmed the test laid down in *Palmer* and added: "But the phrase 'economic interest' is not to be taken as embracing a mere economic advantage derived from production, through a contractual relation to the owner, by one who has no capital investment in the mineral deposit." 303 U. S., at 367. Applying that principle, the Court held that a processor who, by contracts with the owners of gas and oil wells, had acquired the right to take wet gas from the wellheads and to extract and sell the gasoline therefrom, paying the well owners a percentage of the proceeds of such sales, had not acquired an economic interest in the depleting gas in place but only an economic advantage to be derived from the processing operations, and that therefore the

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who has a capital investment therein,—not income from the sale of the oil and gas properties themselves."

Anderson v. *Helvering*, 310 U. S. 404, 408–409, repeated the statement last quoted.

In *Kirby Petroleum Co.* v. *Commissioner*, 326 U. S. 599, 603, the Court said: "The test of the right to depletion is whether the taxpayer has a capital investment in the oil in place which is necessarily reduced as the oil is extracted."

In *Burton-Sutton Oil Co.* v. *Commissioner*, 328 U. S. 25, 32, the Court said: "It seems generally accepted that it is the owner of a capital investment or economic interest in the oil in place who is entitled to the depletion."

Commissioner v. *Southwest Exploration Co.*, 350 U. S. 308, 314, reannounced substantially the rule declared in the *Palmer* case. It said "that a taxpayer is entitled to depletion where he has: (1) 'acquired, by investment, any interest in the oil in place,' and (2) secured by legal relationship 'income derived from the extraction of the oil, to which he must look for a return of his capital.' . . . These two factors, usually considered together, constitute the requirement of 'an economic interest.' "

income from those operations was not subject to the depletion deduction.

In his first regulations prescribed under the Internal Revenue Act of 1939, the Commissioner adopted almost literally the language we have quoted from *Palmer* and *Bankline* as the tests to be administratively applied in determining what interests in mineral deposits are entitled to the depletion allowance. See Treas. Reg. 103, § 19.23 (m)–1, August 23, 1939. That language, with immaterial changes, has remained in the regulations ever since. During the years here involved, 1942 through 1950, the regulation in force was Treas. Reg. 111, § 29.23 (m)–1, which, in pertinent part, provides:

> "Under [the provisions of §§ 23 (m) and 114] the owner of an economic interest in mineral deposits or standing timber is allowed annual depletion deductions. An economic interest is possessed in every case in which the taxpayer has acquired, by investment, any interest in mineral in place or standing timber and secures, by any form of legal relationship, income derived from the severance and sale of the mineral or timber, to which he must look for a return of his capital. But a person who has no capital investment in the mineral deposit or standing timber does not possess an economic interest merely because, through a contractual relation to the owner, he possesses a mere economic advantage derived from production . . . ."

Such are the interests that are permitted a deduction for depletion by the statutes as consistently interpreted by this Court and by the Commissioner.

Petitioners do not dispute that these are the controlling principles, but rather they contend that they come within those that allow the deduction. They argue that by their contracts to mine the coal, and particularly by contribut-

ing their equipment, organizations and skills to the mining project as required by those contracts, they, in legal effect, made a capital investment in, and thereby acquired an economic interest in, the coal in place, which was depletable by production, and that they are therefore entitled to take the deduction against their gross income derived from those mining operations.

We take a different view. It stands admitted that before and apart from their contracts, petitioners had no investment or interest in the coal in place. Their asserted right to the deduction rests entirely upon their contracts. Is there anything in those contracts to indicate that petitioners made a capital investment in, or acquired an economic interest in, the coal in place, as distinguished from the acquisition of a mere economic advantage to be derived from their mining operations? We think it is quite plain that there is not.

By their contracts, which were completely terminable without cause on short notice, petitioners simply agreed to provide the equipment and do the work required to strip mine coal from designated lands of the landowners and to deliver the coal to the latter at stated points, and in full consideration for performance of that undertaking the landowners were to pay to petitioners a fixed sum per ton. Surely those agreements do not show or suggest that petitioners actually made any capital investment in the coal in place, or that the landowners were to or actually did in any way surrender to petitioners any part of their capital interest in the coal in place. Petitioners do not factually assert otherwise. Their claim to the contrary is based wholly upon an asserted legal fiction. As stated, they claim that their contractual right to mine coal from the designated lands and the use of their equipment, organizations and skills in doing so, should be regarded as the making of a capital investment in, and the acquisition of an economic interest in, the coal in place.

But that fiction cannot be indulged here, for it is negated by the facts.

To recapitulate, the asserted fiction is opposed to the facts (1) that petitioners' investments were in their equipment, all of which was movable—not in the coal in place; (2) that their investments in equipment were recoverable through depreciation—not depletion; (3) that the contracts were completely terminable without cause on short notice; (4) that the landowners did not agree to surrender and did not actually surrender to petitioners any capital interest in the coal in place; (5) that the coal at all times, even after it was mined, belonged entirely to the landowners, and that petitioners could not sell or keep any of it but were required to deliver all that they mined to the landowners; (6) that petitioners were not to have any part of the proceeds of the sale of the coal, but, on the contrary, they were to be paid a fixed sum for each ton mined and delivered, which was, as stated in *Huss,* agreed to be in "full compensation for the full performance of all work and for the furnishing of all [labor] and equipment required for the work"; and (7) that petitioners, thus, agreed to look only to the landowners for all sums to become due them under their contracts. The agreement of the landowners to pay a fixed sum per ton for mining and delivering the coal "was a personal covenant and did not purport to grant [petitioners] an interest in the [coal in place]." *Helvering* v. *O'Donnell,* 303 U. S. 370, 372. Surely these facts show that petitioners did not actually make any capital investment in, or acquire any economic interest in, the coal in place, and that they may not fictionally be regarded as having done so.

"Undoubtedly, [petitioners] through [their] contracts obtained an economic advantage from [their] production of the [coal], but that is not sufficient. The controlling fact is that [petitioners] had no interest in the [coal] in

place." *Helvering* v. *Bankline Oil Co.*, 303 U. S., at 368. Of course, the parties might have provided in their contracts that petitioners would have some capital interest in the coal in place, but they did not do so—apparently by design. Instead, petitioners simply entered into contracts, terminable without cause on short notice, with the owners of coal-bearing lands to provide the equipment and do the work required to strip mine and deliver coal from those lands, as independent contractors, for fixed unit prices. "[Petitioners thus] bargained for and obtained an economic advantage from the [mining] operations but that advantage or profit did not constitute a depletable interest in the [coal] in place" (*Helvering* v. *O'Donnell*, 303 U. S., at 372), and having "no capital investment in the mineral deposit which suffered depletion, [petitioners are] not entitled to the statutory allowance" (*Helvering* v. *Bankline Oil Co.*, 303 U. S., at 368). The judgments must therefore be

Affirmed.

BAKER ET AL. *v.* TEXAS & PACIFIC RAILWAY CO.

CERTIORARI TO THE COURT OF CIVIL APPEALS OF TEXAS, FIFTH SUPREME JUDICIAL DISTRICT.

No. 363. Argued March 25, 1959.—Decided April 6, 1959.

In this case arising under the Federal Employers' Liability Act, the question whether the decedent was killed while he was "employed" by the railroad was an issue of fact which should have been submitted to the jury. Pp. 227–229.

309 S. W. 2d 92, reversed.

Harvey L. Davis argued the cause and filed a brief for petitioners.

D. L. Case argued the cause and filed a brief for respondent.

PER CURIAM.

This action was commenced by the petitioners against the respondent railroad in a Texas State District Court, under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. §§ 51–60, to recover damages for the death of petitioners' decedent, Claude Baker, allegedly caused by the negligence of the respondent. Baker had been hired as a workman by W. H. Nichols & Co., Inc., which was engaged in work along the main line right of way of the respondent under a contract with it. The work consisted of "grouting," or pumping sand and cement into the roadbed to strengthen and stabilize it. Baker was struck and killed by a train while engaged at this job. It was petitioners' contention in the trial court that Baker was killed while he was "employed" by respondent, within the meaning of § 1 of the Act. Evidence on the question was introduced by the parties, and a special issue for the jury's determination was framed, but the judge declined to submit the issue to

the jury, holding as a matter of law that Baker was not in such a relationship to the railroad at the time of his death as to entitle him to the protection of the Act. The Court of Civil Appeals affirmed the trial court's judgment for the respondent, 309 S. W. 2d 92, and the Texas Supreme Court refused an application for a writ of error. We granted certiorari, 358 U. S. 878, to investigate whether such an issue is properly one for determination by the jury.

The Federal Employers' Liability Act does not use the terms "employee" and "employed" in any special sense, *Robinson* v. *Baltimore & Ohio R. Co.*, 237 U. S. 84, 94, so that the familiar general legal problems as to whose "employee" or "servant" a worker is at a given time present themselves as matters of federal law under the Act. See *Linstead* v. *Chesapeake & Ohio R. Co.*, 276 U. S. 28, 33–34. It has been well said of the question that "[e]ach case must be decided on its peculiar facts and ordinarily no one feature of the relationship is determinative." *Cimorelli* v. *New York Central R. Co.*, 148 F. 2d 575, 577. Although we find no decision of this Court that has discussed the matter, we think it perfectly plain that the question, like that of fault or of causation under the Act, contains factual elements such as to make it one for the jury under appropriate instructions as to the various relevant factors under law. See Restatement, Agency 2d, § 220, comment *c;* § 227, comment *a.* Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury. See *Chicago, R. I. & P. R. Co.* v. *Bond,* 240 U. S. 449. Here the petitioners introduced evidence tending to prove that the grouting work was part of the maintenance task of the railroad; that the road furnished the material to be pumped into the roadbed; and that a supervisor, admittedly in the employ of the railroad, in the daily course of the work exercised directive control over the details of the job per-

formed by the individual workmen, including the precise point where the mixture should be pumped, when they should move to the next point, and the consistency of the mixture. The railroad introduced evidence tending to controvert this and further evidence tending to show that an employment relationship did not exist between it and Baker at the time of the accident. An issue for determination by the jury was presented. "The very essence of . . . [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable." *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 35.

Reversed.

MR. JUSTICE FRANKFURTER would dismiss this writ of certiorari as improvidently granted. See *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 524. As the Court itself notes, " '[e]ach case must be decided on its peculiar facts . . . .' " Such cases are unique and of no precedential value and are, therefore, outside of the criteria justifying a grant of certiorari. See *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440.

FOSDICK *v.* LINZELL.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 704. Decided April 6, 1959.

Appeal dismissed and certiorari denied.

Robert Fosdick, appellant, *pro se.*

PER CURIAM.

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

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

BRISTOL ET AL. *v.* HEATON ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS, TENTH SUPREME JUDICIAL DISTRICT.

No. 581, Misc. Decided April 6, 1959.

Appeal dismissed and certiorari denied.
Reported below: 317 S. W. 2d 86.

Appellants *pro se.*

Will Wilson, Attorney General of Texas, *James N. Ludlum,* First Assistant Attorney General, and *Leonard Passmore* and *John Reeves,* Assistant Attorneys General, for appellees.

PER CURIAM.

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

GLUS *v.* BROOKLYN EASTERN DISTRICT TERMINAL.

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

No. 446. Argued March 2, 1959.—Decided April 20, 1959.

Claiming that respondent was estopped from pleading the statute of limitations because it had induced delay by representing to petitioner that he had seven years in which to sue, petitioner brought action against respondent in a Federal District Court under the Federal Employers' Liability Act, after expiration of the three-year statutory period of limitation, to recover damages for an industrial disease he allegedly contracted while working for respondent. *Held:* If petitioner can prove that respondent's responsible agents conducted themselves in such a way that he was justifiably misled into a good-faith belief that he could begin his action at any time within seven years after it accrued, he is entitled to have his case tried on the merits, and the District Court erred in dismissing the case on the ground that it was barred by the three-year limitation. Pp. 231–235.

253 F. 2d 957, reversed.

Seymour Schwartz argued the cause for petitioner. With him on the brief was *John J. Seffern.*

William C. Mattison argued the cause for respondent. With him on the brief was *John J. Kennelly.*

MR. JUSTICE BLACK delivered the opinion of the Court.

In 1957 petitioner brought this action under the Federal Employers' Liability Act to recover damages for an industrial disease he allegedly contracted in 1952 while working for respondent.[1] Although § 6 of the Act provides that "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued," petitioner claimed that respondent was estopped from raising this limitation because it had

[1] 35 Stat. 65, as amended, 45 U. S. C. §§ 51–60.

induced the delay by representing to petitioner that he had seven years in which to sue.[2] Respondent contended that while estoppel often prevents defendants from relying on statutes of limitations it can have no such effect in FELA cases for there the time limitation is an integral part of a new cause of action and that cause is irretrievably lost at the end of the statutory period. The District Court, after discussing two lines of cases "in sharp conflict," one supporting respondent [3] and one supporting petitioner,[4] concluded with apparent reluctance that it was required by prior decisions of the Court of Appeals for the Second Circuit to dismiss petitioner's suit.[5] The Court of Appeals affirmed, saying "For the reasons well stated by [the District Court] we should not attempt to retrace our footsteps now, but may well await resolution of the conflict by the Supreme Court." 253 F. 2d 957, 958. Since the question is important and recurring we granted certiorari. 358 U. S. 814.

To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both

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[2] Paragraph 9 of petitioner's complaint states, "Subsequent thereto defendant's agents, servants and employees fraudulently or unintentionally misstated to plaintiff that he had seven years within which to bring an action against said defendant as a result of his industrial disease and in reliance thereon plaintiff withheld suit until the present time."

[3] *American R. Co.* v. *Coronas,* 230 F. 545; *Bell* v. *Wabash R. Co.,* 58 F. 2d 569; *Damiano* v. *Pennsylvania R. Co.,* 161 F. 2d 534; *Ahern* v. *South Buffalo R. Co.,* 303 N. Y. 545, 563, 104 N. E. 2d 898, 908, aff'd on other grounds, 344 U. S. 367.

[4] *Scarborough* v. *Atlantic Coast Line R. Co.,* 178 F. 2d 253, 190 F. 2d 935, 202 F. 2d 84; *Fravel* v. *Pennsylvania R. Co.,* 104 F. Supp. 84; *Toran* v. *New York, N. H. & H. R. Co.,* 108 F. Supp. 564.

[5] The District Court noted, "The reasoning of [petitioner's] cases is not unpersuasive. But I feel that I am bound by the decisions of the Court of Appeals of this Circuit . . . ." 154 F. Supp. 863, 866.

law and equity courts [6] and has frequently been employed to bar inequitable reliance on statutes of limitations.[7] In *Schroeder* v. *Young*, 161 U. S. 334, this Court allowed a debtor to redeem property sold to satisfy a judgment, after the statutory time for redemption had expired although the statute granting the right to redeem also limited that right as to time.[8] The Court held that the purchasers could not rely on the limitation because one of them had told the debtor "that he would not be pushed, that the statutory time to redeem would not be insisted upon, and [the debtor] believed and relied upon such assurance." The Court pointed out that in "such circumstances the courts have held with great unanimity that the purchaser is estopped to insist upon the statutory period, notwithstanding the assurances were not in writing and were made without consideration, upon the ground that the debtor was lulled into a false security." 161 U. S., at 344.[9] As Mr. Justice Miller expressed it in *Insur-*

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[6] See, *e. g.*, *The Arrogante Barcelones*, 7 Wheat. 496, 519; *Sprigg* v. *Bank of Mount Pleasant*, 10 Pet. 257, 264–265; *Van Rensselaer* v. *Kearney*, 11 How. 297, 322–329; *Gregg* v. *Von Phul*, 1 Wall. 274, 280–281; *Morgan* v. *Railroad Co.*, 96 U. S. 716, 720–722; *Reynolds* v. *United States*, 98 U. S. 145, 158–160; *Dickerson* v. *Colgrove*, 100 U. S. 578; *Kirk* v. *Hamilton*, 102 U. S. 68, 76–79; *Daniels* v. *Tearney*, 102 U. S. 415, 420–422.

[7] See, *e. g.*, *Howard* v. *West Jersey & S. R. Co.*, 102 N. J. Eq. 517, 141 A. 755, aff'd on opinion below, 104 N. J. Eq. 201, 144 A. 919. See also Dawson, Estoppel and Statutes of Limitation, 34 Mich. L. Rev. 1; cases collected in 77 A. L. R. 1044; 130 A. L. R. 8; 15 A. L. R. 2d 500; 24 A. L. R. 2d 1413.

[8] Compare 2 Utah Comp. Laws (1888), Tit. IX, §§ 3442–3445 (derived from Act of Feb. 1870, Utah Laws 1870, p. 17, §§ 229–232) with 2 Utah Comp. Laws (1888), Tit. II, §§ 3129–3168. See also Act of Jan. 18, 1867, Utah Laws 1867, p. 32.

[9] See also *Graffam* v. *Burgess*, 117 U. S. 180, where a judgment debtor who had been deceived by his creditors was allowed to redeem land sold on execution even though the time limitation on redemptions had expired and despite a dissent which argued that it was "of the

ance Co. v. *Wilkinson,* 13 Wall. 222, 233, "The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim."

We have been shown nothing in the language or history of the Federal Employers' Liability Act to indicate that this principle of law, older than the country itself, was not to apply in suits arising under that statute.[10] Nor has counsel made any convincing arguments which might lead us to make an exception to the doctrine of estoppel in this case. To be sure language in some decisions of this Court can be taken as supporting such an exception.[11]

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utmost importance . . . that the right thus granted should be strictly exercised according to the statute. For . . . the favor of allowing the debtor one year more to save his land . . . only adds to his obligation to exercise the right thus granted in strict accordance with its terms." *Id.,* at 196.

[10] See *Dickerson* v. *Colgrove,* 100 U. S. 578, 582 (citing discussions of the doctrine by Coke and Littleton). See also *Sprigg* v. *Bank of Mount Pleasant,* 10 Pet. 257, 265; *Van Rensselaer* v. *Kearney,* 11 How. 297, 322–325.

[11] See, *e. g., Phillips Co.* v. *Grand Trunk W. R. Co.,* 236 U. S. 662, 666–668; *Atlantic Coast Line R. Co.* v. *Burnette,* 239 U. S. 199; *Danzer & Co.* v. *Gulf & S. I. R. Co.,* 268 U. S. 633, 637. But cf. *The Harrisburg,* 119 U. S. 199, 214, "The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right. No question arises in this case as to the power of a court of admiralty to allow an equitable excuse for delay in suing, because no excuse of any kind has been shown."

But that language is in dicta and is neither binding nor persuasive. Accordingly, we hold that it was error to dismiss this case. Despite the delay in filing his suit petitioner is entitled to have his cause tried on the merits if he can prove that respondent's responsible agents, agents with some authority in the particular matter, conducted themselves in such a way that petitioner was justifiably misled into a good-faith belief that he could begin his action at any time within seven years after it had accrued.

It is no answer to say, as respondent does, that the representations alleged were of law and not of fact and therefore could not justifiably be relied on by petitioner. Whether they could or could not depends on who made them and the circumstances in which they were made. See *Scarborough* v. *Atlantic Coast Line R. Co.,* 190 F. 2d 935. Such questions cannot be decided at this stage of the proceedings.

It may well be that petitioner's complaint as now drawn is too vague, but that is no ground for dimissing his action. Cf. *Conley* v. *Gibson,* 355 U. S. 41, 47–48. His allegations are sufficient for the present. Whether petitioner can in fact make out a case calling for application of the doctrine of estoppel must await trial.

Reversed.

495957 O–59–20

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

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 66. Argued January 20, 1959.—Decided April 20, 1959.

Although the National Labor Relations Board had declined to exercise jurisdiction, a California state court was precluded by the National Labor Relations Act from awarding damages to respondents under state law for economic injuries resulting from the peaceful picketing of their plant by labor unions which had not been selected by a majority of respondents' employees as their bargaining agents. Pp. 237–248.

(a) When an activity is arguably subject to § 7 or § 8 of the National Labor Relations Act, as was the picketing here involved, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board. P. 245.

(b) Failure of the National Labor Relations Board to assume jurisdiction does not leave the States free to regulate activities they would otherwise be precluded from regulating. Pp. 245–246.

(c) Since the National Labor Relations Board has not adjudicated the status of the conduct here involved, and since such activity is arguably within the compass of § 7 or § 8 of the Act, the State's jurisdiction is displaced. P. 246.

(d) A different conclusion is not required by the fact that all that is involved here is an attempt by the State to award damages, since state regulation can be as effectively exerted through an award of damages as through some form of preventive relief. Pp. 246–247.

(e) *United Automobile Workers* v. *Russell*, 356 U. S. 634, and *United Construction Workers* v. *Laburnum Corp.*, 347 U. S. 656, distinguished. Pp. 247–248.

49 Cal. 2d 595, 320 P. 2d 473, reversed.

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

Marion B. Plant argued the cause for respondents. With him on the brief was *James W. Archer.*

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

Solicitor General Rankin, at the invitation of the Court, 358 U. S. 801, filed a brief for the United States, as *amicus curiae,* urging affirmance.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case is before us for the second time. The present litigation began with a dispute between the petitioning unions and respondents, co-partners in the business of selling lumber and other materials in California. Respondents began an action in the Superior Court for the County of San Diego, asking for an injunction and damages. Upon hearing, the trial court found the following facts. In March of 1953 the unions sought from respondents an agreement to retain in their employ only those workers who were already members of the unions, or who applied for membership within thirty days. Respondents refused, claiming that none of their employees had shown a desire to join a union, and that, in any event, they could not accept such an arrangement until one of the unions had been designated by the employees as a collective bargaining agent. The unions began at once peacefully to picket the respondents' place of business, and to exert pressure on customers and suppliers in order to persuade them to stop dealing with respondents. The sole purpose of these pressures was to compel execution of the proposed contract. The unions contested this finding, claiming that the only purpose of their activities was to educate the workers and persuade them to become members. On the basis of its findings, the court enjoined the unions from picketing and from the use of other pressures to force an agreement, until one of

them had been properly designated as a collective bargaining agent. The court also awarded $1,000 damages for losses found to have been sustained.

At the time the suit in the state court was started, respondents had begun a representation proceeding before the National Labor Relations Board. The Regional Director declined jurisdiction, presumably because the amount of interstate commerce involved did not meet the Board's monetary standards in taking jurisdiction.

On appeal, the California Supreme Court sustained the judgment of the Superior Court, 45 Cal. 2d 657, 291 P. 2d 1, holding that, since the National Labor Relations Board had declined to exercise its jurisdiction, the California courts had power over the dispute. They further decided that the conduct of the union constituted an unfair labor practice under § 8 (b)(2) of the National Labor Relations Act, and hence was not privileged under California law. As the California court itself later pointed out this decision did not specify what law, state or federal, was the basis of the relief granted. Both state and federal law played a part but, "[a]ny distinction as between those laws was not thoroughly explored." *Garmon* v. *San Diego Bldg. Trades Council,* 49 Cal. 2d 595, 602, 320 P. 2d 473, 477.

We granted certiorari, 351 U. S. 923, and decided the case together with *Guss* v. *Utah Labor Relations Board,* 353 U. S. 1, and *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.,* 353 U. S. 20. In those cases, we held that the refusal of the National Labor Relations Board to assert jurisdiction did not leave with the States power over activities they otherwise would be pre-empted from regulating. Both *Guss* and *Fairlawn* involved relief of an equitable nature. In vacating and remanding the judgment of the California court in this case, we pointed out that those cases controlled this one, "in its major aspects." 353 U. S., at 28. However, since it was not clear whether the

judgment for damages would be sustained under California law, we remanded to the state court for consideration of that local law issue. The federal question, namely, whether the National Labor Relations Act precluded California from granting an award for damages arising out of the conduct in question, could not be appropriately decided until the antecedent state law question was decided by the state court.

On remand, the California court, in accordance with our decision in *Guss,* set aside the injunction, but sustained the award of damages. *Garmon* v. *San Diego Bldg. Trades Council,* 49 Cal. 2d 595, 320 P. 2d 473 (three judges dissenting). After deciding that California had jurisdiction to award damages for injuries caused by the union's activities, the California court held that those activities constituted a tort based on an unfair labor practice under state law. In so holding the court relied on general tort provisions of the California Civil Code, §§ 1677, 1708, as well as state enactments dealing specifically with labor relations, Calif. Labor Code, § 923 (1937); *ibid.,* §§ 1115–1118 (1947).

We again granted certiorari, 357 U. S. 925, to determine whether the California court had jurisdiction to award damages arising out of peaceful union activity which it could not enjoin.

The issue is a variant of a familiar theme. It began with *Allen-Bradley* v. *Wisconsin Board,* 315 U. S. 740, was greatly intensified by litigation flowing from the Taft-Hartley Act, and has recurred here in almost a score of cases during the last decade. The comprehensive regulation of industrial relations by Congress, novel federal legislation twenty-five years ago but now an integral part of our economic life, inevitably gave rise to difficult problems of federal-state relations. To be sure, in the abstract these problems came to us as ordinary questions of statutory construction. But they involved a more complicated

and perceptive process than is conveyed by the delusive phrase, "ascertaining the intent of the legislature." Many of these problems probably could not have been, at all events were not, foreseen by the Congress. Others were only dimly perceived and their precise scope only vaguely defined. This Court was called upon to apply a new and complicated legislative scheme, the aims and social policy of which were drawn with broad strokes while the details had to be filled in, to no small extent, by the judicial process. Recently we indicated the task that was thus cast upon this Court in carrying out with fidelity the purposes of Congress, but doing so by giving application to congressional incompletion. What we said in *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, deserves repetition, because the considerations there outlined guide this day's decision:

> "By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in *Garner* v. *Teamsters Union, supra.* But as the opinion in that case recalled, the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much.' 346 U. S., at 488. This penumbral area can be rendered progressively clear only by the course of litigation." 348 U. S., at 480–481.

The case before us concerns one of the most teasing and frequently litigated areas of industrial relations, the multitude of activities regulated by §§ 7 and 8 of the National Labor Relations Act. 61 Stat. 140, 29 U. S. C. §§ 157, 158. These broad provisions govern both protected "concerted activities" and unfair labor practices. They regulate the vital, economic instruments of the strike and the picket line, and impinge on the clash of the still unsettled claims between employers and labor unions. The extent to which the variegated laws of the several States are displaced by a single, uniform, national rule has been a matter of frequent and recurring concern. As we pointed out the other day, "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." *International Assn. of Machinists* v. *Gonzales,* 356 U. S. 617, 619.

In the area of regulation with which we are here concerned, the process thus described has contracted initial ambiguity and doubt and established guides for judgment by interested parties and certainly guides for decision. We state these principles in full realization that, in the course of a process of tentative, fragmentary illumination carried on over more than a decade during which the writers of opinions almost inevitably, because unconsciously, focus their primary attention on the facts of particular situations, language may have been used or views implied which do not completely harmonize with the clear pattern which the decisions have evolved. But it may safely be claimed that the basis and purport of a long series of adjudications have "translated into concreteness" the consistently applied principles which decide this case.

In determining the extent to which state regulation must yield to subordinating federal authority, we have

been concerned with delimiting areas of potential conflict; potential conflict of rules of law, of remedy, and of administration. The nature of the judicial process precludes an *ad hoc* inquiry into the special problems of labor-management relations involved in a particular set of occurrences in order to ascertain the precise nature and degree of federal-state conflict there involved, and more particularly what exact mischief such a conflict would cause. Nor is it our business to attempt this. Such determinations inevitably depend upon judgments on the impact of these particular conflicts on the entire scheme of federal labor policy and administration. Our task is confined to dealing with classes of situations. To the National Labor Relations Board and to Congress must be left those precise and closely limited demarcations that can be adequately fashioned only by legislation and administration. We have necessarily been concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes. But the unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed pro-

> cedures 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 towards labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. . . ." *Garner* v. *Teamsters Union,* 346 U. S. 485, 490–491.

Administration is more than a means of regulation; administration is regulation. We have been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration. Thus, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted. When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting.[1] However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. See *Interna-*

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[1] *E. g., Guss* v. *Utah Labor Relations Board,* 353 U. S. 1; *Youngdahl* v. *Rainfair,* 355 U. S. 131; *Teamsters Union* v. *New York, N. H. & H. R. Co.,* 350 U. S. 155; *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468; *Garner* v. *Teamsters Union,* 346 U. S. 485; *Automobile Workers* v. *O'Brien,* 339 U. S. 454; *Amalgamated Assn. of Street, Electric R. & Motor Coach Employees* v. *Wisconsin Board,* 340 U. S. 383; *Hill* v. *Florida,* 325 U. S. 538. See *Teamsters Union* v. *Oliver,* 358 U. S. 283. The cases up to that time are summarized in *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468.

tional Assn. of Machinists v. *Gonzales*, 356 U. S. 617. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.[2]

When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations.[3] Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.

At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National

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[2] *United Automobile Workers* v. *Russell*, 356 U. S. 634; *Youngdahl* v. *Rainfair*, 355 U. S. 131; *Auto Workers* v. *Wisconsin Board*, 351 U. S. 266; *United Construction Workers* v. *Laburnum Corp.*, 347 U. S. 656.

[3] See *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, in which it was pointed out that the state court had relied on a general restraint of trade statute. Cf. *Auto Workers* v. *Wisconsin Board*, 351 U. S. 266. The case before us involves both tort law of general application and specialized labor relations statutes. See p. 239, *supra*.

Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board. See, *e. g., Garner* v. *Teamsters Union,* 346 U. S. 485, especially at 489–491; *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468.

The case before us is such a case. The adjudication in California has throughout been based on the assumption that the behavior of the petitioning unions constituted an unfair labor practice. This conclusion was derived by the California courts from the facts as well as from their view of the Act. It is not for us to decide whether the National Labor Relations Board would have, or should have, decided these questions in the same manner. When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States.[4] However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file

[4] See *Auto Workers* v. *Wisconsin Board,* 336 U. S. 245. The approach taken in that case, in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application.

a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic problem underlying our decision in *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1. In that case we held that the failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. The withdrawal of this narrow area from possible state activity follows from our decisions in *Weber* and *Guss*. The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.[5]

In the light of these principles the case before us is clear. Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of § 7 or § 8 of the Act, the State's jurisdiction is displaced.

Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate. Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered.

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[5] "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition . . . ." *Charleston & West. Carolina R. Co.* v. *Varnville Furniture Co.*, 237 U. S. 597, 604.

Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme. See *Garner* v. *Teamsters Union,* 346 U. S. 485, 492–497. It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority. The same may be true of the incidence of a particular state injunction. To sanction either involves a conflict with federal policy in that it involves allowing two law-making sources to govern. In fact, since remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict.

It is true that we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. *United Automobile Workers* v. *Russell,* 356 U. S. 634; *United Construction Workers* v. *Laburnum Corp.,* 347 U. S. 656. We have also allowed the States to enjoin such conduct. *Youngdahl* v. *Rainfair,* 355 U. S. 131; *Auto Workers* v. *Wisconsin Board,* 351 U. S. 266. State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction. We recognize that the opinion in *United Construction Workers* v. *Laburnum Corp.,* 347 U. S. 656, found support in the fact that the state remedy had no federal counterpart. But that deci-

sion was determined, as is demonstrated by the question to which review was restricted, by the "type of conduct" involved, *i. e.*, "intimidation and threats of violence." [6] In the present case there is no such compelling state interest.

The judgment below is

Reversed.

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[6] The conduct involved in *Laburnum* was so characterized in *United Automobile Workers* v. *Russell*, 356 U. S. 634, 640, in an opinion by Mr. Justice Burton, who also wrote the opinion of the Court in *Laburnum*. When this very case was before us for the first time we noted that "Laburnum sustained an award of damages under state tort law for violent conduct. We cannot know that the California court would have interpreted its own state law to allow an award of damages in this situation." 353 U. S., at 29.

In *Laburnum* this Court itself expressly phrased its grant of certiorari to include only the limited question of the State's jurisdiction to award damages "[i]n view of the type of conduct found by the Supreme Court of Appeals of Virginia to have been carried out by Petitioners . . . ," 346 U. S. 936, despite the fact that petitioners had urged upon us a question not limited to the particular conduct involved. Petition for certiorari, p. 6.

Throughout, the opinion of the Court makes it clear that the holding in favor of state jurisdiction was limited to a situation involving violence and threats of violence. Thus the findings of the Virginia court as to the flagrant and violent activities of petitioners were set out at length. 347 U. S., at 660–662, n. 4. The Court relies on statements by Senator Taft, the Act's sponsor, and from a Senate Report which point out that "mass picketing," "violence," "threat[s] of violence," may be a violation of state law, as well as unfair labor practices under the Act. 347 U. S., at 668.

The Court in *Laburnum* points out that it would be inconsistent with the provisions of the Act which allow recovery for damages caused by secondary boycotts, not to allow an injured party "to recover damages caused more directly and flagrantly through such conduct as is before us." 347 U. S. 666. The Court also placed reliance on a quotation from *International Union* v. *Wisconsin Board*, 336 U. S. 245, 253, which points out that the "[p]olicing of . . . conduct . . . ," which consists of "actual or threatened violence to persons or destruction of property," is left to the States. In its concluding

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK, MR. JUSTICE WHITTAKER and MR. JUSTICE STEWART join, concurring.

I concur in the result upon the narrow ground that the Unions' activities for which the State has awarded damages may fairly be considered protected under the Taft-Hartley Act, and that therefore state action is precluded until the National Labor Relations Board has made a contrary determination respecting such activities. As the Court points out, it makes no difference that the Board has declined to exercise its jurisdiction. See *Guss* v. *Utah Labor Relations Board,* 353 U. S. 1; *Meat Cutters* v. *Fairlawn Meats, Inc.,* 353 U. S. 20; and our earlier opinion in the present case when it was first before us, 353 U. S. 26.

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paragraph the Court again stresses that Virginia has jurisdiction over "coercion of the type found here . . . ."

The damages awarded were extensive, consisting primarily of loss of profits caused by the disruption of respondents' business resulting from the violence. These damages were restricted to the "damages directly and proximately caused by wrongful conduct chargeable to the defendants . . ." as defined by the traditional law of torts. *United Construction Workers* v. *Laburnum Corp.,* 194 Va. 872, 887, 75 S. E. 2d 694, 704. Thus there is nothing in the measure of damages to indicate that state power was exerted to compensate for anything more than the direct consequences of the violent conduct.

All these factors make it plain that our decision in *Laburnum* rested on the nature of the activities there involved, and the interest of the State in regulating them. The case has been so interpreted in later decisions of this Court. See *Weber* v. *Anheuser-Busch,* 348 U. S. 468, 477; and the phrases quoted from *Russell, supra.* In *Russell* we again allowed the State to award damages for injuries caused by "mass picketing and threats of violence . . . ," 356 U. S., at 638. That opinion also continually stresses the violent nature of the conduct and limits its decision to the "kind of tortious conduct" there involved. 356 U. S., at 646. See also 356 U. S., at 642; and 356 U. S., at 640, where the Court points out that Alabama could have enjoined the activities of the union.

Were nothing more than this particular case involved, I would be content to rest my concurrence at this point without more. But as today's decision will stand as a landmark in future "pre-emption" cases in the labor field, I feel justified in particularizing why I cannot join the Court's opinion.

If it were clear that the Unions' conduct here was unprotected activity under Taft-Hartley, I think that *United Constr. Workers* v. *Laburnum Constr. Corp.,* 347 U. S. 656, and *Automobile Workers* v. *Russell,* 356 U. S. 634, would require that the California judgment be sustained, even though such conduct might be deemed to be federally prohibited. In both these cases state tort damage judgments against unions were upheld in respect of conduct which this Court assumed was prohibited activity under the Federal Labor Act. The Court now says, however, that those decisions are not applicable here because they were premised on violence, which the States could also have enjoined, *Automobile Workers* v. *Wisconsin Board,* 351 U. S. 266, whereas in this case the Unions' acts were peaceful. In this I think the Court mistaken.

The threshold question in every labor pre-emption case is whether the conduct with respect to which a State has sought to act is, or may fairly be regarded as, federally protected activity. Because conflict is the touchstone of pre-emption, such activity is obviously beyond the reach of all state power. *Hill* v. *Florida,* 325 U. S. 538; *Automobile Workers* v. *O'Brien,* 339 U. S. 454; *Motor Coach Employees* v. *Wisconsin Board,* 340 U. S. 383. That threshold question was squarely faced in the *Russell* case, where the Court, at page 640, said: "At the outset, we note that the union's activity in this case clearly was not protected by federal law." The same question was, in my view, necessarily faced in *Laburnum.*

In both cases it was possible to decide that question without prior reference to the National Labor Relations

Board because the union conduct involved was violent, and as such was of course not protected by the federal Act. Thus in *Laburnum,* the pre-emption issue was limited to the "type of conduct" before the Court. 347 U. S., at 658. Similarly in *Russell,* which was decided on *Laburnum* principles, the Court stated that the union's activity "clearly was not protected," and immediately went on to say (citing prior "violence" cases [1]) that "the strike was conducted in such a manner that it could have been enjoined" by the State. 356 U. S., at 640. In both instances the Court, in reliance on former "violence" cases involving injunctions,[2] might have gone on to hold, as the Court now in effect says it did, that the state police power was not displaced by the federal Act, and thus disposed of the cases on the ground that state damage awards, like state injunctions, based on violent conduct did not conflict with the federal statute. The Court did not do this, however.

Instead the relevance of violence was manifestly deemed confined to rendering the *Laburnum* and *Russell* activities federally unprotected. So rendered, they could then only have been classified as prohibited or "neither protected nor prohibited." If the latter, state jurisdiction was beyond challenge. *Automobile Workers* v. *Wisconsin Board,* 336 U. S. 245.[3] Conversely, if the activities could have been considered prohibited, primary decision by the Board would have been necessary, if state damage awards were inconsistent with federal prohibitions. *Garner* v. *Teamsters Union,* 346 U. S. 485. To determine the need for initial reference to the Board, the Court assumed that the activities were unfair labor practices prohibited by the

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[1] *Youngdahl* v. *Rainfair, Inc.,* 355 U. S. 131; *Automobile Workers* v. *Wisconsin Board,* 351 U. S. 266.

[2] See *Allen-Bradley Local* v. *Wisconsin Board,* 315 U. S. 740; cases cited at Note 1, *supra.*

[3] See text at pp. 253–254, *infra.*

federal Act. *Laburnum, supra,* at 660–663; *Russell, supra,* at 641. It then considered the possibility of conflict and held that the state damage remedies were not pre-empted because the federal Act afforded no remedy at all for the past conduct involved in *Laburnum,* and less than full redress for that involved in *Russell.* The essence of the Court's holding, which made resort to primary jurisdiction unnecessary, is contained in the following passage from the opinion in *Laburnum, supra,* at 665 (also quoted in *Russell, supra,* at 644):

> "To the extent that Congress prescribed preventive procedure against unfair labor practices, that case [*Garner* v. *Teamsters Union, supra,*] 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."

Until today this holding of *Laburnum* has been recognized by subsequent cases. See *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, 477; *Automobile Workers* v. *Russell, supra,* at 640, 641, 644; *International Assn. of Machinists* v. *Gonzales,* 356 U. S. 617, 621, similarly characterizing *Russell;* see also the dissenting opinion in *Gonzales,* especially at 624–626.[4]

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[4] The same view is taken of *Laburnum* and *Russell* in the *amici* briefs filed in the present case by the Government and the American Federation of Labor and Congress of Industrial Organizations, the latter stating that "[w]e hope to argue in an appropriate case that the *Russell* decision should be overruled."

The Court's opinion in this case cuts deeply into the ability of States to furnish an effective remedy under their own laws for the redress of past nonviolent tortious conduct which is not federally protected, but which may be deemed to be, or is, federally prohibited. Henceforth the States must withhold access to their courts until the National Labor Relations Board has determined that such unprotected conduct is not an unfair labor practice, a course which, because of unavoidable Board delays, may render state redress ineffective. And in instances in which the Board declines to exercise its jurisdiction, the States are entirely deprived of power to afford any relief. Moreover, since the reparation powers of the Board, as we observed in *Russell,* are narrowly circumscribed, those injured by nonviolent conduct will often go remediless even when the Board does accept jurisdiction.

I am, further, at loss to understand, and can find no basis on principle or in past decisions for, the Court's intimation that the States may even be powerless to act when the underlying activities are clearly "neither protected nor prohibited" by the federal Act. Surely that suggestion is foreclosed by *Automobile Workers* v. *Wisconsin Board,* 336 U. S., *supra,*[5] as well as by the approach taken to federal pre-emption in such cases as *Allen-Bradley Local* v. *Wisconsin Board, supra, Bethlehem Steel Co.* v. *New York Board,* 330 U. S. 767, 773, and *Algoma Plywood Co.* v. *Wisconsin Board,* 336 U. S. 301, not to mention *Laburnum* and *Russell* and the primary jurisdiction

[5] The Court may be correct in stating that "the approach taken in that case, in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application." That, however, has nothing to do with the vitality of the holding that there is no pre-emption when the conduct charged is in fact neither protected nor prohibited. To the contrary, that holding has remained fully intact, and, as already noted, underlay the decisions in *Laburnum* and *Russell.*

doctrine itself.[6] Should what the Court now intimates ever come to pass, then indeed state power to redress wrongful acts in the labor field will be reduced to the vanishing point.

In determining pre-emption in any given labor case, I would adhere to the *Laburnum* and *Russell* distinction between damages and injunctions and to the principle that state power is not precluded where the challenged conduct is neither protected nor prohibited under the federal Act. Solely because it is fairly debatable whether the conduct here involved is federally protected, I concur in the result of today's decision.

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[6] If the "neither protected nor prohibited" category were one of pre-emption, there would be no point in referring any injunction case initially to the Board since the pre-emption issue would be plain however the challenged activities might be classified federally. The same is true of damage cases under the Court's premise of conflict. State power would thus be confined to activities which were violent or of merely peripheral federal concern, see *International Assn. of Machinists* v. *Gonzales*, 356 U. S. 617.

UNITED STATES *v.* SHIREY.

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

No. 72. Argued January 19, 1959.—Decided April 20, 1959.

Alleging that he had offered to a Congressman to donate $1,000 a year to the Republican Party if the Congressman would use his influence to procure for him a certain postmastership, an information was filed in a Federal District Court charging appellee with a violation of 18 U. S. C. § 214, which provides that, "Whoever . . . offers or promises any money or thing of value, to any person, firm or corporation in consideration of the use or promise to use any influence to procure any appointive office or place under the United States for any person" shall be fined or imprisoned or both. *Held:* The information states facts sufficient to constitute an offense under the statute, since the word "person" is broad enough to include the Republican Party and the legislative history of the statute shows that it was intended to cover cases such as that alleged. Pp. 255–262.

168 F. Supp. 382, reversed.

Assistant Attorney General Anderson argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Beatrice Rosenberg* and *J. F. Bishop.*

Donn I. Cohen argued the cause for appellee. With him on the brief was *Sidney G. Handler.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

On July 23, 1954, an information was filed in the District Court for the Middle District of Pennsylvania charging appellee with a violation of 18 U. S. C. § 214 (originally § 1 of the Act of December 11, 1926, 44 Stat. 918). That statute provides:

> "Whoever pays or offers or promises any money or thing of value, to any person, firm, or corporation

> in consideration of the use or promise to use any influence to procure any appointive office or place under the United States for any person, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

The information alleged that appellee had offered S. Walter Stauffer, a member of Congress from Pennsylvania, to contribute $1,000 a year to the Republican Party in consideration of Stauffer's use of influence to procure for appellee the postmastership of York, Pennsylvania. The District Court granted a motion to dismiss for failure to state facts sufficient to constitute an offense against the United States. 168 F. Supp. 382. The Government appealed directly to this Court, 18 U. S. C. § 3731, and we noted probable jurisdiction, 358 U. S. 806, to determine whether the allegations of the information constituted a violation of 18 U. S. C. § 214.[1]

We turn first to the language of the statute. There are alternative constructions of its language. One sensible reading is to say that even though the Republican Party was to be the ultimate recipient of the money, this was a promise to Stauffer of money (which it plainly was) in consideration of his use of influence. Since Stauffer is a "person," the statute covers the alleged offense. It may be urged that although a promise was made to

[1] The information charges as follows:

"On or about the 5th day of December 1953, in the City of York, Middle District of Pennsylvania, and within the jurisdiction of this Court, GEORGE DONALD SHIREY, in violation of the Act of Congress, June 25, 1948, c 645, Sec. 1, 62 Stat. 694, 18 U. S. C. Sec. 214, did KNOWINGLY, WILFULLY and UNLAWFULLY offer or promise to S. WALTER STAUFFER, a Member of Congress of the 19th Congressional District of Pennsylvania, to donate $1,000 a year to the Republican Party to be used as they see fit, in consideration of the use or the promise to use any influence to procure for him the appointive office, under the United States, of Postmaster of York, Pennsylvania."

Stauffer it was not a promise of money to him. Since the word "to" immediately follows the words "money or thing of value" and not the word "promises," it is possible to read the statute as requiring that the recipient of the money or thing of value be the "person, firm, or corporation" which the statute describes. But either construction of the statute covers the classic three-party case: *e. g.*, *A* tells *X* he will give $1,000 to *Y* if *X* will use influence to get him a job. Under the first construction this is a promise of $1,000 to *X* in consideration of the use of influence. Under the second construction this is a promise to give money to *Y* in consideration of a promise to use influence; a standard third-party beneficiary situation. The only difficulty with this second construction in the context of this case is the necessity of finding that the Republican Party is a "person, firm, or corporation," as those words are used in the statute. The Republican Party is not a legal entity. It is an amorphous group of individuals that acts and only can act through persons. Its funds are received and managed by persons. Certainly the word "person" in the statute is broad enough to include the Republican Party, and since the content and manifest purpose of the statute confirm, as we shall see, such a construction, it would unjustifiably contract the law to withdraw gifts to the Republican Party from its scope.[2]

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[2] Whether the word "person" in a particular statute includes a particular body, a corporation, or association is essentially a matter of construction of that statute, aided, where possible, by general statutory definitions. If the purpose of a statute is such as to dictate the inclusion of a particular body within its scope then the statute is generally so interpreted. Since 18 U. S. C. § 214 was aimed at prohibiting the purchase of influence, it is difficult to conclude that Congress would prohibit payments to firms and corporations and not proscribe payments to political organizations, since the influence of political parties in securing jobs and their involvement in the patronage process is greater than that of private companies. We must be blind not to know that among the abuses which led to the legislation

Thus, no matter how the statute is read, one thing is clear—its terms cover this case. Shirey's endeavor to purchase himself a postmastership as alleged has been interdicted by the Congress. Awkwardness is not ambiguity, nor do defined multiple meanings, each of which is satisfied by the allegations of the information, constitute a want of definiteness.

Not only does the compulsion of language within the statutory framework seem clear, but the purpose and history of the enactment powerfully reaffirm the meaning

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were gifts to political parties and campaign treasuries, etc. Although these mostly took the form of payments to local chairmen, etc., there is no reason to assume that Congress meant to proscribe the payment to the officer of the Party but if a check were made out to the Party itself, a check which could be cashed and used by the officers of the Party, it was not outlawed.

In *Georgia* v. *Evans,* 316 U. S. 159, the Court decided that § 7 of the Sherman Act allowing "any person" to bring a treble damage action, allowed the State of Georgia to bring such an action. This was in the face of an earlier case holding that the same act did not allow the United States to sue. In reconciling the cases the Court pointed out that the scope of the word "person" depended on its "legislative environment," and pointed to the differences in considerations which led to the exclusion of the United States and the inclusion of Georgia.

In *Ohio* v. *Helvering,* 292 U. S. 360, a statute taxed "persons" selling liquor. Person was defined to include "partnership, association, company or corporation, as well as a natural person." The Court decided this allowed a State to be taxed, saying that the meaning of the word person "depends upon the connection in which the word is found."

In *Stanley* v. *Schwalby,* 147 U. S. 508, the Court said that the word "person" in a Texas statute of limitations included the United States, and thus the United States could claim the benefit of the statute. The Court said that "the word 'person' in the statute would include them as a body politic and corporate."

Under these principles the statutory context here clearly calls for including the Republican Party within the term "person."

yielded by its language. The bill was first introduced in Congress with a Committee Report which stated:

> "This bill seeks to punish the purchase and sale of public offices. Certain Members of Congress have brought to the attention of the House both by speeches on the floor and statements before the Judiciary Committee a grave situation, disclosing corruption in connection with postal appointments in Mississippi and South Carolina. It is believed that this bill will prevent corrupt practices in connection with patronage appointments in the future." H. R. Rep. No. 1366, 69th Cong., 1st Sess.

The information in this case deals with the very kind of situation that gave rise to the provision under scrutiny. In the years preceding the enactment of this legislation members of Congress referred to contributions to party treasuries and to campaign funds, as well as direct payments to those in charge of patronage, as among the corrupt methods of obtaining postmasterships.[3] See, *e. g.*, 65 Cong. Rec. 1408–1413. These revelations on the floor of the Congress, as disclosed by the authoritative history of enactment, indicate the aim of Congress to proscribe

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[3] The bill was introduced by Congressman Stevenson. 67 Cong. Rec. 6419. Two years before, in describing the "corruption in connection with postal appointments in . . . South Carolina" to which the Committee Report refers, Congressman Stevenson said, in response to the question "Where did this money finally find its home?":

"I do not know. As I said here once before, I doubt if much of it gets to the Republican executive committee, but I do not care where it goes. Either it goes into his pocket and the pockets of his machine or it goes into the coffers of the Republican Party. If it does, it is the most blatant defiance of the civil service law that any party has ever had the hardihood to put over, and it is as disgraceful as the Teapot Dome proposition any day." 65 Cong. Rec. 1410.

payments to political parties in return for influence. Indeed this form of payment was a major concern of Congress. Certainly we cannot infer that Congress expressed this concern in self-defeating terms.[4]

Statutes, including penal enactments, are not inert exercises in literary composition. They are instruments of government, and in construing them "the general purpose is a more important aid to the meaning than any

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[4] When the bill which became § 1 of the Act of December 11, 1926 (now 18 U. S. C. § 214), was introduced in the House, it was coupled with a bill requiring the filing of an affidavit by certain officers of the United States. (This bill, with changes from its original wording, is now 5 U. S. C. § 21a.) Mr. Graham, introducing both bills, said: "They are correlative. I promised the committee and the gentlemen who are proponents of the bill that I would try to get unanimous consent to consider both bills together." 67 Cong. Rec. 10840.

The text of this "correlative" bill was as follows:

"*Be it enacted, etc.*, That each individual hereafter appointed as an officer of the United States by the President, by and with the advice and consent of the Senate, or by the President alone, or by a court of law, or by the head of a department, shall, within 30 days after the effective date of his appointment, file with the Comptroller General of the United States an affidavit under oath stating that neither he nor anyone acting in his behalf has given, transferred, or paid any consideration for or in the expectation or hope of receiving assistance in securing such appointment.

. . . . . .

"SEC. 3. When used in this Act the term 'consideration' includes a payment, distribution, gift, subscription, loan, advance, or deposit of money, or anything of value, or a contract, promise, or agreement, whether or not legally enforceable, to make such a payment, distribution, gift, subscription, loan, advance, or deposit." *Ibid.*

This Act has been since amended, but the portions here relevant—the last phrases of § 1—remain unchanged. This is the affidavit Shirey would have to file were he appointed Postmaster of York. It is clear that he could not truthfully file such an affidavit if the allegations of the information are true. The fact that the sponsor of both bills expressly declared them to be correlative is persuasive evidence that an act which would make the oath impossible to take is a violation of § 214.

rule which grammar or formal logic may lay down." *United States* v. *Whitridge,* 197 U. S. 135, 143. This is so because the purpose of an enactment is embedded in its words even though it is not always pedantically expressed in words. See *United States* v. *Wurzbach,* 280 U. S. 396, 399. Statutory meaning, it is to be remembered, is more to be felt than demonstrated, see *United States* v. *Johnson,* 221 U. S. 488, 496, or, as Judge Learned Hand has put it, the art of interpretation is "the art of proliferating a purpose." *Brooklyn Nat. Corp.* v. *Comm'r,* 157 F. 2d 450, 451. In ascertaining this purpose it is important to remember that no matter how elastic is the use to which the term scientific may be put, it cannot be used to describe the legislative process. That is a crude but practical process of the adaptation by the ordinary citizen of means to an end, except when it concerns technical problems beyond the ken of the average man.

Applying these generalities to the immediate occasion, it is clear that the terms, the history, and the manifest purpose of 18 U. S. C. § 214 coalesce in a construction of that statute which validates the information against Shirey.[5] The evil which Congress sought to check and the mischief wrought by what it proscribed are the same when the transaction is triangular as when only two parties are

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[5] This Court reviews judgments, not arguments assailing them or seeking to sustain them. See *Williams* v. *United States,* 168 U. S. 382, 389. The judgment which the Government brought here for review under the Criminal Appeals Act of 1907 is that "The information does not state facts sufficient to constitute an offense against the United States." The correctness of this judgment depends on the construction of 18 U. S. C. § 214 and more particularly whether that section supports the allegations of the information. Arguments invoked by the Government do not determine the meaning of a statute nor do they define the scope of our inquiry into its meaning. If § 214 brings the allegations of this information within its scope, an offense is charged and the course of the Government's reasoning is beside the point.

involved.[6] It is incredible to suppose that Congress meant to prohibit Shirey from giving $1,000 to Stauffer, to be passed on by the latter to the Party fund, but that Shirey was outside the congressional prohibition for securing the same influence by a promise to deposit $1,000 directly in the Party's fund. That is not the kind of finessing by which this Court has heretofore allowed penal legislation to be construed. See, *e. g., United States* v. *Mosley,* 238 U. S. 383, and *United States* v. *Saylor,* 322 U. S. 385.

The judgment is *Reversed.*

MR. JUSTICE DOUGLAS, concurring.

The argument that § 214 requires the payment of money or other thing of value be made to the person who is to use his influence "to procure" an "appointive office" is not frivolous. The legislative history shows that that was one of the evils against which Congress acted. But I am also convinced that Congress moved against the other evil as well—payment to a political party for the use of "influence to procure any appointive office." The abuse in appointing postmasters during the Coolidge administration was the occasion for the law; and then as now (if the allegations in the information are to be

[6] It is claimed that because § 2 of the Act of December 11, 1926, 44 Stat. 918, which deals with the user of influence, is restricted in scope to the "payee" of the money or thing of value, a similar restriction must be read into § 1. There is not one shred of evidence in the legislative history or in the statutes themselves to indicate that the two sections are in any way to be read *"in pari materia."* In fact, normal principles of statutory construction tell us that the use of the word "payee" in § 2, and its absence in § 1, is convincing evidence that the provisions are different in scope and not congruent. A look at the other statutes in the bribery and graft section of 18 U. S. C. shows that the wording of other Acts directed to the receipt and offer of bribes, etc., is not identical in the statute directed to offer and that directed to receipt. Whether this would mean a difference in ultimate construction is not now our concern.

believed) payments for those offices sometimes went to the party, sometimes to a politician. As Congressman Stevenson, who later introduced the measure in the House, said in answering a question as to who gets the money paid for "the appointive office":

> "Either it goes into his pocket and the pockets of his machine or it goes into the coffers of the Republican Party. If it does, it is the most blatant defiance of the civil service law that any party has ever had the hardihood to put over, and it is as disgraceful as the Teapot Dome proposition any day." 65 Cong. Rec. 1410.

The words used in § 214 are broad enough to include both evils.

I have sometimes felt, as my dissents show (see *United States* v. *Classic,* 313 U. S. 299, 331; *Rosenberg* v. *United States,* 346 U. S. 273, 310; *United States* v. *A & P Trucking Co.,* 358 U. S. 121, 127), that the Court has not always construed a criminal statute so as to resolve doubts in favor of the citizen. But that principle—as highly preferred as any in a government of laws—does no service here. To hold the conduct charged in this information outside the Act is to find ambiguities and doubts not obvious on the face of the legislation, nor justifiably imputed from the legislative history. The inclusion in the original version of § 215 of limiting words can indicate no more than that Congress intended a narrower scope for that section than for § 214. It does not show that § 214 was to be similarly narrowed.

Accordingly I join the opinion of the Court.

MR. JUSTICE HARLAN, whom MR. JUSTICE BLACK, MR. JUSTICE WHITTAKER, and MR. JUSTICE STEWART join, dissenting.

The Government's primary contention in this case is that an offer to a Congressman to make contributions of

money to his political party is an offer of a "thing of value" to that Congressman within the meaning of 18 U. S. C. § 214. The Court, in ignoring this contention, appears to believe that it is not supportable. The Court holds, however, that the information here involved nevertheless states an offense under § 214 on either of two theories, (1) that the offer alleged is an offer of money to Congressman Stauffer (a theory not even advanced by the Government), or (2) that the Republican Party is a "person" within the meaning of § 214, and that the offer alleged is an offer of money to that "person." In light of the history of § 214, and with proper regard for the principle that an essentially ambiguous criminal statute is to be strictly construed, I cannot agree that this information states an offense under § 214.

Dealing with the Government's principal contention, which the Court by-passes, the information does not charge that Congressman Stauffer would have received any direct, tangible benefit from the payment of money to the Republican Party. The initial problem, therefore, is to decide whether the term "thing of value" is sufficiently broad to embrace any act which might constitute an inducement to the person to whom the offer to do the act is made. The history of the statute of which § 214 was passed as a part sheds clarifying light on this problem.

Title 18 U. S. C. § 214 was originally enacted as § 1 of a statute (44 Stat. 918) designed to "punish the purchase and sale of public offices." See H. R. Rep. No. 1366, 69th Cong., 1st Sess. Section 2 of that statute read on the "seller" of influence as opposed to the "purchaser," and in the 1948 codification became what is now the first paragraph of 18 U. S. C. § 215.[1] As originally enacted § 2 provided:

> "It shall be unlawful to solicit or receive from anyone whatsoever, either as a political contribution,

[1] See Note 4, *infra*.

> or for personal emolument, any sum of money or thing of value, whatsoever, in consideration of the promise of support, or use of influence, or for the support or influence *of the payee,* in behalf of the person paying the money, or any other person, in obtaining any appointive office under the Government of the United States." (Emphasis added.)

I think it plain that this language would not have reached one who solicited, in consideration of the promise of his influence, a general political contribution of money to be paid directly to his party. Under such circumstances the political party would be the "payee" of the money, but it would be the influence of the solicitor, as opposed to that of the party, which was promised. And although the payment of money to the solicitor's party might well be "valuable" to him in the sense that it would induce him to exert influence, the use of the word "payee," an extremely unconventional term to describe the recipient of indefinite and intangible benefits which might flow from the payment of money to another, shows that it was not contemplated that such an indirect inducement should be considered a "thing of value" in the statutory sense.

Confirmation for this view is found in a letter of Attorney General Clark written to the Senate on February 19, 1946, in connection with an amendment to 44 Stat. 918 proposed to deal with the solicitation of fees by private employment agencies for referring persons to federal employment openings. In contrasting the language of the proposed amendment with that of § 2 of 44 Stat. 918 the Attorney General was of the opinion that the solicitation provisions of the existing statute reached only the solicitation of political contributions or emoluments "on behalf of the solicitor himself." [2]

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[2] The Attorney General wrote: "Further, under the proposed language, the solicitation or receipt of compensation, either on behalf of the solicitor *or another,* would be prohibited, whereas the existing

This proposed amendment was enacted into law in 1951. 65 Stat. 320. Its effect was merely to add to present § 215 what is now the second paragraph of that section.[3] The amendment did not disturb the first paragraph of § 215, which alone is relevant in the "use of influence" context, and which, as it had formerly stood in 44 Stat. 918, had been construed by the Attorney General as already indicated.

In the 1948 codification the Revisers, in carrying over into § 215 of the present Code § 2 of 44 Stat. 918, omitted the language which had expressly restricted its scope to a situation where the influence of the "payee" is promised.[4] But it is apparent that this omission was not

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law merely prohibits the solicitation or receipt of compensation, either as a political contribution or personal emolument *on behalf of the solicitor himself*." (Emphasis added.)

The Attorney General's letter first appears in S. Rep. No. 1036, 79th Cong., 2d Sess., and was carried over into a series of Senate Reports on bills embodying the proposed amendment. S. Rep. No. 2, 80th Cong., 1st Sess.; S. Rep. No. 7, 81st Cong., 1st Sess.; S. Rep. No. 3, 82d Cong., 1st Sess.

[3] That paragraph provides:

"Whoever solicits or receives any thing of value in consideration of aiding a person to obtain employment under the United States either by referring his name to an executive department or agency of the United States or by requiring the payment of a fee because such person has secured such employment shall be fined not more than $1,000, or imprisoned not more than one year, or both. This section shall not apply to such services rendered by an employment agency pursuant to the written request of an executive department or agency of the United States."

[4] The relevant portion of 18 U. S. C. § 215 reads:

"Whoever solicits or receives, either as a political contribution, or for personal emolument, any money or thing of value, in consideration of the promise of support or use of influence in obtaining for any person any appointive office or place under the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

intended to work a substantive change in the statute.[5] Under these circumstances the solicitation provisions of present § 215 must be read in the light of their history, and so read they require the conclusion that their impact is restricted to "the solicitation or receipt of compensation . . . on behalf of the solicitor himself." [6]

Given this conclusion, I turn once more to § 214, the provision directly involved in this case. The Government has strongly urged, in an effort to avoid the District Court's holding that the specific mention of "political contribution" in § 215 implied its exclusion from the term "thing of value" in § 214, that the two sections are plainly reciprocal and must be construed *in pari materia.* I agree. There is not the slightest indication in the sparse legislative history that Congress intended that the "purchase" and "sale" provisions of the statute should have different scope, nor has any reason which would reasonably support a difference in scope been suggested to us.[7] I

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[5] The Reviser's Note refers expressly to other substantive changes made in the section at the time of codification, and appears to class the omission of the "payee" language under "changes in style."

It is also noteworthy that the Senate Report on the bill which became the "employment agency" amendment to § 215 in the 82d Congress, three years after the codification of Title 18, contained the letter of the Attorney General construing the precodification language with no suggestion that the meaning of that language had been altered by the changes made at the time of codification. See S. Rep. No. 3, 82d Cong., 1st Sess.

[6] See Note 2, *supra.*

[7] That the two provisions are reciprocal is further shown by the fact that the same substantive and stylistic changes were made in both of them in 1948, the Reviser's Note under § 215 merely incorporating that under § 214 by reference.

It is argued that this conclusion is controverted by the circumstance that on the same day as 44 Stat. 918 was introduced, another bill, also 44 Stat. 918 (now 5 U. S. C. § 21a), was also introduced requiring those appointed to public office under the United States to file affidavits that they had not paid any consideration to *anyone* in the

495957 O–59–22

cannot believe that Congress intended that although a Congressman soliciting the kind of party contribution charged in this information in return for his influence would not be covered under § 215 (as the Court appears to concede is so), nevertheless the individual from whom the contribution was solicited would, by promising to make it, become guilty of a crime against the United States under § 214 (as the Court now holds). For surely Congress could not have been less eager to reach corruption on the part of government officials than attempts by individuals to take advantage of that corruption. It follows that just as the solicitation of political contributions to be paid directly to a party treasury in return for the promise of the solicitor's influence is not interdicted by § 215, the converse of that situation, the offering to a Congressman of a contribution payable directly to his party's treasury, in return for the promise of his influence, is not reached by § 214.[8]

Given these considerations, even if the Court were right in holding that the conduct here alleged is an offer of money to Congressman Stauffer I would think it wrong in going on to decide that the information states an offense under § 214. Entirely apart from the statutory history, however, I think it a remarkable construction of the language of § 214 to find that an offer to X to pay money to Y, with whom X is not claimed to have any

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expectation of receiving appointment, and that the two bills were described as "correlative." There is no reason to take the word "correlative" to imply an identity of scope between the two bills, since the word equally well bears the interpretation that 5 U. S. C. § 21a was intended to be merely supplementary to the criminal provisions of §§ 214 and 215. Indeed, it is on its face broader than § 214 in its reference to mere "assistance" as opposed to "influence."

[8] This is not, of course, to suggest that an offer of a "political contribution" to a Congressman's personal campaign fund in return for his promise of influence would be without the scope of § 214, or that the solicitation of such a contribution would not fall within § 215.

financial relationship, is an offer of money to X. Under these circumstances there is an offer to X, but it is plainly an offer to perform an act (pay money to Y) rather than an offer of money to X. The statute does not say that any offer to a person involving money is rendered criminal if the other statutory criteria are met, but only that an offer of *money to a person* may be.

My reading of the statute makes it unnecessary to decide whether, as the Government further contends and the Court holds, the Republican Party is a "person" within the meaning of § 214, although I would have considerable difficulty in holding that what is characterized by the Court as an "amorphous group of individuals" fits within this term, particularly when Congress saw fit explicitly to add references to "firm" and "corporation" to secure the inclusion of these entities.[9] I think that the use of the words "of the payee" in what is now § 215 merely made explicit what was intended to be implicit in § 214—that the "influence" sought must be that of the "person, firm, or corporation" to whom any money or thing of value is promised or paid.[10] And although the information does not charge in terms that it was the influence of Congressman Stauffer, as opposed to that of the Republican Party, which was sought by appellee, it is clear from the brief and argument of the Government in this Court that it stands on the former construction of the information.

It is of course true, as the Government argues, that relatively indirect and subtle inducements may contain the seeds of the same mischief as the crudest bribery. But "it would be dangerous, indeed, to carry the prin-

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[9] All of the cases cited by the Court in this connection involve clearly defined entities—not "amorphous" groups.

[10] It is apparent that the Revisers believed that the omission of the words "of the payee" in the recodification of 44 Stat. 918 added nothing to the meaning of § 215. See p. 266, *supra*.

ciple, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated." *United States* v. *Wiltberger,* 5 Wheat. 76, 96. In light of the considerations discussed above it cannot be said that Congress in 18 U. S. C. § 214 has unequivocally seen fit to outlaw conduct of the kind charged in this information.[11] The most that can be said in favor of the Government's position is that the statute is highly ambiguous in the respect involved here, and this in any event should require rejection of the Government's position under principles discussed in *Bell* v. *United States,* 349 U. S. 81. I would affirm.

[11] The Court derives support for its holding from various statements concerning official corruption in office selling made on the floor of the House of Representatives some two years before the passage of the bill which is now §§ 214 and 215. Since these statements were directed exclusively to revelations of corruption on the part of sellers of influence and the Court appears to concede that the seller of influence is not covered by § 215 unless he is a "payee," it is difficult to see how these statements can be utilized to support a broader reading of § 214.

MELROSE DISTILLERS, INC., ET AL. *v.* UNITED STATES.

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

No. 404. Argued March 30, 1959.—Decided April 20, 1959.

Petitioners, two Maryland corporations and a Delaware corporation, were indicted in a Federal District Court for restraining trade and conspiring and attempting to monopolize commerce in violation of §§ 1 and 2 of the Sherman Act. They were dissolved under their respective state statutes and moved to dismiss the indictment on the ground that their dissolution abated the proceeding. *Held:* Under the applicable Maryland and Delaware statutes, their corporate lives were sufficiently continued to make them "existing" corporations within the meaning of § 8 of the Sherman Act, so that the proceeding did not abate. Pp. 271–274.

258 F. 2d 726, affirmed.

Robert S. Marx argued the cause for petitioners. With him on the brief were *Hilary W. Gans* and *Roy G. Holmes.*

Richard A. Solomon argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Hansen* and *Henry Geller.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioners are corporations—two organized under Maryland law and one under Delaware law—and wholly owned subsidiaries of Schenley Industries, Inc. They were indicted with others for restraining trade, conspiring to monopolize and attempting to monopolize commerce in violation of §§ 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C. §§ 1, 2. Shortly after the indictment was returned, petitioners were dissolved under their respective

state statutes and became separate divisions of a new corporation under the same ultimate ownership. They then moved to dismiss the indictment on the ground that their dissolution abated the proceeding. The District Court denied the motions, holding that under the applicable Maryland and Delaware statutes the existence of the dissolved corporations continued so far as prosecution of this criminal proceeding was concerned. 138 F. Supp. 685. Petitioners then pleaded *nolo contendere* and the District Court levied fines against them. The Court of Appeals affirmed, 258 F. 2d 726. The case is here on a petition for a writ of certiorari which we granted because of a conflict among the Circuits.[1] 358 U. S. 878.

We start from the premise that in the federal domain prosecutions abate both on the death of an individual defendant (*List* v. *Pennsylvania,* 131 U. S. 396; *Schreiber* v. *Sharpless,* 110 U. S. 76) and on the dissolution of a corporate defendant (*Defense Supplies Corp.* v. *Lawrence Warehouse Co.,* 336 U. S. 631, 634), unless the action is saved by statute. We need not decide whether federal law alone would be sufficient to save a federal cause of action against a corporation dissolved under state law. We have here a situation where the interplay of federal and state law makes it clear that petitioners did not escape criminal responsibility under the Sherman Act by the kind of dissolution decreed under Maryland and Delaware law.

The Sherman Law in § 8 defines "person" to include corporations "existing" under the laws of any State. The question whether a corporation "exists" for any purpose is thus determined by reference to state law. We conclude that under both Maryland and Delaware law the

[1] See *United States* v. *Line Material Co.,* 202 F. 2d 929; *United States* v. *United States Vanadium Corp.,* 230 F. 2d 646. Cf. *United States* v. *P. F. Collier & Son,* 208 F. 2d 936.

lives of these corporations were not cut short, as is sometimes done on dissolution, cf. *Chicago T. & T. Co.* v. *Wilcox Bldg. Corp.*, 302 U. S. 120, but were sufficiently continued so that this proceeding did not abate.

In Maryland, during the period relevant here, though the dissolution of the corporation was effective when the articles of dissolution had been accepted, the corporation continued "in existence for the purpose of paying, satisfying and discharging any existing debts and obligations . . . ." (Flack's Md. Ann. Code, 1951, Art. 23, § 72 (b).) It was also provided in § 78 (a) that "such dissolution" shall not "abate any pending suit or proceeding by or against the corporation . . . ." We have found no Maryland decisions interpreting these sections; but we are satisfied that the term "proceeding," no matter how the state court may construe it,[2] implies enough vitality to make the corporation an "existing" enterprise for the purposes of § 8 of the Sherman Act.

The Delaware statute seems equally clear, though again there is no authoritative interpretation of it. It provides that any "proceeding" begun by or against a corporation before or within three years after dissolution shall continue "until any judgments, orders, or decrees therein shall be fully executed." Del. Code Ann., 1953, Tit. 8, § 278; *Addy* v. *Short*, 47 Del. 157, 89 A. 2d 136, 139. The term "proceeding" is elsewhere used in the Delaware Code as including criminal prosecutions; [3] and that seems to us to

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[2] A memorandum filed by the Attorney General's office states that while there are no rulings on the point by the Maryland Court of Appeals or by the Attorney General, "the issue has been fully covered in opinions of the District Court and the Fourth Circuit Court of Appeals." And it adds, "We wish to express, however, our concurrence with the rulings of the lower courts in the pending litigation."

[3] "Whenever a corporation is informed against in a criminal proceeding . . . ." Tit. 11, § 1702.

be consistent with its normal construction.[4] We conclude that irrespective of how the Delaware statute may be construed by the Delaware courts, it sufficiently continued the existence of this corporation for the purpose of § 8 of the Sherman Act.

Policy reasons look to the same result. Petitioners were wholly owned subsidiaries of Schenley Industries, Inc. After dissolution they simply became divisions of a new corporation under the same ultimate ownership. In this situation there is no more reason for allowing them to escape criminal penalties than damages in civil suits. As the Court of Appeals noted, a corporation cannot be sent to jail. The discharge of its liabilities whether criminal or civil can be effected only by the payment of money.

Affirmed.

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[4] An argument to the contrary is premised on Del. Code Ann., 1953, Tit. 8, § 281, which provides that the trustees of a dissolved corporation shall, after payment of allowances, expenses, and costs, pay "the other debts due from the corporation." It is urged that "debts" in this setting means existing debts. But that seems to us too narrow a reading in light of the provision in § 279 which contemplates the entry of judgments against the corporation.

Syllabus.

PETTY, ADMINISTRATRIX, *v.* TENNESSEE-MISSOURI BRIDGE COMMISSION.

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

No. 233. Argued March 4, 1959.—Decided April 20, 1959.

Petitioner sued in a Federal District Court to recover under the Jones Act for the death of her husband while working aboard a Mississippi River ferryboat owned by respondent, an agency of the States of Tennessee and Missouri created by a compact entered into between them with the consent of Congress. The compact authorizes respondent "to sue and be sued," and the Act of Congress approving it provides that it shall not be construed "to affect, impair, or diminish any right, power or jurisdiction of . . . any court . . . of the United States, over or in regard to any navigable waters, or any commerce between the States." *Held:*

1. By entering into the compact and acting under it after Congressional approval, the States waived whatever immunity from a suit such as this in a federal court respondent, as their agency, might have enjoyed under the Eleventh Amendment. Pp. 276–282.

(a) The construction of a compact sanctioned by Congress under Art. I, § 10, cl. 3, of the Constitution presents a federal question over which this Court has the final say. Pp. 278–279.

(b) Congress approved the sue-and-be-sued clause in the compact here involved under conditions that make it clear that the States accepting it waived any immunity from suit which they otherwise might have had. Pp. 279–280.

(c) The above-quoted proviso in the Act of Congress approving the compact, read in the light of the sue-and-be-sued clause in the compact, reserves the jurisdiction of the federal courts to act in any matter arising under the compact over which they would have jurisdiction by virtue of the fact that the Mississippi is a navigable stream and that interstate commerce is involved. Pp. 280–282.

2. Respondent, as a bi-state corporation, is not excepted from the term "employer" as used in the Jones Act. Pp. 282–283.

254 F. 2d 857, reversed.

Douglas MacLeod argued the cause for petitioner. With him on the brief were *Charles W. Miles III*, *W. Morris Miles* and *Fred Robertson.*

James M. Reeves argued the cause and filed a brief for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

When the Court in 1793 held that a State could be sued in the federal courts by a citizen of another State [1] (*Chisholm* v. *Georgia,* 2 Dall. 419), the Eleventh Amendment [2] was passed precluding it. But this is an immunity which a State may waive at its pleasure (*Missouri* v. *Fiske,* 290 U. S. 18, 24) as by a general appearance in litigation in a federal court (*Clark* v. *Barnard,* 108 U. S. 436, 447–448) or by statute. *Ford Motor Co.* v. *Department of Treasury,* 323 U. S. 459, 468–470. The conclusion that there has been a waiver of immunity will not be lightly inferred. *Murray* v. *Wilson Distilling Co.,* 213 U. S. 151, 171. Nor will a waiver of immunity from suit in state courts do service for a waiver of immunity where the litigation is brought in the federal court. *Chandler* v. *Dix,* 194 U. S.

[1] "When Chisholm dared to sue the 'sovereign state' of Georgia, all the states were so indignant that Congress moved with vehement speed to prevent subsequent affronts to the dignity of states. More than the dignity of a sovereign state was probably at issue, however. When the Eleventh Amendment was proposed many states were in financial difficulties and had defaulted on their debts. The states could therefore use the new amendment not only in defense of theoretical sovereignty but also in a more practical way to forestall suits by individual creditors!" Irish and Prothro, The Politics of American Democracy (1959), p. 123.

[2] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

590, 591–592. And where a public instrumentality is created with the right "to sue and be sued" that waiver of immunity in the particular setting may be restricted to suits or proceedings of a special character in the state, not the federal, courts. Cf. *Delaware River Comm'n* v. *Colburn,* 310 U. S. 419. Suits against agencies of a State based on maritime torts are no exception to these rules. *Ex parte New York,* 256 U. S. 490.

The question here is whether Tennessee and Missouri have waived their immunity under the facts of this case.

Congress, under conditions specified in 33 U. S. C. § 525 *et seq.,* gave its consent to the construction of bridges over the navigable waters in the United States. Respondent is a "body corporate and politic" created by Missouri (13 Vernon's Ann. Stat., Tit. 14, § 234.360) and Tennessee (P. L. 1949, cc. 167, 168) acting pursuant to the Compact Clause of the Constitution. Art. I, § 10, cl. 3.[3] The compact prepared by the two States and submitted to the Congress provided in Art. I, §§ 1 and 2, that respondent should have the power to build a bridge and operate ferries across the Mississippi at specified points and in Art. I, § 3, that it should have the power "to contract, to sue and be sued in its own name." Congress granted its consent to the compact, 63 Stat. 930, stating in a proviso:

> "That nothing herein contained shall be construed *to affect, impair, or diminish any right, power, or jurisdiction* of the United States or *of any court,* department, board, bureau, officer, or official *of the United States, over or in regard to any navigable waters, or any commerce between the States* or with foreign countries, or any bridge, railroad, highway, pier, wharf, or other facility or improvement, or any

[3] "No State shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State . . . ."

other person, matter, or thing, forming the subject matter of the aforesaid compact or agreement or otherwise affected by the terms thereof." (Italics added.)

The facts are that petitioner's husband was employed on a ferryboat operated by respondent as a common carrier across the Mississippi between a point in Missouri and one in Tennessee. He met his death when he was trapped in the pilothouse of the ferryboat as it sank, following a collision with another boat. Suit was brought under the Jones Act, 46 U. S. C. § 688, charging respondent with negligence.

The District Court granted the motion to dismiss, holding that respondent is an agency of the States of Tennessee and Missouri and immune from suit in tort. 153 F. Supp. 512. The Court of Appeals, agreeing with that view, affirmed. 254 F. 2d 857. The case is here on certiorari. 358 U. S. 811.

The construction of a compact sanctioned by Congress under Art. I, § 10, cl. 3, of the Constitution presents a federal question. *Delaware River Comm'n* v. *Colburn, supra,* at 427. Moreover, the meaning of a compact is a question on which this Court has the final say.[4] *Dyer* v. *Sims,* 341 U. S. 22, 28. The rule is no different when the contention is that a State has, by compact, waived its immunity from suit. Of course, when the alleged basis of waiver of the Eleventh Amendment's immunity is a state statute, the question to be answered is whether the State has intended to waive its immunity. *Chandler* v. *Dix, supra.* But where the waiver is, as here, claimed to

[4] That is true even though the matter in dispute concerns a question of state law on which the courts or other agencies of the State have spoken. *Dyer* v. *Sims,* 341 U. S. 22, 30–32. While we show deference to state law in construing a compact, state law as pronounced in prior adjudications and rulings is not binding. *Ibid.*

arise from a compact between several States, the Court is called on to interpret not unilateral state action but the terms of a consensual agreement, the meaning of which, because made by different States acting under the Constitution and with congressional approval, is a question of federal law. *Delaware River Comm'n* v. *Colburn, supra.* In making that interpretation we must treat the compact as a living interstate agreement which performs high functions in our federalism,[5] including the operation of vast interstate enterprises.[6]

The Court of Appeals laid emphasis on the law of Missouri, which, it said, construes a sue-and-be-sued provision as not authorizing a suit for negligence against a public corporation. It likewise cited Tennessee decisions strictly construing statutes permitting suits against the State. We assume *arguendo* that this suit must be considered as one against the States since this bi-state corporation is a joint or common agency of Tennessee and Missouri. But we disagree with the construction given

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[5] The Court in *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 104, spoke of two methods under our Constitution of settling controversies between States. One is our original jurisdiction defined in Art. III, § 2. The other is the compact: "The compact—the legislative means—adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations. Adjustment by compact without a judicial or quasi-judicial determination of existing rights had been practiced in the Colonies, was practiced by the States before the adoption of the Constitution, and had been extensively practiced in the United States for nearly half a century before this Court first applied the judicial means in settling the boundary dispute in *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 723–25."

[6] See Port of New York Authority, 42 Stat. 174; New York and New Jersey Tunnel Agreement, 41 Stat. 158; Kansas City Water Works Agreement, 42 Stat. 1058; New York-Vermont Bridge Agreement, 45 Stat. 120; Delaware River Toll Bridge Compact, 61 Stat. 752; Menominee River Bridge Compact, 45 Stat. 300.

by the Court of Appeals to the sue-and-be-sued clause. For the resolution of that question we turn to federal not state law. Congress might of course adopt as federal law the law of either or both of the States. *Delaware River Comm'n* v. *Colburn, supra.* Cf. *Commissioner* v. *Stern,* 357 U. S. 39; *Helvering* v. *Stuart,* 317 U. S. 154; *Myers* v. *Matley,* 318 U. S. 622. But Congress took no such step here. It approved a sue-and-be-sued clause in a compact under conditions that make it clear that the States accepting it waived any immunity from suit which they otherwise might have.

This compact, approved by Congress in 1949, was made in an era when the immunity of corporations performing governmental functions was not in favor in the federal field. In *Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U. S. 381, decided nearly 10 years before the present compact was made, the authority to sue and be sued contained in a federal charter granted a government corporation was held to be broad enough to include suits in torts, at least where the duties relied upon "have their source in contract even though the guilty agents may be merely tort-feasors." *Id.,* at 395. There the underlying contract was a bailment; here it is employment. To draw a distinction in either the *Keifer* case or in this case between tort and contract would be to "make application of a steadily growing policy of governmental liability contingent upon irrelevant procedural factors. These, in our law, are still deeply rooted in historical accidents to which the expanding conceptions of public morality regarding governmental responsibility should not be subordinated." *Id.,* at 396.

This case, like the *Keifer* case, involves the launching of a governmental corporation into an industrial or business field. In view of the federal climate of opinion which by that time had grown up around the sue-and-be-sued clause, we cannot believe that Congress intended to

confine it more narrowly here than in the *Keifer* case. But we need not rest on that alone. Congress, when it approved this compact, attached a condition that "nothing herein contained shall be construed to affect, impair, or diminish any right, power, or jurisdiction of . . . any court . . . of the United States over or in regard to any navigable waters or any commerce between the States . . . ." We need not stop to catalogue all the ends that may be served by this proviso. See S. Rep. No. 1198, 81st Cong., 1st Sess.; H. R. Rep. No. 1429, 81st Cong., 1st Sess. It is argued that the proviso was included to make plain that the bonds issued by the agency were taxable by the United States. We must go further, however, to find a rational purpose since another proviso of the Act of Congress specifically stated: "That any obligations issued and outstanding, including the income derived therefrom, under the terms of the compact or agreement, and any amendments thereto, shall be subject to the tax laws of the United States." Whatever may be the several effects of the other proviso with which we are presently concerned, one result seems to us clear. This proviso, read in light of the sue-and-be-sued clause in the compact, reserves the jurisdiction of the federal courts to act in any matter arising under the compact over which they would have jurisdiction by virtue of the fact that the Mississippi is a navigable stream and that interstate commerce is involved. There is no more apt illustration of the involvement of the commerce power and the power over maritime matters than the Jones Act. *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 39–43. This is not enlarging the jurisdiction of the federal courts but only recognizing as one of its appropriate applications the business activities of an agency active in commerce and maritime matters.

The States who are parties to the compact by accepting it and acting under it assume the conditions that Congress

under the Constitution attached.[7] So if there be doubt as to the meaning of the sue-and-be-sued clause in the setting of the compact prior to approval by Congress, the doubt dissipates when the condition attached by Congress is accepted and acted upon by the two States.

Finally we can find no more reason for excepting state or bi-state corporations from "employer" as used in the Jones Act than we could for excepting them either from the Safety Appliance Act (*United States* v. *California,* 297 U. S. 175) or the Railway Labor Act (*California* v. *Taylor,* 353 U. S. 553). In the latter case we reviewed at length federal legislation governing employer-employee relationships and said, "When Congress wished to exclude state employees, it expressly so provided." 353 U. S., at 564. The Jones Act (46 U. S. C. § 688) has no exceptions from the broad sweep of the words "Any seaman who shall suffer personal injury in the course of his employment may" etc. The rationale of *United States* v. *California,*

[7] "Historically the consent of Congress, as a prerequisite to the validity of agreements by States, appears as the republican transformation of the needed approval by the Crown. . But the Constitution plainly had two very practical objectives in view in conditioning agreement by States upon consent of Congress. For only Congress is the appropriate organ for determining what arrangements between States might fall within the prohibited class of 'Treaty, Alliance, or Confederation', and what arrangements come within the permissive class of 'Agreement or Compact.' But even the permissive agreements may affect the interests of States other than those parties to the agreement: the national, and not merely a regional, interest may be involved. Therefore, Congress must exercise national supervision through its power to grant or withhold consent, or to grant it under appropriate conditions. The framers thus astutely created a mechanism of legal control over affairs that are projected beyond State lines and yet may not call for, nor be capable of, national treatment. They allowed interstate adjustments but duly safeguarded the national interest." Frankfurter and Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustments, 34 Yale L. J. 685, 694–695.

supra, and *California* v. *Taylor, supra,* makes it impossible for us to mark a distinction here and hold that this bi-state agency is not an employer under the Jones Act.

Reversed.

MR. JUSTICE BLACK, MR. JUSTICE CLARK and MR. JUSTICE STEWART concur in the judgment and opinion of the Court with the understanding that we do not reach the constitutional question as to whether the Eleventh Amendment immunizes from suit agencies created by two or more States under state compacts which the Constitution requires to be approved by the Congress.

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

The Court, acknowledging the applicability of the provisions of the Eleventh Amendment to the Tennessee-Missouri Bridge Commission, states: "The question here is whether Tennessee and Missouri have waived their immunity under the facts of this case." *Ante,* p. 277. The Court finds such a waiver in the words "sue and be sued" included in Art. I, § 3, of the Compact creating respondent Commission. The Supreme Court of Missouri has said: "A statutory provision that such a public corporation 'may sue and be sued' does not authorize a suit against it for negligence." *Todd* v. *Curators of the University of Missouri,* 347 Mo. 460, 465, 147 S. W. 2d 1063, 1064. The Tennessee courts have not ruled on the significance of this clause, but the Supreme Court of Tennessee has been emphatic in its holding that waivers of sovereign immunity from suit are to be narrowly construed. *Hill* v. *Beeler,* 199 Tenn. 325, 286 S. W. 2d 868. The Court of Appeals below held that in neither Missouri nor Tennessee would the language "sue and be sued" render a public corporation liable for suit in tort. 254 F. 2d 857. Three times during this Term the Court fol-

495957 O–59–23

lowed its settled practice in dealing with a doubtful state statute by deferring to interpretations of local law rendered by the lower federal courts.[1] We should not now disregard this settled practice but should accept the interpretation of Missouri and Tennessee law as found by the Court of Appeals for the Eighth Circuit.

Despite the fact that it has been authoritatively held that neither State waives sovereign immunity by the "sue and be sued" provision, this Court finds that those words constitute a waiver by the States of the immunity from suit, in the federal courts, afforded them by the Eleventh Amendment.

The legal consequences of the terms of a Compact are not, as a generalized proposition, for the originating construction of this Court. What was held in *Dyer* v. *Sims*, 341 U. S. 22, does not support such a claim. That case arose under a Compact among eight States to control pollution in the Ohio River System. Seven of the States asserted that under the Compact West Virginia was obligated to appropriate funds for administrative expenses of the Joint Commission formed under the Compact. By a self-serving construction of its duty under the Compact, West Virginia resisted the claims of the other States to the Compact. Here was a typical controversy among States, a controversy as to the undertaking of a Compact among States, for the peaceful solution of which the Constitution designed Art. III, § 2. The very nature of the controversy made it necessary for this Court to construe the terms of the Compact, that is, the contractual obligations assumed by West Virginia *vis-à-vis* the other parties to the Compact. The problem presented by this case has no kinship with that presented by *Dyer* v. *Sims*. This is a suit by an individual against the States over which the

[1] *Sims* v. *United States*, 359 U. S. 108; *The Tungus* v. *Skovgaard*, 358 U. S. 588; *United Pilots Assn.* v. *Halecki*, 358 U. S. 613.

federal courts have jurisdiction only if the States have authorized such suits. Both States deny having given such authorization and the Court of Appeals has justified their denial in its finding of their law. Since a Compact comes into being through an Act of Congress, its construction gives rise to a federal question. *Delaware River Comm'n* v. *Colburn,* 310 U. S. 419, 427. But a federal question does not require a federal answer by way of a blanket, nationwide substantive doctrine where essentially local interests are at stake. See, *e. g., Board of County Comm'rs* v. *United States,* 308 U. S. 343. A Compact is, after all, a contract. Ordinarily, in the interpretation of a contract, the meaning the parties attribute to the words governs the obligations assumed in the agreement. Similarly, since these States had the freedom to waive or to refuse to waive immunity granted by the Eleventh Amendment, the language they employed in the Compact, not modified by Congress, should be limited to the legal significance that these States have placed upon such language, not to avoid the obligations they undertook, but to enforce the meaning of conventional language used in their law.

This Court, however, finds that Congress, in granting the necessary consent to the Compact, imposed suability in the federal courts upon the States as a condition to its consent. No doubt Congress could have insisted upon a provision waiving immunity from suit in the federal courts as the price of obtaining its consent to the Compact. The fact that this Court in *Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U. S. 381, 389–391, indicated that governmental immunity from suit had fallen into disfavor may well have been a good reason why Congress should have done just this in passing upon the Tennessee-Missouri Compact. It is a bad reason for this Court to write in such a waiver when Congress has not done so. Surely the doctrine of sovereign immunity was

not so obsolete that a waiver of immunity did not require a clear indication that Congress had exacted a waiver by the States as the price of consent. The disfavor which was referred to by this Court in *Keifer* has not attained such acceptance as to lead this Court to disregard the strictness with which States continue to enforce it. See *Great Northern Life Ins. Co.* v. *Read,* 322 U. S. 47. Moreover, the Court's conclusion that Congress must have understood the "sue and be sued" clause to be a waiver of the Eleventh Amendment and that therefore their consent must have been predicated on that understanding finds no support in the legislative history.[2]

As the evidence from which the Court finds an implied imposed withdrawal of the States' immunity from suit is tenuous, the basis for its finding of an explicit imposition of waiver is non-existent. Such an explicit imposition is deemed to lie in the language in the Act which states that nothing in the Compact "shall be construed to affect, impair, or diminish any right, power, or jurisdiction of the United States or of any court, . . . over or in regard to any navigable waters, or any commerce between the States . . . ." Read as this should be read on the natural understanding of the phrasing, there is nothing to indicate that the subject of immunity from suit was in

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[2] See S. Rep. No. 1198, 81st Cong., 1st Sess.; H. R. Rep. No. 1429, 81st Cong., 1st Sess.; 95 Cong. Rec. 14589–14590, 14982–14983. In letters to the House and Senate Committees considering the bill consenting to this Tennessee-Missouri Compact, Acting Secretary of Commerce Thomas C. Blaisdell, Jr., expressed his belief that "this provision is intended to avoid the application to the Federal Government of the specific provision found in the compact that 'Such bonds shall be the negotiable bonds of the Commission, the income from which shall be tax free.' . . ." S. Rep. No. 1198, *supra,* at 3; H. R. Rep. No. 1429, *supra,* at 3. To avoid the possibility that the provision was not sufficiently clear, Congress added specific language stating that the bonds issued by the Commission were taxable by the United States. 63 Stat. 930.

contemplation. In addition, this clause has a history of more than one hundred years which confirms and emphasizes the plain intendment of the language.

The use of clauses preserving "jurisdiction . . . of any court" dates back to a Compact between New York and New Jersey approved by Congress in 1834: *"Provided,* That nothing therein contained shall be construed to impair or in any manner affect, any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement." [3] Substantially this same language may be found in other early congressional Acts consenting to interstate Compacts.[4] An alternate but similar provision regarding federal jurisdiction is found in some other congressional consents: "Nothing herein contained shall be construed to affect the right of the United States to regulate commerce, or the jurisdiction of the United States over navigable waters." [5] A third variation has been: *"Provided,* That nothing therein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement." [6] In not one of the ten cited Compacts thus approved was there any language which could be construed as a waiver of the constitutional immunity granted to States from suits in the federal courts. And yet the language before us, in essence conveying the same meaning, is said to have that effect.[7] Indeed, the identical

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[3] 4 Stat. 711.

[4] 20 Stat. 483; 21 Stat. 352 (added "jurisdiction of its courts"); 25 Stat. 553 (added "jurisdiction of its courts"); 34 Stat. 861.

[5] 40 Stat. 515. Similar language is found in 41 Stat. 158.

[6] 42 Stat. 180. See similar language in 45 Stat. 301; 45 Stat. 121.

[7] In some Compacts there have been similar though not identical federal jurisdiction clauses in the Compacts themselves, although those Compacts did not contain suability provisions. 66 Stat. 74, 77–78; 68 Stat. 690, 697. In the recently approved Compact between

clause upon which the Court today rests its finding of an imposed waiver of the Eleventh Amendment has appeared in at least two prior consents to Compacts. One of these Compacts contained a "sue and be sued" provision,[8] but the other did not.[9] The history of these federal jurisdiction provisions demonstrates beyond peradventure that the clause was unrelated to the question of waiver of Eleventh Amendment immunity.

The conclusion that what the language in the Act alone would not do it accomplishes when "read in light of the sue-and-be-sued clause," *ante*, p. 281, violates the very congressional language on which it relies. Had there been no "sue and be sued" clause in the Compact, this Bridge Commission could not have been sued in the federal courts despite the fact that it was operating a vessel on navigable water and in interstate commerce. The Eleventh Amendment would not have permitted it. By finding that language in the Compact permits this suit, the Court is construing the Compact to "affect," by enlarging, the jurisdiction of the United States courts over activities conducted in interstate commerce.

The constitutional requirement of consent by Congress to a Compact between the States was designed for the protection of national interests by the power to withhold consent or to grant it on condition of appropriate safeguards of those interests. The Compact may impair the

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California and Oregon involving the Klamath River Basin, 71 Stat. 497, the Compact itself contains clauses rendering suits possible against state agencies and also a clause reserving federal jurisdiction, in its terms similar to the provisions in prior congressional consents to Compacts. Yet another provision states that nothing in the Compact shall be construed as "Enlarging, diminishing or otherwise affecting the jurisdiction of the courts of the United States." 71 Stat. 508. It was, clearly enough, not believed that these provisions were inconsistent with each other.

[8] 49 Stat. 1058, 1060.

[9] 64 Stat. 568, 571.

course of interstate commerce in a way found undesirable by Congress. Or the national interest may derive from the necessity of maintaining a properly balanced federal system by vetoing a Compact which would adversely affect States not parties to the Compact. To imply from a congressional consent changes in the law of the Compact States of merely local concern, such as dislodging a State's policy on suability for torts attributable to the administration of the bridge (while necessarily leaving unaffected the State's suability for torts not attributable to its administration), would constitute a complete disregard of the purpose of the Constitution in requiring congressional consent to Compacts. Such disregard would introduce a wholly irrational disharmony in the application of local policy.

In view of the authorities cited by the Court for the proposition that the Jones Act applies to the Commission,[10] I assume that the Court is referring solely to the substantive applicability of that Act. Believing as I do that the federal courts have no jurisdiction over this suit, I do not reach that substantive question.

I would affirm the judgment of the Court of Appeals for the Eighth Circuit.

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[10] Suit in *United States* v. *California*, 297 U. S. 175, was instituted by the United States, and jurisdiction over such an action is not within the proscription of the Eleventh Amendment. In *California* v. *Taylor*, 353 U. S. 553, the State intervened in an action brought against the National Railroad Adjustment Board, hence voluntarily submitted itself to the jurisdiction of the federal courts.

MITCHELL, SECRETARY OF LABOR, *v.* KENTUCKY FINANCE CO., INC., ET AL.

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

No. 161. Argued March 3, 1959.—Decided April 20, 1959.

The business of making small personal loans and purchasing conditional sales contracts from dealers in furniture and appliances does not constitute "sales of . . . services" by a "retail or service establishment," within the meaning of the exemption provided in § 13 (a) (2) of the Fair Labor Standards Act, as amended in 1949. Pp. 290–296.

254 F. 2d 8, reversed.

Bessie Margolin argued the cause for petitioner. With her on the brief were *Solicitor General Rankin, Stuart Rothman* and *Sylvia S. Ellison.*

Harold H. Levin argued the cause for respondents. With him on the brief were *Frank A. Logan, Charles S. Kelly* and *Thomas S. Dawson.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioner, the Secretary of Labor, brought suit to enjoin respondents from violating the overtime and record-keeping provisions of the Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U. S. C. § 201 *et seq.* Respondents, two closely affiliated subsidiaries of a common corporate parent, share an office in Louisville, Kentucky. They are engaged in the business of making personal loans, in amounts up to $300, to individuals, and in purchasing conditional sales contracts from dealers in furniture and appliances. Respondents share the services of a common manager and nine full-time and two part-time employees.

By pretrial stipulation and concessions at trial, respondents in effect conceded that an injunction should issue

unless their employees are exempted from the overtime and record-keeping provisions of the statute by § 13 (a)(2) thereof, which provides that such requirements shall not apply to

> ". . . any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; . . ."

As concededly more than 50 percent of respondents' loan and discount business is with Kentucky residents and none of it involves "resale" transactions, the sole question involved in this litigation is whether respondents should be considered as "retail or service establishment[s]," engaged in the making of "sales of goods or services," within the meaning of § 13 (a)(2). The burden is, of course, upon respondents to establish that they are entitled to the benefit of the § 13 exemption, since coverage apart from the exemption is admitted.

After trial the District Court found that respondents had not proved that they are a "retail or service establishment" within the meaning of § 13 (a)(2), and issued an injunction restraining respondents from further violating the Act. 150 F. Supp. 368. The Court of Appeals reversed. 254 F. 2d 8. We granted certiorari, 358 U. S. 811, to resolve the conflict between the decision of the court below and that of the Court of Appeals for the First Circuit in *Aetna Finance Co.* v. *Mitchell,* 247 F. 2d 190.

Until 1949, § 13 (a)(2) exempted from the overtime and record-keeping provisions of the Fair Labor Stand-

ards Act "Any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." The Administrator early ruled that personal loan companies and other business entities in what may broadly be called the "financial industry" were not within the scope of that exemption.[1] When Congress amended the Act in 1949 it provided that pre-1949 rulings and interpretations by the Administrator should remain in effect unless inconsistent with the statute as amended. 63 Stat. 920. The narrow issue before us, then, is whether Congress in the 1949 amendment of § 13 (a)(2) broadened the scope of that section so as to embrace personal loan companies.

The present § 13 (a)(2) differs from its predecessor primarily in the addition of a definition of the term "retail or service establishment," such an establishment being one "75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; . . ." Respondents argue that they plainly come within this definition because (1) more than 75 percent of their loan and discount business is "not for resale," and (2) their activities are recognized in the financial industry as being the "retail end" of that industry. They claim that the intent of Congress in the 1949 amendment was to provide that "local" business was exempt from the overtime requirements of the statute, and that their activities are precisely the kind the § 13 exemption was designed to embrace.

We do not think the issue before us can be disposed of so simply. The Government points out that the concept of "sale" is inherently inapposite to the lending of money at interest, and urges that because respondents cannot

[1] Interpretative Bull. No. 6, 1942 WH Manual 326, ¶¶ 29–31. That ruling has been carried over under the amended version of § 13 (a)(2). 29 CFR, 1958 Supp., § 779.10.

properly be said to be engaged in the "sale of goods or services" the exemption cannot as to them come into play even if their activities are recognized as "retail" in the financial industry. Respondents concede that they are not engaged in the sale of "goods," but insist that their activities do constitute a "sale" of a "service" within the intendment of § 13 (a)(2), characterizing that "service" as credit or the use of money.[2]

This is not a case where perforce we must attempt to resolve a controversy as to the true meaning of equivocal statutory language unaided by any reliable extrinsic guide to legislative intention. On the contrary, the debates and reports in Congress with reference to this section of the statute are detailed and explicit. To those legislative materials we now turn.

The legislative history of the 1949 amendment to § 13 (a)(2) demonstrates beyond doubt that Congress was acting in implementation of a specific and particularized purpose. Before 1949 the Administrator, in interpreting the term "retail or service establishment," then nowhere defined in the statute, had, in addition to excluding from the coverage of the exemption personal loan companies and other financial institutions, ruled that a business enterprise generally would not qualify as such an establishment unless 75 percent of its receipts were derived from the sale of goods or services "to private persons to satisfy their personal wants," on the theory that sales for business use were "nonretail." [3] This administratively announced "business use" test was generally approved by this Court in *Roland Electrical Co.* v. *Walling,* 326 U. S. 657.

Congress was dissatisfied with this construction of the statute, and over the objection of the Administrator, who

[2] The term "service" is nowhere defined in the Fair Labor Standards Act.

[3] See Interpretative Bull. No. 6, 1942 WH Manual 326, ¶¶ 14, 18.

sought to have his "business use" test legislatively confirmed,[4] passed the 1949 amendment to § 13 (a)(2) to do away with the rule that sales to other than individual consumers could not qualify as retail in deciding whether a particular business enterprise was a "retail or service establishment," and to substitute a more flexible test, under which selling transactions would qualify as retail if they (1) did not involve "resale," and (2) were recognized in the particular industry as retail. We find nothing in the debates or reports which suggests that Congress intended by the amendment to broaden the fields of business enterprise to which the exemption would apply. Rather, it was time and again made plain that the amendment was intended to change the prior law only by making it possible for business enterprises otherwise eligible under existing concepts to achieve exemption even though more than 25 percent of their sales were to other than private individuals for personal consumption, provided those sales were not for resale and were recognized in the field or industry involved as retail.[5] Thus enter-

[4] The Administrator supported the so-called Lesinski bill, which would have adopted the Administrator's "business use" test in the definition of "retail or service establishment."

[5] See H. Conf. Rep., 95 Cong. Rec. 14931: "[§ 13 (a)(2)] . . . clarifies the existing exemption by defining the term 'retail or service establishment' and stating the conditions under which the exemption shall apply. This clarification is needed in order to obviate the sweeping ruling of the Administrator and the courts that no sale of goods or services for business use is retail. See *Roland Electrical Co.* v. *Walling* (326 U. S. 657); . . ."; Report of Majority of Senate Conferees, 95 Cong. Rec. 14877: "The conference agreement exempts establishments which are traditionally regarded as retail. . . ." See also the statement of Senator Holland, sponsor of the legislation in the Senate: "The only substantial difference between the Administrator and his recommendation [which would have written the "business use" test into the statute] and the amendment which we propose is that we propose to do away with this artificial distinction between a retail sale on the one hand and

prises in the financial field, none of which had previously been considered to qualify for the exemption regardless of the class of persons with which they dealt, and regardless of whether they were thought of in the financial industry as engaged in "retail financing," remained unaffected by the amendment of § 13 (a)(2).

Any residual doubt on this score is dispelled by the explicit and repeated statements of the sponsors of the amendatory legislation and in the House and Senate Reports to the effect that "The amendment does not exempt banks, insurance companies, building and loan associations, *credit companies,* newspapers, telephone companies, gas and electric utility companies, telegraph companies, etc., because there is no concept of retail selling or servicing in these industries. Where it was intended that such businesses have an exemption one was specifically provided by the law . . . ." [6] (Emphasis added.) It is well settled that exemptions from the Fair Labor Standards Act are to be narrowly construed. *A. H. Phillips, Inc.,* v. *Walling,* 324 U. S. 490, 493; see also

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a business sale on the other . . . ." 95 Cong. Rec. 12498. For other authoritative expressions of the legislative intent in this regard, see 95 Cong. Rec. 11115–11116, 12492–12493, 12496, 12502, 12506, 12508.

[6] H. R. Conf. Rep., 95 Cong. Rec. 14932. See also Report of Majority of Senate Conferees, 95 Cong. Rec. 14877; statement of Senator Holland, 95 Cong. Rec. 12505–12506.

Respondents urge that statements of this kind have no application to them because they are not "credit companies," in that such term properly is to be restricted to commercial credit companies. We agree with the observation of the Court of Appeals in *Aetna Finance Co.* v. *Mitchell, supra,* at 193, that this contention is "quite unconvincing." There is nothing which indicates that Congress was using the term "credit companies" in any specialized sense, and indeed one of respondents' own expert witnesses testified that personal loan companies are "credit institutions." We think it clear that the House and Senate Conferees used "credit companies" to mean nothing more nor less than companies which deal in credit, as respondents concededly do.

Powell v. *United States Cartridge Co.*, 339 U. S. 497, 517. In the light of the abundant pointed evidence that Congress did not intend that businesses like those of respondents be exempted from the overtime and record-keeping provisions of the statute by § 13 (a)(2), we would not be justified in straining to bring respondents' activities within the literal words of the exemption.

Reversed.

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

ROBERT C. HERD & CO., INC., *v.* KRAWILL MACHINERY CORP. ET AL.

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

No. 276. Argued February 26, 1959.—
Decided April 20, 1959.

Neither the provisions of § 4 (5) of the Carriage of Goods by Sea Act nor the parallel provisions of an ocean bill of lading, limiting the liability of an ocean "carrier" to a shipper to $500 per package of cargo, apply to, or limit the liability of, a negligent stevedore employed by the carrier to load cargo on its vessel. Pp. 298–308.

(a) Nothing in the provisions, legislative history or environment of the Act, or in the limitation-of-liability provisions of the bill of lading, indicates any intention, of Congress by the Act, or of the contracting parties by the bill of lading, to limit the liability of negligent agents of the carrier. Pp. 301–303.

(b) The doctrine of *A. M. Collins & Co.* v. *Panama R. Co.*, 197 F. 2d 893, is disapproved as being contrary to decisions of this Court. Pp. 303–305.

(c) *Elder, Dempster & Co., Ltd.*, v. *Paterson, Zochonis & Co., Ltd.*, [1924] A. C. 522, distinguished. Pp. 306–308.

256 F. 2d 946, affirmed.

George W. P. Whip argued the cause for petitioner. With him on the brief was *Robert E. Coughlan, Jr.*

William A. Grimes argued the cause for respondents. With him on the brief was *Leslie W. Fleming.*

Harold M. Kennedy filed a brief for the National Association of Stevedores, as *amicus curiae,* urging reversal.

Henry N. Longley and *F. Herbert Prem* filed a brief for the American Institute of Marine Underwriters, as *amicus curiae,* urging affirmance.

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

The question presented by this case is whether the provisions of § 4 (5) of the Carriage of Goods by Sea Act (46 U. S. C. § 1304 (5)) or the parallel provisions of an ocean bill of lading, limiting the liability of an ocean "carrier" to a shipper to $500 per package of cargo, also apply to and likewise limit the liability of a negligent stevedore.

Respondents, having sold and agreed to deliver certain goods to a Spanish company, arranged for their ocean carriage on the S. S. *Castillo Ampudia* from Baltimore, Maryland, to Valencia, Spain. The goods, consisting of 62 cases, were transported from Detroit by flatcar to a point on the Baltimore pier alongside the S. S. *Castillo Ampudia* and were there taken in charge by her agent for loading and shipment. A bill of lading was prepared by respondents, on forms of the carrier, and was submitted to and signed by an agent of the carrier. The value of the goods was not declared by respondents or inserted in the bill of lading.

Petitioner, an independent stevedoring company, was orally engaged by the carrier to load the cargo aboard the ship, and while endeavoring to load one of the cases, containing a press weighing 19 tons, petitioner's employees caused it to fall into the harbor and to be extensively damaged. Respondents then brought this tort action in the United States District Court against petitioner to recover their damages which they alleged had been caused by petitioner's negligence. Petitioner's answer denied the allegations of negligence, and asserted, alternatively, that if the damage was caused by its negligence its liability was limited to $500 by the limitation-of-liability provisions of the Carriage of Goods

by Sea Act [1] and by the parallel provisions of the bill of lading.[2]

After trial, the District Court held that the damage to the press was caused by petitioner's negligence; that the limitation-of-liability provisions of the bill of lading were, in express terms, applicable only to the carrier, and did not apply to nor limit the liability of the stevedore; [3] and that

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[1] The limitation-of-liability provisions of the Carriage of Goods by Sea Act appear in 46 U. S. C. § 1304 (5), which, so far as pertinent, provides:

(5) "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States . . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading."

[2] The parallel limitation-of-liability provisions contained in the bill of lading are found in §§ 30 and 37 thereof which, so far as pertinent, provide:

"30. In consideration of a choice of freight rates having been offered to the shipper by the Carrier, it is agreed that in case of loss of, or damage to . . . goods of an actual value exceeding $500 . . . per package . . . the value of such goods, shall be deemed to be $500 per package . . . and the Carrier's liability, if any, shall be determined on the basis of a value of $500 per package . . . unless the nature of such goods and a value higher than $500 per package . . . shall have been declared in writing by the shipper upon delivery to the Carrier and noted on the face hereof and unless payment of the extra freight charge incident thereto shall have been made or promised . . . , in which case such declared value, or the actual value if less, shall be the basis for computing damages and any partial loss or damage shall be adjusted pro rata. . . ."

"37. This bill of lading shall have effect subject to the Carriage of Goods by Sea Act of the U. S. A. and the Carrier and the ship shall be entitled to all of the rights and immunities set forth in said Act."

[3] 46 U. S. C. § 1301 (e) provides: "The term 'carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship." The district

respondents were entitled to recover the full amount of their damages from petitioner (145 F. Supp. 554). It accordingly rendered judgment for respondents in the amount of $47,992.04 (155 F. Supp. 296). On appeal, the Court of Appeals unanimously affirmed on the question here presented. 256 F. 2d 946. It held that neither the limitation-of-liability provisions of the Carriage of Goods by Sea Act [4] (Note 1) nor of the bill of lading (Note 2) were applicable to, or limited the liability of, the stevedoring company, and that it was therefore liable for the full damage caused by its negligence. The court expressly disagreed with and declined to follow the majority opinion of the Fifth Circuit in *A. M. Collins & Co.* v. *Panama R. Co.*, 197 F. 2d 893, saying that it thought the dissenting opinion in that case presented the correct view. The question being of importance to the shipping industry, we granted certiorari to resolve this conflict. 358 U. S. 812.

Petitioner's contentions are twofold. First, it contends that the liability-limiting provisions of the Carriage of Goods by Sea Act and of the bill of lading should be construed to limit its liability as well as that of the carrier. Second, it contends that even if it be held that those provisions limit only the liability of the "carrier," it is nevertheless protected by the carrier's limitation under the theory and holding of the majority opinion in the *Collins* case.

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judge was of the view that the casualty occurred before the press had been "loaded on" the ship, and that therefore the Carriage of Goods by Sea Act was not applicable because its effective period had not begun.

[4] The court held that inasmuch as nothing in the Act purports to limit the liability of a stevedore, there was no need to review the holding of the District Court that its effective period had not begun. See Note 3.

With regard to petitioner's first contention, we look first to the provisions, legislative history and environment of the Carriage of Goods by Sea Act, 46 U. S. C. §§ 1300–1315, and next to the limiting provisions of the bill of lading, to determine whether Congress by the Act, or the shippers and the carrier by the bill of lading, evidenced any intention to limit the liability of negligent agents of a carrier.

The Act is clearly phrased. It defines the term "carrier" to include "the owner or the charterer who enters into a contract of carriage with the shipper." § 1301 (a). It imposes particularized duties and obligations upon, and grants stated immunities to, the "carrier." §§ 1302, 1303, 1304. Respecting limitation of the amount of liability for loss of or damage to goods, it says that "neither the carrier nor the ship" shall be liable for more than $500 per package. § 1304 (5). It makes no reference whatever to stevedores or agents. The legislative history of the Act shows that it was lifted almost bodily from the Hague Rules of 1921, as amended by the Brussels Convention of 1924, 51 Stat. 233.[5] The effort of those Rules was to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade. *Ibid.* Those Rules do not advert to stevedores or agents of a carrier. The debates and Committee Reports in the Senate and the House upon the bill that became the Carriage of Goods by Sea Act likewise do not mention stevedores or agents.[6] There is, thus, nothing in the language, the legislative history

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[5] The Hague Rules as amended by the Brussels Convention were, in turn, based in part upon the pioneering Harter Act of 1893, 27 Stat. 445, 46 U. S. C. §§ 190–196. See H. R. Rep. No. 2218, 74th Cong., 2d Sess. 7.

[6] S. Rep. No. 742, 74th Cong., 1st Sess.; H. R. Rep. No. 2218, 74th Cong., 2d Sess.

or environment of the Act that expressly or impliedly indicates any intention of Congress to regulate stevedores or other agents of a carrier, or to limit the amount of their liability for damages caused by their negligence. It must be assumed that Congress knew that generally agents are liable for all damages caused by their negligence. Yet Congress, while limiting the amount of liability of "the carrier [and] the ship," did not even refer to stevedores or agents of a carrier. "We can only conclude that if Congress had intended to make such an inroad on the rights of claimants [against negligent agents] it would have said so in unambiguous terms" and "in the absence of a clear Congressional policy to that end, we cannot go so far." *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, 581, 584.

Looking to the limitation-of-liability provisions of the bill of lading, we see that they, like § 1304 (5) of the Act and its legislative history, do not advert to stevedores or agents. Instead they deal only with the "Carrier's liability" to the shippers. They say that "the Carrier's liability, if any, shall be determined on the basis of $500 per package." There is, thus, nothing in those provisions to indicate that the contracting parties intended to limit the liability of stevedores or other agents of the carrier for damages caused by their negligence. If such had been a purpose of the contracting parties it must be presumed that they would in some way have expressed it in the contract. Since they did not do so, it follows that the provisions of the bill of lading did "not cut off [respondent's] remedy against the agent that did the wrongful act." *Sloan Shipyards Corp.* v. *Emergency Fleet Corp.*, 258 U. S. 549, 568.

We therefore conclude that there is nothing in the provisions, legislative history and environment of the Act, or in the limitation-of-liability provisions of the bill of lading, to indicate any intention, of Congress by the Act,

or of the contracting parties by the bill of lading, to limit the liability of negligent agents of the carrier.

We now turn to petitioner's second contention that even if, as we hold, the Act and the bill of lading granted limitation of liability only to the "carrier," petitioner is nevertheless protected by the carrier's limitation under the theory and holding of the majority opinion in the *Collins* case. The premise of the majority opinion in that case is that all agents of the carrier who perform any part of the work undertaken by the carrier in the contract of carriage, evidenced by the bill of lading, are, by reason of that fact alone, protected by the provisions of the contract limiting the liability of the carrier, though such agents are not parties to nor express beneficiaries of the contract. Applying that theory in accordingly limiting the liability of a negligent stevedore, the majority said:

> "A stevedore so unloading, in every practical sense, does so by virtue of the bill of lading and, though not strictly speaking a party thereto, is, while liable as an agent for its own negligence, at the same time entitled to claim the limitation of liability provided by the bill of lading to the furtherance of the terms of which its operations are directed." 197 F. 2d, at 896.

We are unable to agree with that conclusion, for we think it runs counter to a long-settled line of decisions of this Court. From its early history this Court has consistently held that an agent is liable for all damages caused by his negligence, unless exonerated therefrom, in whole or in part, by a statute or a valid contract binding on the person damaged. In *Osborn* v. *Bank of the United States,* 9 Wheat. 738, 843, it was said that an agent "is responsible for his own act, to the full extent of the injury [caused thereby]." In *Reid* v. *Fargo,* 241 U. S. 544, this Court held, on facts very similar to those

here, that, though the carrier's liability was limited by the bill of lading to $100, the negligent agent, a stevedoring company, was liable to the shipper for the full amount of damage caused by its negligence.[7] In *Sloan Shipyards Corp.* v. *Emergency Fleet Corp.*, 258 U. S., at 567, it was said that an "agent, because he is agent, does not cease to be answerable for his acts." In *Brady* v. *Roosevelt S. S. Co.*, 317 U. S., at 580–581, this Court said that "The liability of an agent for his own negligence has long been embedded in the law," that "withdrawal of the right to sue the agent for his torts would result at times in a substantial dilution of the rights of claimants," and that withdrawal of that right would be "such a basic change in one of the fundamentals of the law of agency [as] should hardly be left to conjecture." This Court has several times held that an agent's only shield from liability "for conduct harmful to the plaintiff . . . is a constitutional rule of law that exonerates him." *Sloan Shipyards Corp.* v. *Emergency Fleet Corp.*, 258 U. S., at 567; *Brady* v. *Roosevelt S. S. Co.*, 317 U. S., at 584. Any such rule of law, being in derogation of the common law, must be strictly construed, for "[n]o statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any inno-

[7] Though the *Reid* case involved very similar facts, we do not consider that it alone is dispositive of this case because it does not clearly enough appear that the negligent stevedore specifically raised, or that this Court actually decided, the question whether the negligent stevedore was entitled to invoke the limitation of liability given by the shipper to the carrier in the bill of lading. However, it would seem that there is some basis for respondents' argument that the members of the Bar understood that case to hold that the stevedore was not so entitled, for that principle does not appear to have been challenged in any reported American opinion during the 36 years between the decision of the *Reid* case in 1916 and the decision of the *Collins* case in 1952.

vation upon the common law which it does not fairly express." *Shaw* v. *Railroad Co.,* 101 U. S. 557, 565; see *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 437. Similarly, contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries, for they "are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties." *Boston Metals Co.* v. *The Winding Gulf,* 349 U. S. 122, 123–124 (concurring opinion).

The holding of the majority in *Collins* that the liability of a negligent agent of a carrier, though not limited by any statute or contract, is nevertheless limited by and to the extent of the limitation granted by the shipper to the carrier in the bill of lading, simply because the agent is performing some part of the work thereby undertaken by the carrier, is clearly contrary to the above-cited decisions of this Court.[8]

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[8] Apart from the disapproving opinions of the District Court (145 F. Supp. 554) and of the Court of Appeals (256 F. 2d 946) in this case, the *Collins* case has been cited three times in the present context, twice approvingly and once disapprovingly, and seven times in somewhat different contexts.

It was first cited approvingly in *Ford Motor Co.* v. *Jarka Corp.,* 134 N. Y. S. 2d 52 (Mun. Ct. of New York City), where the court, relying on *Collins* and two New South Wales cases, *Waters Trading Co., Ltd.,* v. *Dalgety & Co., Ltd.,* [1951] 2 Ll. L. Rep. 385, and *Gilbert Stokes & Kerr, Prop., Ltd.,* v. *Dalgety & Co., Ltd.,* 81 Ll. L. Rep. 337, held that a covenant in a bill of lading limiting the liability of the carrier to $500 per package likewise limited the liability of a negligent stevedoring company, which was not a party to nor an express beneficiary of the bill of lading. However the two New South Wales cases relied on by the court have recently been overruled by the High Court of Australia in *Wilson* v. *Darling Island Stevedoring*

Petitioner claims that its position is supported by the decision of the House of Lords in *Elder, Dempster & Co., Ltd.*, v. *Paterson, Zochonis & Co., Ltd.*, [1924] A. C. 522, 18 Ll. L. Rep. 319. There, Elder, Dempster & Co. had chartered a ship, on time charter, from the shipowners. The plaintiff company shipped a number of casks of palm oil by that ship from West African ports to England. The casks were crushed by other cargo negligently laid over them, and a large part of the oil was lost. The bill of lading contained a clause which, so far as here pertinent, provided that "The shipowners . . . shall not be liable . . . for . . . any damage arising from . . . stowage. . . ." The plaintiff company sued both the char-

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& Lighterage Co., Ltd., [1956] 1 Ll. L. Rep. 346, [1956] Argus Law Rep. 311, 29 Austral. L. J. 740.

It was next cited approvingly in *Autobuses Modernos, S. A.*, v. *The Federal Mariner*, 125 F. Supp. 780 (D. C. E. D. Pa.). The court held, citing *Collins*, that a stevedoring company whose negligence in loading cargo joined with that of the carrier to cause damage to the cargo was entitled to the benefits of the $500 limitation given to the carrier in the bill of lading.

It was cited disapprovingly in *International Milling Co.* v. *The Perseus*, [1958] A. M. C. 526 (D. C. E. D. Mich.). The court held that the negligent master of a ship was not entitled to invoke the limitation of liability given by the shipper to the carrier in the contract of carriage, saying that it was "unable to agree with the reasoning of the majority of the court in the *Collins* case." [1958] A. M. C., at 529.

The opinions in which the *Collins* case has been cited in different contexts are *United States* v. *The South Star*, 210 F. 2d 44 (C. A. 2d Cir.); *J. B. Effenson Co.* v. *Three Bays Corp.*, 238 F. 2d 611 (C. A. 5th Cir.); *Twentieth Century Delivery Service, Inc.*, v. *St. Paul Fire & Marine Ins. Co.*, 242 F. 2d 292 (C. A. 9th Cir.); *Van Camp Sea Food Co.* v. *Pacific-Atlantic S. S. Co.*, 122 F. Supp. 163 (D. C. E. D. Pa.); *Chutter* v. *KLM Royal Dutch Airlines*, 132 F. Supp. 611 (D. C. S. D. N. Y.); *National Federation of Coffee Growers of Colombia* v. *Isbrandtsen Co.*, [1957] A. M. C. 1571 (Sup. Ct. N. Y.); *Berger* v. *34th Street Garage*, 3 N. Y. 2d 701, 148 N. E. 2d 883.

terer and the shipowners. The principal question was whether the damage was caused by unseaworthiness (which was not within the exemption clause) or by bad stowage (which was within that clause). The House of Lords decided that the loss was due to bad stowage and held, but for differing reasons, that the exemption clause applied to and protected both the charterer and the shipowners.

A careful reading of the several lengthy opinions of their lordships in that case discloses that the question whether a provision in the bill of lading limiting the liability of the carrier likewise limits the liability of its negligent agent, though the agent is neither a party to nor an express beneficiary of the bill of lading, was not involved in or decided by that case. Nor has any English case ever held that a bill of lading that expressly limits the liability of only the carrier nevertheless applies to and limits the liability of its negligent agent. See Scrutton, Charterparties (16th ed. 1955), 286–287, note (g). It is true that in *Gilbert Stokes & Kerr, Prop., Ltd.*, v. *Dalgety & Co., Ltd.*, 81 Ll. L. Rep. 337 (1948), and *Waters Trading Co., Ltd.*, v. *Dalgety & Co., Ltd.*, [1951] 2 Ll. L. Rep. 385, the Supreme Court of New South Wales held that stevedores, who negligently performed a part of the work undertaken by the carrier in the bill of lading, were entitled to the limitation of liability given to the carrier by the limiting provisions of the bill of lading, though the stevedores were neither parties to nor express beneficiaries of the bill of lading. However, in *Wilson* v. *Darling Island Stevedoring & Lighterage Co., Ltd.*, [1956] 1 Ll. L. Rep. 346, [1956] Argus Law Rep. 311, 29 Austral. L. J. 740—an appeal involving facts indistinguishable from those involved in the two New South Wales cases, which was prosecuted for the avowed purpose of challenging the correctness of those decisions—the High Court of Australia, after extensively reviewing the *Elder, Dempster*

case and many other English decisions, found that there was no English case that supported the two New South Wales decisions mentioned, and it held that they were wrongly decided and overruled them, saying:

> "The stevedore is a complete stranger to the contract of carriage, and it is no concern of his whether there is a bill of lading or not, or, if there is, what are its terms. He is engaged by the shipowner and by nobody else, and the terms on which he handles the goods are to be found in his contract with the shipowner and nowhere else. The shipowner has no authority whatever to bind the shipper or consignee of cargo by contract with the stevedore, and there is, in my opinion, no principle of law—deducible from the *Elder Dempster Case* or from any other case—which compels the inference of any contract between the shipper or consignee and the stevedore. If the stevedore negligently soaks cargo with water and ruins it, I can find neither rule of law nor contract to save him from the normal consequences of his tort." Opinion of Fullager, J., 29 Austral. L. J., at 751.

Under the common law as declared by this Court, petitioner was liable for all damages caused by its negligence unless exonerated therefrom, in whole or in part, by a constitutional rule of law. No statute has limited its liability, and it was not a party to nor a beneficiary of the contract of carriage between the shipper and the carrier, and hence its liability was not limited by that contract. It follows that petitioner's common-law liability for damages caused by its negligence was in no way limited, and the judgment below so holding was correct and must be

Affirmed.

KOLLER ET AL. *v.* UNITED STATES.

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

No. 362. Argued March 26, 30, 1959.—Decided April 20, 1959.

A suit for damages under § 26 (b)(1) of the Surplus Property Act is not a suit to enforce a civil fine, penalty or forfeiture and, therefore, is not subject to the five-year limitation of 28 U. S. C. § 2462. *Rex Trailer Co.* v. *United States,* 350 U. S. 148.

255 F. 2d 865, affirmed.

Robert H. Malis argued the cause and filed a brief for petitioners.

Lionel Kestenbaum argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade.*

PER CURIAM.

The judgment is affirmed. *Rex Trailer Co.* v. *United States,* 350 U. S. 148 (1956).

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE WHITTAKER join, dissenting.

I do not agree that disposition of this case is controlled by the decision in *Rex Trailer Co.* v. *United States,* 350 U. S. 148. Believing that § 26 (b)(1) of the Surplus Property Act of 1944, 40 U. S. C. § 489 (b)(1), imposes a civil penalty, and that an action thereunder is therefore subject to the five-year limitation provided in 28 U. S. C. § 2462, I would reverse. Cf. *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537; *Erie Basin Metal Products, Inc.,* v. *United States,* 150 F. Supp. 561 (Ct. Cl.). See *Priebe & Sons* v. *United States,* 332 U. S. 407.

DULUTH, SOUTH SHORE & ATLANTIC RAILROAD CO. *v.* MICHIGAN CORPORATION AND SECURITIES COMMISSION ET AL.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 712. Decided April 20, 1959.

Appeal dismissed and certiorari denied.

Reported below: 353 Mich. 636, 92 N. W. 2d 22.

Henry I. Armstrong, Jr. and *Louis F. Dahling* for appellant.

Paul L. Adams, Attorney General of Michigan, *Samuel J. Torina,* Solicitor General, and *William D. Dexter,* Assistant Attorney General, for appellees.

PER CURIAM.

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

WHYTE *v.* COAST CITIES COACHES, INC., ET AL.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 747. Decided April 20, 1959.

Appeal dismissed and certiorari denied.

Joseph A. Perkins for appellant.

PER CURIAM.

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

BRAEBURN SECURITIES CORP. *v.* SMITH, AUDITOR OF PUBLIC ACCOUNTS OF ILLINOIS, ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 718. Decided April 20, 1959.

Appeal dismissed for want of a substantial federal question.
Reported below: 15 Ill. 2d 55, 153 N. E. 2d 806.

John A. Bussian, William M. Doty and *Gerald M. Chapman* for appellant.

Latham Castle, Attorney General of Illinois, *William C. Wines, Raymond S. Sarnow* and *A. Zola Groves,* Assistant Attorneys General, and *Benjamin S. Adamowski* for appellees.

PER CURIAM.

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

BURKE *v.* BENNETT, WARDEN.

APPEAL FROM THE SUPREME COURT OF IOWA.

No. 623, Misc. Decided April 20, 1959.

Appeal dismissed and certiorari denied.

PER CURIAM.

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

OHIO EX REL. IAUS *v.* CARLTON ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 726. Decided April 20, 1959.

Appeal dismissed and certiorari denied.
Reported below: 168 Ohio St. 279, 154 N. E. 2d 150.

Irwin Greene and *Walter L. Greene* for appellant.

PER CURIAM.

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

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

McCANN *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 636, Misc. Decided April 20, 1959.

Appeal dismissed and certiorari denied.
Reported below: 3 N. Y. 2d 797, 166 N. Y. S. 2d 1.

PER CURIAM.

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

FORE *v.* TOTH.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 740. Decided April 20, 1959.

Appeal dismissed and certiorari denied.
Reported below: 168 Ohio St. 363, 155 N. E. 2d 194.

Maurice F. Hanning and *J. King Rosendale* for appellant.

Charles C. Redmond for appellee.

Jack P. F. Gremillion, Attorney General of Louisiana, filed a brief for the State of Louisiana, as *amicus curiae,* in support of appellant.

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 certiorari, certiorari is denied.

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

RILEY *v.* NEW JERSEY.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 659, Misc. Decided April 20, 1959.

Appeal dismissed and certiorari denied.
Reported below: 28 N. J. 188, 145 A. 2d 601.

PER CURIAM.

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

UNITED STATES *v.* ISTHMIAN STEAMSHIP CO.

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

No. 285. Argued February 25, 1959.—Decided April 27, 1959.

1. Under the Suits in Admiralty Act, as amended, 46 U. S. C. § 741 *et seq.*, respondent filed a libel against the United States in a Federal District Court, alleging that the United States owed respondent $116,511.44 for cargo transported on one of respondent's ships; that respondent had presented a bill for that amount; and that the United States had failed and refused to pay $115,203.76 which was due and payable. The United States filed an answer admitting that respondent had submitted a claim for $116,511.44; denying that the United States had not paid $115,203.76; and further alleging that this sum had been "paid" by application against an indebtedness of respondent to the United States for additional charter hire. Respondent excepted on the ground that the defensive matter pleaded did not arise "out of the same contract, cause of action or transaction for which the libel was filed," and moved that the excepted matter be stricken and that respondent be awarded "judgment on the pleadings." This motion was granted and respondent was awarded a decree *pro confesso*. *Held:* This portion of the judgment is sustained. Pp. 315–324.

   (a) The Government's defense is not properly one of "payment" but one of setoff arising out of a transaction unrelated to the cause of action on which the libel was filed. Pp. 318–319.

   (b) In an action under the Suits in Admiralty Act, the United States may not defend by pleading against the libelant a claim arising out of a separate and unrelated transaction between the same parties. Pp. 319–322.

   (c) If the law on this point in admiralty is to be changed, it should be by rulemaking or legislation and not by decision. Pp. 322–324.

2. In the final decree, the District Court awarded respondent interest at 4% per annum from the filing of the libel until the entry of the decree and at 4% from the entry of the decree until satisfaction, with this latter interest to be computed upon the entire decree, including the interest up to the date of the decree. *Held:* Insofar

as this judgment awarded compound interest from the date of the decree until the date of satisfaction, it was improper and is reversed. Pp. 324–325.

255 F. 2d 816, affirmed in part and reversed in part.

Ralph S. Spritzer argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, Leavenworth Colby* and *Seymour Farber.*

Clement C. Rinehart argued the cause for respondent. With him on the brief was *Walter P. Hickey.*

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

The principal question presented in this case is whether in an action under the Suits in Admiralty Act, 41 Stat. 525, as amended, 46 U. S. C. § 741 *et seq.,* the United States may defend by pleading against the libelant a claim arising out of an unrelated transaction.

In 1953, the S. S. *Steelworker,* a ship belonging to the respondent, Isthmian Steamship Company ("Isthmian"), carried certain cargo for the United States. Isthmian submitted a bill of $116,511.44 for this service. The United States paid $1,307.68 but withheld the remaining $115,203.76. This sum was said to have been applied to an alleged indebtedness of Isthmian to the United States which was claimed to have arisen in 1946, when the United States, acting through the War Shipping Administration, chartered out to Isthmian eight vessels on a bare boat basis. Some disagreement arose over the amount of charter hire due and the United States asserted that Isthmian owed $115,203.76 for additional charter hire for the period from May 1, 1946, to July 31, 1948. The S. S. *Steelworker* was not one of the boats involved in the 1946 transaction.

495957 O–59–25

Isthmian filed a libel in the United States District Court for the Southern District of New York alleging that the United States owed Isthmian $116,511.44 for cargo transported on the S. S. *Steelworker;* that Isthmian had presented a bill for that amount; and that the United States had failed and refused to pay $115,203.76 which was due and payable.[1] Isthmian made no reference whatsoever to the parties' dispute over additional charter hire for the 1946–1948 period.

The United States filed an answer admitting that Isthmian had submitted a claim for $116,511.44; denying that the United States had not paid $115,203.76; and further alleging that this sum had been "paid" by application against an indebtedness of Isthmian to the United States for additional charter hire. Shortly before this answer was filed, the United States filed a cross-libel against Isthmian seeking recovery of the additional charter hire of $115,203.76. After filing the answer, the United States moved to consolidate its cross-libel with the original libel on the ground that the additional charter-hire claim was dispositive of both libels.

Isthmian excepted to the answer of the United States on the ground that the defensive matter pleaded therein did not arise "out of the same contract, cause of action or transaction for which the libel was filed." Isthmian moved that the excepted matter be stricken and asked "judgment on the pleadings."

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[1] Isthmian first attempted to recover the unpaid portion of the freight bill by a suit in the Court of Claims. The United States moved to dismiss that suit because Isthmian's claim was said to have been maritime in nature, thus giving the District Courts exclusive jurisdiction under the Suits in Admiralty Act. 46 U. S. C. § 741 *et seq.* The Court of Claims dismissed Isthmian's suit. *Isthmian Steamship Co.* v. *United States,* 131 Ct. Cl. 472, 130 F. Supp. 336. Before that dismissal, Isthmian filed the instant proceeding.

The District Court held that the answer setting forth the withholding and application of the $115,203.76 did not set forth a defense of payment but rather was a claim of setoff arising from a separate transaction.[2] The District Court then held that setoffs arising from distinct transactions could not be asserted in admiralty and sustained Isthmian's exceptions. Since there was no longer any common issue, consolidation of the libel and cross-libel was denied and Isthmian was awarded a decree *pro confesso*. 134 F. Supp. 854. The Government's cross-libel is still pending.

The District Court's final decree awarded interest at 4% per annum on $115,203.76 from the date of the filing of the libel to the day of decree. The District Court further ordered that interest at 4% should run from the date of the decree until it was paid. This second 4% was to be computed on a sum which included the basic recovery, the costs awarded and the interest which had run from the date of the libel to the date of the decree.

On appeal, the Court of Appeals for the Second Circuit affirmed. 255 F. 2d 816. The Court of Appeals relied on the authority of a case decided at the same time as the instant case, *Grace Line, Inc.*, v. *United States*, 255 F. 2d 810, wherein it was held that withholding and applying did not constitute "payment," but, rather, setoff. Since the withholding and applying in the instant case did not arise out of the same transaction on which the libel was based, the Court of Appeals held it was not cognizable in admiralty. The award of interest was also upheld. We granted certiorari principally to consider the question posed at the outset of this opinion. 358 U. S. 813.

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[2] See generally, as to the nature of setoff, Loyd, The Development of Set-Off, 64 U. of Pa. L. Rev. 541 (1916). As to the distinctions between setoff and recoupment see Shipman, Common Law Pleading (3d ed. 1923), §§ 209, 210; Waterman on Set-Off, Recoupment, and Counter Claim (2d ed. 1872), § 464.

The Government presses a threshold argument which, if accepted, would obviate the need to reach the question posed at the outset of this opinion. While admitting the correctness of Isthmian's bill, the Government claims that the bill has been "paid" and argues that the true nature of the dispute between the parties concerns charter hire despite the fact that Isthmian's libel does not mention the charter-hire dispute. We agree with the courts below that the Government's defense is not properly one of payment.

The Government relies upon the Act of March 3, 1817, 3 Stat. 366, which now appears in similar form as Section 305 of the Budget and Accounting Act of 1921, 42 Stat. 24, 31 U. S. C. § 71. This section provides that the General Accounting Office shall settle and adjust all claims and demands by or against the Government. This is said to mean that when the General Accounting Office administratively sets one claim off against another that is the same as payment. But recognizing the Government's long-standing power to set off is far different from finding that the Government's setoff is "payment" which enables the Government to plead in admiralty foreign and unrelated transactions. See *United States* v. *Munsey Trust Co.,* 332 U. S. 234, 239; *McKnight* v. *United States,* 13 Ct. Cl. 292, 306, affirmed, 98 U. S. 179; *Climatic Rainwear Co.* v. *United States,* 115 Ct. Cl. 520, 88 F. Supp. 415, 418. In other situations, the claim of withholding and applying has traditionally been treated as setoff. *Virginia-Carolina Chemical Co.* v. *Kirven,* 215 U. S. 252, 257–258; *Merchants Heat & Light Co.* v. *Clow & Sons,* 204 U. S. 286, 289–290 (a recoupment case); *Scammon* v. *Kimball,* 92 U. S. 362, 367; *United States* v. *Eckford,* 6 Wall. 484. See also 3 Williston, Contracts (rev. ed. 1936), § 887E. In this context, "payment" connotes tender by the debtor with the intention to satisfy the debt

coupled with its acceptance as satisfaction by the creditor. See *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139, 149; *Bronson* v. *Rodes*, 7 Wall. 229, 250; *Sheehy* v. *Mandeville*, 6 Cranch 253, 264; *United States* v. *J. A. J. Const. Co.*, 137 F. 2d 584, 586.

To consider withholding and applying the equivalent of "payment" would have strange consequences. In *Grace Line, Inc.*, v. *United States, supra*, for example, the Government had a claim against the carrier which had become time-barred. The carrier performed some unrelated services for the United States and then brought suit to collect. The Government claimed that it had "paid" by withholding the money and applying it to the time-barred claim. Thus, the Government attempted to use its unique concept of "payment" to revive a totally unrelated time-barred claim.

We can understand the Government's desire to litigate all of its disputes with Isthmian in one lawsuit, but that is no warrant for abandoning the traditional meaning of the defense of payment.[3]

We therefore reach the question posed at the outset. Section 3 of the Suits in Admiralty Act, 46 U. S. C. § 743, provides that suits against the United States under

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[3] The Government cites several cases, *e. g.*, *United States* v. *New York, N. H. & H. R. Co.*, 355 U. S. 253; *Alcoa Steamship Co.* v. *United States*, 338 U. S. 421, and *Wabash R. Co.* v. *United States*, 59 Ct. Cl. 322, affirmed *sub nom. United States* v. *St. Louis, S. F. & T. R. Co.*, 270 U. S. 1, in which the courts adjudicated disputes which were not the bases of the original complaints. None of the cases cited was brought under the Suits in Admiralty Act. The first two suits invoked the Tucker Act, now 28 U. S. C. § 1346, while *Wabash* was brought in the Court of Claims. The controlling statutes contain express authority for entertaining unrelated setoffs. See n. 11, *infra*. On this point, these cases indicate no more than that when the pleadings properly in the case, taken together, indicate there are disputes as to issues not raised in the complaint, those issues will be determined.

the Act shall "proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." With this express command before us, we must ascertain whether admiralty practice permits private parties to defend by setting up claims arising out of separate and unrelated transactions between the parties.

Traditionally, admiralty has narrowly circumscribed the filing of unrelated cross-libels and defenses. The first American case considering this problem appears to be *Willard* v. *Dorr*, 29 Fed. Cas. No. 17,680 (1823), in which Justice Story sitting as Circuit Justice refused to permit the attempted setoff. Since that early holding various reasons have been offered for refusal to entertain unrelated defenses: protection of the seaman's wage claims;[4] preservation of relatively simple proceedings not affecting third-party rights;[5] and the recognition that allowing cross-libels might deprive litigants of jury trials to which they would otherwise be entitled if the cross-libel were pressed in an independent proceeding.[6] But for whatever reason, the doctrine gained general acceptance.[7]

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[4] See, *e. g.*, *The Hudson*, 12 Fed. Cas. No. 6,831; *Willard* v. *Dorr*, 29 Fed. Cas. No. 17,680; *Shilman* v. *United States*, 164 F. 2d 649. See also *Isbrandtsen Co.* v. *Johnson*, 343 U. S. 779.

[5] See, *e. g.*, *Howard* v. *9,889 Bags of Malt*, 255 F. 917; *The Ping-On* v. *Blethen*, 11 F. 607, 611–612. In *British Transport Comm'n* v. *United States*, 354 U. S. 129, the rights of the various parties arose from the same collision. Cf. *Powell* v. *United States*, 300 U. S. 276, 290.

[6] See, *e. g.*, *The Yankee*, 37 F. Supp. 512; *Bains* v. *The James and Catherine*, 2 Fed. Cas. No. 756.

[7] The following cases arose in the Second Circuit: *The Hudson*, 12 Fed. Cas. No. 6,831; *Emery Co.* v. *Tweedie Trading Co.*, 143 F. 144, 146; *The Oceano*, 148 F. 131, 132; *United Transportation & Lighterage Co.* v. *New York & B. T. Line*, 185 F. 386; *The Jane Palmer*, 270 F. 609; *The Yankee*, 37 F. Supp. 512; *Cioffi* v. *New Zealand*

This consistent pattern of the cases in admiralty on this point was reflected in the promulgation of Rule 54 of the Admiralty Rules by this Court at December Term, 1868, 7 Wall. v:

> "Whenever a cross-libel is filed upon any counter claim arising out of the same cause of action for which the original libel was filed, the respondents in the cross-libel shall give security in the usual amount and form, to respond in damages as claimed in said cross-libel, unless the court on cause shown, shall otherwise direct; and all proceedings upon the original libel shall be stayed until such security shall be given."

That rule has remained in the Admiralty Rules [8] ever since with only slight change and now appears as Rule 50 in the following form which still reflects the underlying settled state of the law:

> "Whenever a cross-libel is filed upon any counterclaim arising out of the same contract or cause of action for which the original libel was filed, and the respondent or claimant in the original suit shall have given security to respond in damages, the respondent in the cross-libel shall give security in the usual amount and form to respond in damages to the claims

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Shipping Co., 73 F. Supp. 1015, 1016; *Ozanic* v. *United States*, 188 F. 2d 228, 231.

Cases arising in other Circuits include: *Willard* v. *Dorr*, 29 Fed. Cas. No. 17,680; *Bains* v. *The James and Catherine*, 2 Fed. Cas. No. 756; *The Two Brothers*, 4 F. 158; *The Zouave*, 29 F. 296; *Anderson* v. *Pacific Coast Co.*, 99 F. 109; *Howard* v. *9,889 Bags of Malt*, 255 F. 917; *Monongahela & Ohio Dredging Co.* v. *Rodgers Sand Co.*, 296 F. 916; *Susquehanna S. S. Co.* v. *A. O. Anderson & Co.*, 6 F. 2d 858, 859; *Hildebrand* v. *Geneva Mill Co.*, 32 F. 2d 343, 347.

[8] Present authority for this Court's promulgation of Admiralty Rules is found in 28 U. S. C. § 2073. Original authority is found in the Act of August 23, 1842, 5 Stat. 516, 518.

> set forth in said cross-libel, unless the court for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given unless the court otherwise directs." [9]

But the Government urges the Court in this particular case to apply the more flexible procedure utilized in civil cases in federal courts.[10] The Government contends that none of the reasons for limited cross-libels suggested above has any application to the particular facts of this case and that, moreover, the rule has become an anachronism and is out of line with the practice in specific courts [11]

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[9] It is interesting to note that the local rules of several of the District Courts have recognized the same principle. See, *e. g.*, Rule 16 of the Admiralty Rules of the United States District Courts for the Southern and Eastern Districts of New York.

[10] See Fed. Rules Civ. Proc., 13 (b):

"A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."

Rule 13 (c):

"A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party." See generally, 3 Moore, Federal Practice (2d ed.), § 13.01 *et seq.*

[11] The jurisdictional statute of the Court of Claims, 28 U. S. C. § 1503, provides:

"The Court of Claims shall have jurisdiction to render judgment upon any set-off or demand by the United States against any plaintiff in such court."

Rule 17 (b) of the Court of Claims provides:

"The answer may state as a counterclaim any claim against a plaintiff not arising out of the transaction or occurrence that is the subject matter of the petition."

See also 28 U. S. C. § 1346 (c) relating to jurisdiction of the District Courts over certain claims against the United States:

"The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section."

and with the general rules of practice for federal courts.[12] But it should be observed that where the procedure has been changed in this regard it has been the result of legislation or rulemaking and not the decisional process.[13]

The law on this point in admiralty has been settled beyond doubt in the lower courts for many years and an Admiralty Rule of this Court recognizes this case law. We think that if the law is to change it should be by rulemaking or legislation and not by decision.

Whether the setoff and cross-libel procedure now operative in admiralty is anachronistic, is not a matter best considered by this Court in a litigation without the benefits which normally accompany intelligent rulemaking—including hearings and opportunities to submit data. In addition to this Court's responsibility for rulemaking, the Judicial Conference of the United States [14] has been given certain responsibilities in this area by the Act of July 11, 1958, 72 Stat. 356:

> "The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended

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[12] See n. 10, *supra*. But see § 3 of the Public Vessels Act, 43 Stat. 1112, 46 U. S. C. § 783, providing that when the United States files a libel against a private party, the private party may only set off or counterclaim for damages "arising out of the same subject matter or cause of action. . . ."

[13] See Clark, Code Pleading (2d ed.), §§ 100, 101.

[14] For the composition and function of the Judicial Conference of the United States see 28 U. S. C. § 331, as amended by the Act of July 11, 1958, 72 Stat. 356, quoted in the text.

by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

The result in this case does not cause irreparable loss to the United States nor indeed require any expenditure of government funds prior to the complete disposition of all claims. The Government is authorized to withhold payment of Isthmian's judgment in this case to the extent the Government has claims outstanding against Isthmian.[15] The only requirement is that the Government press the libel now pending in the District Court. In other situations where no suit is pending, the United States may have to commence a separate suit rather than set up an unrelated defense in the original suit. This may be an inconvenience to the United States but it must be remembered that Congress has expressly declared that when sued under the Suits in Admiralty Act the United States is to have its procedural rights determined and governed in the same manner as private parties.

The Government also complains that the District Court improperly awarded compound interest. This resulted from the decree's direction that interest be computed at

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[15] Act of March 3, 1875, 18 Stat. 481, as amended, 31 U. S. C. § 227. The interest provisions of this section indicate that Isthmian may well be prejudiced if the prior law is disregarded in this case because the other reasons for the rule may not exist. If the Government were permitted to raise its cross-libel in this case and should lose on the merits, then at best Isthmian might be awarded 4% interest on $115,203.76 to run from the date of the libel until satisfaction.

But if the Government's cross-libel is not permitted in this case, Isthmian is entitled to a decree *pro confesso*. The Comptroller General then will withhold payment of the judgment until the Government's action is terminated and if the Government should lose on the merits of its claim, § 227 requires the Government pay the withheld amount with interest at 6% "for the time it has been withheld from" Isthmian. The difference in rates is of no mean significance when the amount in dispute is as large as it is here.

4% from the filing of the libel until the entry of the decree, and that interest run at 4% from decree until satisfaction with this latter interest to be computed upon the entire decree including the interest up to decree.

Section 3 of the Suits in Admiralty Act, 46 U. S. C. § 743, provides:

> "A decree against the United States . . . may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. . . ."

Congress' demonstrated concern with the problem of interest under the Suits in Admiralty Act indicates that it intended to cover these awards affirmatively and not have them controlled by the general command that the suit "shall proceed and shall be heard and determined according to the principles of law" applicable to private parties. Section 3 provides for but one award of interest in the decree and that award is limited to 4% until satisfaction. We find nothing in the rather ambiguous statute authorizing the accumulation of interest up to the decree and then a second independent award of interest which operates upon the first interest. Compound interest is not presumed to run against the United States. See *Cherokee Nation* v. *United States,* 270 U. S. 476, 490.

The judgment is affirmed as to entry of the decree *pro confesso*. The award of compound interest was improper and the judgment is reversed and remanded for proceedings not inconsistent with this opinion.

It is so ordered.

FELTER *v.* SOUTHERN PACIFIC CO. ET AL.

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

No. 269. Argued March 24, 1959.—Decided April 27, 1959.

The Railway Labor Act, as amended, authorizes labor organizations representing employees of carriers to make "checkoff" agreements with the carriers for the deduction from employees' wages of periodic dues, initiation fees and assessments; but it provides that "no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization . . . which shall be revocable in writing after the expiration of one year." The Brotherhood of Railroad Trainmen and a Railroad entered into, and attempted to enforce against an employee of the Railroad, an agreement that there be used, as a necessary form for revoking an assignment, nothing other than a writing executed on a form furnished by the Brotherhood and forwarded by the Brotherhood to the Railroad. *Held:* Such a requirement may not be enforced against an individual employee, because it would restrict his statutory right to revoke an assignment after one year. Pp. 326–338.

256 F. 2d 429, reversed.

Harry E. Wilmarth argued the cause for petitioner. With him on the brief were *Roland C. Davis* and *V. Craven Shuttleworth.*

Clifton Hildebrand argued the cause and filed a brief for respondents. *George L. Buland, Burton Mason* and *W. A. Gregory* were on a brief for the Southern Pacific Co., respondent.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Railway Labor Act[1] was amended in 1951 to authorize labor organizations representing employees of

[1] The Act is c. 347, 44 Stat. 577, c. 691, 48 Stat. 1185, as amended, 45 U. S. C. §§ 151–163. The Act was originally enacted in 1926 and considerably rewritten in 1934.

carriers to make "checkoff" agreements with the carriers for the deduction from employees' wages of periodic dues, initiation fees and assessments. Section 2 Eleventh (b), as added by 64 Stat. 1238, 45 U. S. C. § 152 Eleventh (b).[2] The amendment contains a proviso "[t]hat no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization . . . *which shall be revocable in writing* after the expiration of one year . . . ." (Emphasis supplied.) In this case the Dues Deduction Agreement between respondents Brotherhood of Railroad Trainmen and Southern Pacific Company required that there be used, as a necessary form for revoking an assignment, nothing other than a writing executed on a form furnished by the Brotherhood of Railroad Trainmen and forwarded by that organization to the employer.[3] The petitioner challenges this contractual

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[2] The amendment added a new paragraph to § 2 of the Act, § 2 Eleventh.

[3] The contract provision is as follows: "Both the authorization forms and the revocation of authorization forms shall be reproduced and furnished as necessary by the Organization without cost to the Company. The Organization shall assume full responsibility for the procurement and execution of the forms by employes and for the delivery of such forms to the Company."

The Trainmen's position, concurred in by the company, is that this provision means that no revocation cards are to be recognized "except those reproduced by our organization." While this construction of the agreement is hardly an obvious one, it is the construction put on the agreement by the parties to it, the Southern Pacific and the Trainmen, and since petitioner in this suit does not question it as a matter of construction, we of course accept it here.

Since there was no question of interpretation or application of the collective agreement, but rather only one of its validity under the statute, the case is not one in which resort to the grievance and Adjustment Board machinery provided by the Railway Labor Act was required. "This dispute involves the validity of the contract, not its meaning." *Brotherhood of Railroad Trainmen* v. *Howard,* 343

regulation as violative of the employee's statutory right to revoke the assignment. The District Court for the Northern District of California held that the requirement was valid, reasoning that although it "may seem a bit arbitrary" to allow revocation only by means of the form provided by the Trainmen, it was "no burden" and was "easily complied with." 155 F. Supp. 315, 317. The Court of Appeals for the Ninth Circuit adopted the District Court's reasoning and affirmed. 256 F. 2d 429. We granted certiorari to consider the important question of the scope of the proviso of § 2 Eleventh (b). 358 U. S. 812.

The petitioner is employed by respondent, Southern Pacific Company, and through March 1957 was a member of respondent Brotherhood of Railroad Trainmen. He had executed an individual assignment authorizing the check-off in his case. In March 1957, more than a year after his assignment had been in effect, petitioner decided to join the Order of Railway Conductors and Brakemen. He notified the Trainmen of his resignation by letter dated March 30, 1957, advising them that he was revoking the authorization to check off his dues and that he had sent a revocation form to the company. The same day a representative of the Conductors sent petitioner's executed revocation form to the company and handed an executed duplicate revocation form to the Secretary-Treasurer of petitioner's Lodge of the Trainmen.

The company and the Trainmen, relying on the provisions of the Dues Deduction Agreement, declined to honor the revocation forms executed by the petitioner, though they were identical with the form which the Dues Deduc-

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U. S. 768, 774. Cf. *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 242–244. The case presents an employee dispute as much, if not more, with the labor organization as with the employer. Cf. *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 205.

tion Agreement provided should be obtained from the Trainmen. The company advised that "[t]his matter is being directed to the attention of the appropriate officer of the Brotherhood of Railroad Trainmen for handling in accordance with the Agreement." The Trainmen's local Secretary-Treasurer in turn wrote the petitioner that the forms he had executed and submitted were not acceptable. He said that "the only way that you can be released from Wage Assignment Authorization is by signing a regulation A–2 card furnished by me and forwarded by me to the Company." He enclosed such a card for the petitioner's signature and noted "We would be sorry to lose you as a member of the BRT and hope that you may reconsider." As a result of the refusal of the company and the Trainmen to treat the petitioner's forms as valid, it was too late to stop the checkoff of petitioner's April 1957 wages.

The petitioner declined to execute any further forms and commenced this suit in the District Court against the company and the Trainmen. His complaint alleged that the action was brought under the Railway Labor Act, an "Act of Congress regulating commerce"; in this posture the jurisdiction of the District Court was properly invoked under 28 U. S. C. § 1337.[4] The complaint alleged that the action was brought on behalf of petitioner and others similarly situated; the parties are in dispute as to how many other employees were in fact similarly situated with petitioner, but, with the courts below, we do not find

[4] "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." This jurisdictional provision, unlike the general "arising under" statute, 28 U. S. C. § 1331, requires no monetary jurisdictional amount. See *Mulford* v. *Smith*, 307 U. S. 38, 46; *Turner, Dennis & Lowry Lumber Co.* v. *Chicago, M. & St. P. R. Co.*, 271 U. S. 259, 261.

it necessary to resolve the dispute,[5] and with them, we decide this case on the merits. The complaint prayed for a declaration that the petitioner, under the proviso, had complied with the requirements for effecting revocation and had terminated all authority of the company to check off his wages in favor of the Trainmen. Injunctive relief was also sought. The company and the Trainmen admitted that they were continuing to treat the petitioner's assignment as unrevoked, contending that the collective bargaining authority under the 1951 amendment to make checkoff agreements included authority to agree upon the challenged provisions of the Dues Deduction Agreement. We disagree with the District Court and the Court of Appeals and hold that the restrictive provisions of the Dues Deduction Agreement are violative of the 1951 amendment.

First. The 1951 amendment relaxed provisions of the Railway Labor Act dating from 1934 which had forbidden carriers and labor organizations from making either "union-shop" arrangements,[6] or arrangements whereby car-

[5] Petitioner originally listed 24 others as being similarly situated with him. The respondents stated that 11 of these were in fact not so situated. After this, petitioner listed others. If it appears in fact necessary on remand, the District Court may conduct such further investigation of the matter as will allow it to enter an appropriate judgment.

[6] Section 2 Fifth, as added by § 2, c. 691, 48 Stat. 1188, 45 U. S. C. § 152 Fifth, provided that "No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization . . ."; § 2 Fourth, as added by § 2, 48 Stat. 1187, 45 U. S. C. § 152 Fourth, provided that "it shall be unlawful for any carrier . . . to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization . . . ."

The 1951 amendment permitted carriers and labor organizations "to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such em-

riers would check off from employee wages amounts owed to a labor organization for dues, initiation fees and assessments.[7] It thus became lawful to bargain collectively for "union-shop" and "checkoff" arrangements; but this power was made subject to limitations. The limitation here pertinent is that, by force of the proviso, the authority to make checkoff arrangements does not include authority to bind individual employees to submit to the checkoff. Any agreement was to be ineffective as to an employee who did not furnish the employer with a written assignment in favor of the labor organization, and any assignment made was to be "revocable in writing after the expiration of one year . . . ." This failure to authorize agreements binding employees to submit to the checkoff was deliberate on the part of Congress. Proposals to

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ployment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class . . . ." Section 2 Eleventh (a), as added by 64 Stat. 1238.

[7] Section 2 Fourth, as added by § 2, c. 691, 48 Stat. 1187, 45 U. S. C. § 152 Fourth, provided that "it shall be unlawful for any carrier . . . to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions . . . ."

The 1951 amendment permitted carriers and labor organizations, subject to the proviso in the text, "to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties), uniformly required as a condition of acquiring or retaining membership . . . ." Section 2 Eleventh (b), as added by 64 Stat. 1238.

The 1951 amendment provided that "Any provisions in paragraphs Fourth and Fifth of section 2 of this Act in conflict herewith are to the extent of such conflict amended." Section 2 Eleventh (d), as added by 64 Stat. 1239.

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that end were expressly rejected. The bills originally introduced in the House and Senate, and favorably reported by the respective House and Senate Committees, would simply have authorized carriers and labor organizations "to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any dues, initiation fees or assessments which may be payable to such labor organization." H. R. Rep. No. 2811, p. 1, and S. Rep. No. 2262, pp. 1–2, 81st Cong., 2d Sess. Indeed the House Report reveals that the choice finally made of making implementation of the checkoff a matter of individual employee assignment was at first considered and rejected; "the committee thought that the making of such assignments . . . should remain a subject for collective bargaining." [8] But the matter had been a recurrent subject of concern particularly at the Senate Hearings, and between the time of the Committee Reports and the consideration of the bill on the Senate floor, the Senate Committee reversed its view and developed the proviso [9] allowing the individual employee to decide for himself whether to submit to the checkoff, and whether to revoke an authorization after the expiration of one year. See 96 Cong. Rec. 15735, 16268.[10] In this form the bill was passed by both Houses and approved.

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[8] H. R. Rep. No. 2811, 81st Cong., 2d Sess., p. 6.

[9] The proviso was inserted by way of an amendment which was submitted by Senator Hill on behalf of himself and Senator Taft, with the agreement of the Committee. See 96 Cong. Rec. 15735. For the reservations of the Committee members which doubtless led to this, see note 10, *infra*.

[10] At the time of the rendition of the Senate Committee Report, S. Rep. No. 2262, 81st Cong., 2d Sess., Senators Taft, H. Alexander Smith, and Donnell attached a statement of supplementary views by which they reserved the right to introduce and support on the

The structure of § 2 Eleventh (b) then is simple: carriers and labor organizations are authorized to bargain for arrangements for a checkoff by the employer on behalf of the organization. Latitude is allowed in the terms of such arrangements, but not past the point such terms impinge upon the freedom expressly reserved to the individual employee to decide whether he will authorize the checkoff in his case. Similarly Congress consciously and deliberately chose to deny carriers and labor organizations authority to reach terms which would restrict the employee's complete freedom to revoke an assignment by a writing directed to the employer after one year. Congress was specifically concerned with keeping these areas of individual choice off the bargaining table. It is plainly our duty to effectuate this obvious intention of Congress, and we must therefore be careful

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floor amendments, *inter alia,* which would "cause the . . . check-off conditions of employees of industry covered by the Railway Labor Act to be in general accord with the . . . check-off conditions of employees of other industry." *Id.,* at 5. These three Senators had been among those responsible for pressing an amendment to the Senate Committee version of the Taft-Hartley Act which restored to the Senate version of that Act the provision for individual option on the checkoff which they had desired during Committee deliberation, and now found in § 302 (c)(4) of that Act, 61 Stat. 157, 29 U. S. C. § 186 (c)(4). See S. Rep. No. 105, 80th Cong., 1st Sess., p. 53. The provision finally enacted in the Railway Labor amendment was quite similar to that of the Taft-Hartley Act.

For the concern with the matter at the Senate hearings, see Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, on S. 3295, 81st Cong., 2d Sess., pp. 74, 86, 94, 173, 188, 208. Senator Donnell was primarily concerned with the point. *Id.,* at 74, 86, 94, 188.

There were a few references to the matter at the House hearings. See Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, on H. R. 7789, 81st Cong., 2d Sess., pp. 33, 91, 261.

not to allow the employee's freedom of decision to be eroded in the name of procedure, or otherwise. We see no authority given by the Act to carriers and labor organizations to restrict the employee's individual freedom of decision by such regulations as were agreed upon in the Dues Deduction Agreement. The question is not whether these restrictions might abstractly be called "reasonable" or not.

Second. It is argued that the requirement that the revocation notice be on a form provided by the Trainmen is necessary in the interests of orderly procedure, and that the collective agreement provision was an appropriate place to specify this procedure. We might note that the original Committee rejection of the concept of individual authorization and revocation was supported for much the same reasons—that it was inconsistent with orderly procedure—but this view did not prevail finally in the Act.[11] Of course, the parties may act to minimize the procedural problems caused by Congress' choice. Carriers and labor organizations may set up procedures through the collec-

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[11] The House Report, note 8, *supra,* at 6, had argued: "[T]here is a stability of employment relationships in the railroad industry not found in industry generally. The committee felt that if an employee is required to become and remain a member of a labor organization as a condition of employment with a resulting obligation to pay dues, initiation fees, and assessments, and with the slight prospect of changing employment or his union affiliation within the industry, no statutory requirement for individual assignments seemed necessary. Furthermore, the physical nature of railroad and airline operations would make a mandatory requirement of individual assignments an exceedingly cumbersome procedure. Employees of a single carrier are scattered over thousands of miles of territory and many are located in isolated spots where few other persons are employed. It would seem that a mandatory requirement for assignments from individual employees would result in confusion and lack of stability. . . ."

tive agreement for processing, between themselves, individual assignments and revocations received, and carriers may make reasonable designations, in or out of collective bargaining contracts, of agents to whom revocations may be sent. Revocations, after all, must be sent somewhere. And doubtless forms may be established, by way of suggestion, and means for making them available set up. But here a specific procedure was established and made mandatory, imposing requirements over and above what we can perceive to be fairly those of the statute—which are simply that there be a writing, attributable to the employee and fairly expressing a revocation of his assignment, furnished the carrier.

The respondents urge that the requirement is necessary in the interests of preventing fraud and forgery, and of obviating disputes as to the authenticity of revocation instruments. Such problems are hardly peculiar to this setting. If the company suspects fraud or forgery in a revocation, it is within its power informally to check the matter with the employee. But we think it has no power, whether pursuant to action taken jointly with the labor organization in the collective bargaining agreement or to unilateral declaration, to treat as nullities revocation notices which are clearly intended as such and about whose authenticity there is no dispute.

The Trainmen next justify the procedure as a necessary protection to the employee from himself—that is, from his desire to revoke the checkoff—and from outside undue influence to do so, presumably that of a rival organization or of management. But Congress apparently foresaw and discounted any necessity for this protection when it took the matter out of the hands of the carriers and labor organizations and left it to the employee's individual choice. It did not make any provision for preliminary correspondence or dealings between the employee and the

organization when the employee wanted to stop the check-off, whether incident to terminating his affiliation or not. The complete freedom of individual choice in this area, undampened by the necessity of such preliminary dealings with the labor organization to make it effective, may seem unfortunate to labor organizations, but it is a problem with which we think Congress intended them to live.

Third. There is some suggestion that, possibly apart from the provisions of the Act, because petitioner was a member of the Trainmen and represented by them in the negotiation of the bargaining agreement, he is bound here by the action of his agent, as it were, in establishing this provision. But the short answer is that the proviso makes it clear that the organization was not to function as its members' agent in waiving their statutory revocation rights; we doubt whether the right to revoke could be waived at all in advance of the time for its exercise, but in any event, a waiver through the collective agreement would, under the statute, be the last conceivably permissible. And equally lacking in merit is the suggestion that the requirement of a Trainmen-furnished form is so trivial as to make the whole controversy *de minimis* and perhaps deny petitioner and those in his position judicial redress. Additional paper work or correspondence, after he once has indicated his desire to revoke in writing, might well be some deterrent, so Congress might think, to the exercise of free choice by an individual worker. When one considers the problem in its industrial setting and recalls the fact that individual workmen are not as equipped for and inclined to correspondence as are business offices, any complication of the procedure necessary to withdraw or the addition of any extra steps to it may be burdensome. That involved here may deter employees from taking an action they might have taken if no preliminary contact with their lodge was necessary. And within the area that the Act leaves open for solicitation by rival organiza-

tions—as where no union shop has been established,[12] or within the area where even a worker under a union-shop arrangement can change affiliations, see *Pennsylvania R. Co.* v. *Rychlik,* 352 U. S. 480, 492–494—the matter may be far from trivial, as the facts in this case suggest. Organizational efforts are attended by persuading the recruit to drop his membership in his present union and terminate any checkoff of his wages in its favor.[13] There may well be a difference in the weight of persuasion necessary to enlist the worker if he cannot at once effectuate his intentions through papers furnished him on the spot by the recruiting organization. We do not say whether the "cooling off" period which the procedure insisted upon here creates would be wise or unwise as a matter of policy. It is enough to say that we believe the Act has not left

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[12] The Act makes no formal relationship between a union-shop arrangement and a checkoff arrangement; under it the parties can negotiate either one without the other, if they are so disposed. And of course, a labor organization member who is subject to a union-shop arrangement need not subscribe to the checkoff; he can maintain his standing by paying his dues personally.

[13] The respondents make some suggestion that petitioner was not harmed because in any event the carrier could not continue a checkoff in favor of the Trainmen after it learned that he was no longer a member. Section 2 Eleventh (c) provides that "no [checkoff] agreement made pursuant to subparagraph (b) shall provide for deductions from his [an employee within specified categories] wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership." 64 Stat. 1238. But there is no showing when the carrier received notice of petitioner's change of membership; the papers used by him to revoke the checkoff and furnished the carrier did not refer to such a change. And of course a worker could revoke his checkoff authorization and remain a member of the same labor organization. It is clear that Congress meant to make the checkoff machinery stand on its own feet and be independent of any machinery for changing labor organizations—notice of which would ordinarily be sent only to the organizations involved.

any place for it. We think the added requirement involved here is meaningfully burdensome when considered in context; but in any event, we do not think the Act empowered carriers and labor organizations to bargain for any restrictions on the individual's right to revoke his assignment, even if later, while insisting on them, they choose to describe them as petty.

Reversed.

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

I would affirm the action of the District Court and the Court of Appeals in dismissing this petition for declaratory judgment and injunction. I agree, of course, that the provisions of the Railway Labor Act authorizing railroad workers to revoke their previously executed "checkoff" agreements "after the expiration of one year" grant workers a right which neither Union, nor Railroad, nor both together, can take away in whole or in part. I am of the opinion, however, that the collective bargaining agreement between the Brotherhood of Railroad Trainmen (B. R. T.) and the Southern Pacific Company provides a procedure which substantially aids in the preservation of the employees' statutory right to revoke their assignments at will. Since the checkoff provisions of the Act were not designed primarily to aid the Railroad, it is natural that the governing contract between Railroad and Union should relieve the Railroad, as much as possible, of burdens and expenses. Necessarily, Congress in authorizing checkoff arrangements contemplated that they could be administered in a businesslike manner, without imposition of undue burden on the railroads. It seems plain to me that the provision of the contract requiring that revocation be made through the B. R. T. to the Railroad, on forms supplied by the B. R. T. is, on the

whole, just and practical as applied to the Railroad, the Union and its members.

But in any event, the circumstances existing here call for no exercise of a court's discretionary power either to enter a declaratory judgment or to grant an injunction. This suit was filed April 12, 1957—10 days after B. R. T. in response to petitioner's letter terminating his membership and revoking his Wage Assignment Authorization mailed to petitioner for his signature the revocation form provided for in the collective bargaining contract. At the time of filing suit petitioner had no more than a highly questionable claim for one month's dues—several dollars. He also had in his possession the B. R. T. form which would have been recognized both by the B. R. T. and the Railroad. Petitioner therefore could have avoided any future deductions, and any possible damage to himself, merely by signing and mailing that form. And he could have recovered the one month's dues, if illegally deducted, by suit against the Railroad.

Equity's extraordinary power to grant injunctive relief to prevent irreparable damage can hardly be sustained by the proof in this case; plainly enough petitioner could not show irreparable damage, and, in fact, did not even allege it. Similarly, he could not claim he lacked an adequate remedy at law. Nor would declaratory relief be appropriate, for as we have said:

> "The declaratory judgment procedure may be resorted to only in the sound discretion of the Court and where the interests of justice will be advanced and an adequate and effective judgment may be rendered." *Alabama Federation of Labor* v. *McAdory,* 325 U. S. 450, 462.

The question we finally have here, therefore, is whether the District Court and the Court of Appeals should be reversed because they refused to use the court's process

in a controversy which, in reality, is between two unions over which one's printed form shall be used to revoke an assignment. Perhaps judicial history can produce no other case in which the extraordinary relief the Court now orders granted has been accorded under comparable circumstances. For any possible injury to petitioner would have been avoided except for his stubborn refusal to sign a simple, 11-line form identical to one he had already signed. The federal courts have too much work to do in adjudicating real, genuine, meaningful cases or controversies to have their time consumed in consideration of trivial disputes like this one. I would affirm the decisions below.

COMMERCIAL COMMUNICATIONS, INC., ET AL. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 719. Decided April 27, 1959.

Appeal dismissed and certiorari denied.

Reported below: 50 Cal. 2d 512, 327 P. 2d 513.

Frederick M. Rowe for appellants.

J. Thomason Phelps for the Public Utilities Commission of California, and *Arthur T. George, Eugene M. Prince* and *Francis R. Kirkham* for the Pacific Telephone & Telegraph Co., appellees.

PER CURIAM.

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

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

COMMERCIAL BARGE LINES, INC., ET AL. *v.* UNITED STATES ET AL.

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

No. 721. Decided April 27, 1959.

166 F. Supp. 867, affirmed.

Dudley B. Tenney and *Nuel D. Belnap* for appellants.

Solicitor General Rankin, Assistant Attorney General Hansen, Robert W. Ginnane and *Charlie H. Johns* for the United States and the Interstate Commerce Commission, appellees.

Stuart B. Bradley, Carl Helmetag, Jr., J. D. Feeney, Harry C. Ames, R. Granville Curry, Frederick M. Dolan, Donald Macleay and *Russell S. Bernhard* for Carrier Appellees.

PER CURIAM.

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

DON McCULLAGH, INC., *v.* MICHIGAN, DEPARTMENT OF REVENUE.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 756. Decided April 27, 1959.

Appeal dismissed for want of a substantial federal question.
Reported below: 354 Mich. 413, 93 N. W. 2d 252.

Anthony A. Vermeulen for appellant.

Paul L. Adams, Attorney General of Michigan, *Samuel J. Torina,* Solicitor General, and *William D. Dexter,* Assistant Attorney General, for appellee.

PER CURIAM.

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

SCULL *v.* VIRGINIA EX REL. COMMITTEE ON LAW REFORM AND RACIAL ACTIVITIES.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 51. Argued November 18, 1958.—Decided May 4, 1959.

Petitioner was convicted in a State Court of contempt and sentenced to fine and imprisonment for refusing to obey an order of that Court to answer certain questions put to him by an Investigating Committee of the State Legislature. The events leading to his subpoena, as well as the questions asked him, made it clear that the Committee's investigation touched the area of free speech, press and association; and the record showed that the purposes of the inquiry, as announced by the Chairman of the Committee, were so unclear and conflicting that petitioner did not have a fair opportunity of understanding the basis of the questions or any justification on the Committee's part for seeking the information he refused to give. *Held:* His conviction violated the Due Process Clause of the Fourteenth Amendment, since he was not given a fair opportunity, at the peril of contempt, to determine whether he was within his rights in refusing to answer. He cannot be sent to jail for a crime he could not with reasonable certainty know he was committing. Pp. 344–353.

Reversed.

Joseph L. Rauh, Jr. argued the cause for petitioner. With him on the brief were *John Silard* and *Karl Sorg.*

Leslie Hall argued the cause and filed a brief for respondent.

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

David H. Scull was convicted of contempt in the Circuit Court of Arlington County, Virginia, for refusing to obey a decision of that court ordering him to answer a number of questions put to him by a Legislative Investigative Committee of the Virginia General Assembly. On

appeal the Virginia Supreme Court of Appeals affirmed without opinion. Scull contended at the Committee hearings, in the courts below, and in this Court that the Virginia statute authorizing the investigation, both on its face and as applied, violated the Fourteenth Amendment to the United States Constitution. He claimed, among other things, that: (1) The Committee was "established and given investigative authority, as part of a legislative program of 'massive resistance' to the United States Constitution and the Supreme Court's desegregation decisions, in order to harass, vilify, and publicly embarrass members of the NAACP and others who are attempting to secure integrated public schooling in Virginia." (2) The questions asked him violated his rights of free speech, assembly and petition by constituting an unjustified restraint upon his associations with others in "legal and laudable political and humanitarian causes." (3) "The information sought from [him] was neither intended to, nor could reasonably be expected to, assist the Legislature in any proper legislative function." (4) Despite his requests, repeated at every stage of the proceedings, the Committee failed to inform him "in what respect its questions were pertinent to the subject under inquiry . . . ." We granted certiorari to consider these constitutional challenges to the validity of petitioner's contempt conviction. 357 U. S. 903. After careful consideration, we find it unnecessary to pass on any of these constitutional questions except the last one because we think the record discloses an unmistakable cloudiness in the testimony of the Committee Chairman as to what was sought of Scull, as well as why it was sought. Scull was therefore not given a fair opportunity, at the peril of contempt, to determine whether he was within his rights in refusing to answer and consequently his conviction must fall under the procedural requirements of the Fourteenth Amendment.

Scull is a printer and calendar publisher in Annandale, Virginia, where he has been a long-time resident active in religious, civic and welfare groups. Soon after this Court's decision in *Brown* v. *Board of Education,* 347 U. S. 483, holding segregation in the public schools to be unconstitutional, Scull began to advocate compliance with the requirements of the *Brown* case. In December of 1954, Scull and a group of other citizens met at a church in Alexandria to consider and discuss "the part which concerned and conscientious citizens can best play in helping to achieve the community adjustments necessary to protect the educational and constitutional rights of all citizens as recently defined and interpreted by the Supreme Court of the United States." The group decided to prepare and publish through a "Citizens Clearing House On Public Education" information about the Virginia educational program and to report on the progress made by various Parent-Teacher Associations in Northern Virginia in developing programs for "orderly integration."

One of the newsletters published by the Clearing House was obtained by the Fairfax Citizens' Council, a group which vigorously opposed any desegregation of Virginia schools. The Council republished a large part of the letter in a pamphlet entitled "The Shocking Truth!" It called attention to the fact that the newsletter was being "disseminated through Box 218, Annandale, Va. (David Scull)," and stated that "communications with the N. A. A. C. P., Southern Regional Council, Clearing House, B'nai B'rith, Council on Human Relations, American Friends and many other pro-integration groups are funneled through Box 218, Annandale, Va., and membership is encouraged if not actually suggested by the P. T. A. Federation."

The pamphlet came to the attention of Delegate James M. Thomson, Chairman of the Virginia Committee on

Law Reform and Racial Activities, who promptly subpoenaed Scull to appear and testify. This group, commonly called the "Thomson Committee," was established a few months after the Virginia General Assembly adopted a resolution attacking the *Brown* decision and pledging that the Legislature would take all constitutionally available measures to resist desegregation in the public schools.[1] The bill setting up the "Thomson Committee" was one of a series relating to segregation passed on the same day. Among these were bills establishing a pupil-assignment plan, providing for the withdrawal of state funds from integrated schools and forbidding barratry, champerty and maintenance.[2] While they did not mention the NAACP by name, Chairman Thomson testified below that in the course of the "legislative battle" over them he had stated that with "this set of bills . . . 'we can bust that organization . . . wide open.' "

Scull appeared before the Thomson Committee, as ordered. He answered several questions about his publishing business, and then was asked whether he belonged "to an organization known as The Fairfax County Council on Human Relations." He replied that "on advice of counsel I wish to state that the language of the subpoena delivered to me was so broad and vague . . . that before going further I wish to ask you to tell me the specific subject of your inquiry today, so that I may judge which of your questions are pertinent." Chairman Thomson told him that the general subjects under inquiry were "threefold": (1) the tax status of racial organizations and of contributions to them; (2) the effect of integration or its threat on the public schools of Virginia and on the State's general welfare; and (3) the violation of certain statutes

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[1] See Va. Acts 1956, S. J. Res. 3.

[2] See generally, Va. Acts, E. S. 1956, cc. 31–37, 56–71.

against "champerty, barratry, and maintenance, or the unauthorized practice of the law." [3] He told Scull, however, that several of these subjects "primarily do not deal with you." Scull then filed a statement of his objections to the questioning and emphasized that he had not been "properly informed of the subject of inquiry." Without clarifying Chairman Thomson's ambiguous statement or specifying which of the "several" subjects did not apply to Scull, the Committee proceeded to ask the 31 questions listed in the footnote below.[4]

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[3] The Committee was authorized to: "make a thorough investigation of the activities of corporations, organizations, associations and other like groups which seek to influence, encourage or promote litigation relating to racial activities in this State. The Committee shall conduct its investigation so as to collect evidence and information which shall be necessary or useful in

"(1) determining the need, or lack of need, for legislation which would assist in the investigation of such organizations, corporations and associations relative to the State income tax laws;

"(2) determining the need, or lack of need, for legislation redefining the taxable status of such corporations, associations, organizations and other groups, as above referred to, and further defining the status of donations to such organizations or corporations from a taxation standpoint; and

"(3) determining the effect which integration or the threat of integration could have on the operation of the public schools in the State or the general welfare of the State and whether the laws of barratry, champerty and maintenance are being violated in connection therewith." Va. Acts, E. S. 1956, c. 37.

[4] (1) "Are you a member of The Fairfax County Council on Human Relations?"

(2) "Are you a member of the National Association for the Advancement of Colored People?"

(3) "Have you contributed to any of the suits, contributed financially to any of the suits designed to bring about racial integration in the public schools?"

(4) "Have you paid court costs in any of the suits designed to bring about racial integration in the State of Virginia?"

(5) "Have you paid attorneys' fees to any attorneys in regard to

It is difficult to see how some of these questions have any relationship to the subjects the Committee was authorized to investigate, or how Scull could possibly discover any such relationship from the Chairman's state-

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racial litigation involved in the integration of the public schools in Virginia?"

(6) "Have you attended any meetings at which the formulation of suits against the State of Virginia in racial integration suits in the public schools have been discussed?"

(7) "I notice in your statement that you say that you think you have a moral duty to counsel with a fellow citizen as to his legal rights if he is ignorant of them. Do you feel qualified to counsel with him as to his legal rights?"

(8) "Who else uses that box number [No. 218 in Annandale, Va.] besides yourself?"

(9) "Does the Fairfax County Council on Human Relations use that box?"

(10) "Has the NAACP used that number from time to time?"

(11) "Has the organization known as the Citizens Clearing House used that box number?"

(12) "Has the Fairfax County Federation of PTA's used that number?"

(13) "Has the Fairfax County Federation of P-TA Workshops on Supreme Court Decisions on the Public Schools used that box number?"

(14) "Has Miss Caroline H. Planck or Mrs. Barbara Marx used that box number?"

(15) "Do you know Mrs. Planck or Mrs. Marx?"

(16) "Has Dr. E. B. Henderson used that box number?"

(17) "Has the National Conference of Christians and Jews used that box number?"

(18) "Has the Save Our Schools Committee of Fairfax County used that box number?"

(19) "Has Mr. Warren D. Quenstedt used that box?"

(20) "Has Mr. E. A. Prichard used that number?"

(21) "Has the American Civil Liberties Union used that same box number?"

(22) "Has the Americans For Democratic Action, known as ADA, used that box number?"

[*Footnote 4 continued on p. 350.*]

ment.[5] It does seem that several of the questions asked were aimed at connecting Scull with barratry or champerty, but it was never made wholly clear to Scull, either before or after the questioning, that this was one of the subjects under inquiry as far as he was concerned. Nevertheless, Scull was cited to appear before the Circuit Court to show cause why he should not be compelled to answer.

In the Circuit Court the Chairman sought to explain his ambiguous statements about the scope of the investigation. Far from clarifying the matter, however, his

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(23) "Has the Japanese-American Citizens League used that box number?"

(24) "Has the Washington Inter-Racial Workshop used that same number?"

(25) "Has the American Friends Service Committee used that box number?"

(26) "Does the Community Council for Social Progress use the same box number?"

(27) "Does B'nai Brith use that same box number?"

(28) "Does the Communist Party use that box number?"

(29) "Do you belong to any racial organization, and by 'racial' I mean organizations whose membership is interracial in character or organizations that are instituting or fostering racial litigation?"

(30) "Have you ever been called as a witness before any Congressional Committee?"

(31) "Has your name ever been cited by any Congressional Committee as being on any list of members of any organizations that are cited as subversive?"

[5] Question 28 asked if the Communist Party used Box 218; Question 30 asked if Scull had ever been called as a witness before a Congressional Committee; Question 31 asked if his name had ever been cited by any Congressional Committee as being on any list of members of any organizations that are cited as subversive. Nothing in the language of the Act authorizing the Committee or in the statement of Chairman Thomson about the subjects under inquiry could lead Scull to think that it was the Committee's duty to investigate Communist or subversive activities.

testimony added to the confusion, since he successively ruled out as inapplicable to Scull each of the subjects which the Legislature had authorized the Committee to investigate. On first being asked which of the three subjects applied to Scull, he testified:

> "For my personal standpoint, I would say that the one dealing with the taxable status does not affect him here, and likewise the one—I have forgotten whether I stated it or not, but I would think that the integration or the threat of integration on public school systems, on the general welfare, would apply.
>
> "Looking at it in retrospect, the other on champerty, barratry, and maintenance would not apply. I don't recall whether I did say or did not say. We did specifically with the third one: Champerty, barratry, and maintenance."

Later the following colloquy took place:

> Counsel for Scull: "Q. Now, is it also correct that you said several which primarily do not deal with you?"
>
> Chairman Thomson: "A. If the transcript says it there, I said it.
>
> "Q. Which of those three were you referring to when you said, 'Several which primarily do not deal with you'?
>
> "A. I think it is the last mentioned there. [The last mentioned was barratry.]
>
> "Q. Would you just state for the record so that it is clear on the record which ones you were referring to that did not deal with Mr. Scull?
>
> "A. The violation of those statutes dealing with champerty, barratry, and maintenance, and general unauthorized practice of the law.
>
> "Q. Those did not deal with Mr. Scull?

"A. No, no; I think in the connection that we are dealing with here, that the ones spoken of first did not apply; only the latter one did apply that I was making.

. . . . . .

"Q. Now I am confused."

Subsequently, Chairman Thomson stated that barratry applied to a certain "section of the testimony" but did not identify which section. Still later he undertook to specify the section but instead of doing so he made what may have been a general retraction and said, "The whole statement would be applicable to the entire transcript and the fact that he was advised of each one of them would be applicable to the entire transcript."

The judge who ordered Scull to answer the questions made no clearer statement of their pertinence to the investigation or to basic state interests than had the Committee Chairman. His holding was merely that "the questions are of a preliminary nature and in developing the inquiry to secure the information which the Committee is after appears to the Court to be perfectly proper line of inquiry." He at no time analyzed the individual questions asked, nor explained to Scull what it was that the Committee wanted from him and how the questions put to him related to these desires.

The events leading to Scull's subpoena, as well as the questions asked him, make it unmistakably clear that the Committee's investigation touched an area of speech, press, and association of vital public importance.[6] In *NAACP* v. *Alabama,* 357 U. S. 449, 460–466, this Court

[6] See *NAACP* v. *Alabama,* 357 U. S. 449, 460–466; *United States* v. *Rumely,* 345 U. S. 41. Among the questions asked were several dealing directly with political activity. Question 19, for example asked if Mr. Warren D. Quenstedt, a candidate for Congress had used Scull's post-office box.

held that such areas of individual liberty cannot be invaded unless a compelling state interest is clearly shown.[7] But we do not reach that question because the record shows that the purposes of the inquiry, as announced by the Chairman, were so unclear, in fact conflicting, that Scull did not have an opportunity of understanding the basis for the questions or any justification on the part of the Committee for seeking the information he refused to give. See *Watkins* v. *United States,* 354 U. S. 178, 208–209, 214–215. To sustain his conviction for contempt under these circumstances would be to send him to jail for a crime he could not with reasonable certainty know he was committing. This Court has often held that fundamental fairness requires that such reasonable certainty exist. See *Lanzetta* v. *New Jersey,* 306 U. S. 451, 453; *Jordan* v. *De George,* 341 U. S. 223, 230; *Watkins* v. *United States,* 354 U. S. 178, 208–209, 214–215, 217; *Flaxer* v. *United States,* 358 U. S. 147, 151. Certainty is all the more essential when vagueness might induce individuals to forego their rights of speech, press, and association for fear of violating an unclear law. *Winters* v. *New York,* 333 U. S. 507. Such is plainly the case here. The information given to Scull was far too wavering, confused and cloudy to sustain his conviction.

The case is reversed and remanded to the Virginia Supreme Court of Appeals for further proceedings not inconsistent with this opinion.

Reversed.

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[7] Four members of this Court adhere to the view they expressed in *Sweezy* v. *New Hampshire,* 354 U. S. 234, 251, and "do not now conceive of any circumstances wherein a state interest would justify infringement of rights in these fields."

PLUMBERS, STEAMFITTERS, REFRIGERATION, PETROLEUM FITTERS, AND APPRENTICES OF LOCAL 298, A. F. OF L., ET AL. *v.* COUNTY OF DOOR ET AL.

CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

No. 396. Argued March 26, 1959.—Decided May 4, 1959.

A county, a general contractor and a plumbing contractor sued in a State Court to enjoin picketing by a plumbers' union, because of the employment of nonunion plumbers, which had stopped work on an addition to the county courthouse, about half of the total cost of which was the cost of materials brought from outside the State. *Held:* The controversy was exclusively within the jurisdiction of the National Labor Relations Board, and the State Court had no jurisdiction. Pp. 355–359.

(a) Since about half the cost of the entire project was the cost of materials brought from outside the State, the controversy had sufficient effect on interstate commerce to give the National Labor Relations Board jurisdiction. P. 356.

(b) The dispute involved is the kind over which the Board normally has exclusive power. Pp. 356–357.

(c) That one of the parties is a county and that political subdivisions are expressly excluded from the definition of "employer" in the National Labor Relations Act does not prevent the Board from having jurisdiction. *Teamsters Union* v. *New York, N. H. & H. R. Co.*, 350 U. S. 155. Pp. 357–359.

4 Wis. 2d 142, 89 N. W. 2d 920, reversed.

David Previant argued the cause for petitioners. With him on the brief were *Martin F. O'Donoghue* and *William J. Duffy.*

Donald J. Howe argued the cause for respondents. With him on the brief were *George E. Frederick* and *John H. Wessel.*

Solicitor General Rankin, Jerome D. Fenton, Thomas J. McDermott and *Dominick L. Manoli* filed a brief for the National Labor Relations Board, as *amicus curiae.*

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

Respondent, County of Door, Wisconsin, is a municipal corporation; petitioners are a Plumbers' Union Local and a Council of Trade Unions. The County hired respondent Oudenhoven to do the general contracting work on an addition to the Door County Courthouse. At the same time some eight contracts covering specific items of construction were entered into by the County with various other firms. Among the contractors was respondent Zahn who had successfully bid for the plumbing work in the project. Unlike the other successful bidders, however, Zahn employed nonunion labor. This disturbed the Plumbers' Union which attempted to induce him to sign a union agreement. After Zahn refused, a picket was assigned to walk around the courthouse carrying a placard which stated that nonunion workers were employed on the project. The picketing, though peaceful, effectively stopped all the work since union members employed by other constractors refused to cross the picket line.

To end the interruption respondents Door County, Zahn, and Oudenhoven sought an injunction in the local Circuit Court. Petitioners defended by claiming, among other things, that under the National Labor Relations Act [1] the state courts had no jurisdiction and that the controversy was exclusively subject to National Labor Relations Board control. The trial court, believing that interstate commerce was not affected by the dispute, denied that the Board had jurisdiction and held that state power existed. It found that state law had been violated by the picketing and issued an injunction. On appeal the Wisconsin Supreme Court affirmed. 4 Wis. 2d 142, 89 N. W. 2d 920. It apparently disagreed with the basis of the lower court's holding and assumed that the dis-

[1] 61 Stat. 136, as amended, 29 U. S. C. §§ 151–168.

pute did affect interstate commerce, but held that the N. L. R. B. had no jurisdiction because Door County, a governmental subdivision, was among those seeking relief. Since the N. L. R. B. had no power, the court ruled, state laws were not pre-empted and the injunction could stand. Under similar circumstances both the National Labor Relations Board and the United States Court of Appeals for the Third Circuit have concluded that the N. L. R. B. has jurisdiction.[2] We granted certiorari to resolve this conflict. 358 U. S. 878.

There can be no doubt that were Door County not a party to the litigation state courts would have no power over the dispute. The stipulated facts show that the total cost of the project was about $450,000. Roughly half of this was the cost of materials brought from outside Wisconsin. On similar facts this Court has often found a sufficient effect on commerce to give the N. L. R. B. jurisdiction. See, *e. g., Labor Board* v. *Denver Bldg. & Constr. Trades Council,* 341 U. S. 675, 683–684. We see no reason to deviate from those holdings. It is also admitted that the dispute here involved is the kind over which the Labor Board normally has exclusive power. Respondents allege an attempt to force Zahn and the County to stop doing business with each other or, alternatively, to coerce Zahn into making his employees organize a union shop. Both of these allegations, if proved, would constitute unfair labor practices under § 8 (b)(4) of the National Labor Relations Act.[3] If the charges are not proved the

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[2] *Labor Board* v. *Local 313, Int'l Bro. of Elect. Workers,* 254 F. 2d 221, affirming *Peter D. Furness,* 117 N. L. R. B. 437. See also *New Mexico Bldg. Branch, Assoc. Gen. Contractors,* CCH 1957–1958 Labor L. Rep. (4th ed.) ¶ 55,304; *Freeman Constr. Co.,* CCH 1957–1958 Labor L. Rep. (4th ed.) ¶ 55,353.

[3] Section 8 (b)(4) provides in part: "It shall be an unfair labor practice for a labor organization or its agents . . . to engage in, or to

conduct might well be "protected" under § 7 of the Labor Act.[4] In either case this Court has held that the determination must be made by the N. L. R. B. and that "state [courts] must decline jurisdiction in deference to the tribunal which Congress has selected. . . ." [5]

It is claimed, however, that the presence of Door County somehow deprives the Board of jurisdiction and re-establishes state power. This contention is based on the fact that political subdivisions are expressly excluded from the definition of "employer" in the Labor Relations Act and therefore are not subject to many of its provisions.[6] To allow the County to file a complaint against the union would, it has been argued, give the County the advantages of the Labor Relations Act without subjecting it to the correlative responsibilities the statute imposes.

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induce or encourage the employees of any employer to engage in . . . a strike . . . where an object thereof is: (A) forcing or requiring . . . any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees . . . ." 61 Stat. 141, 29 U. S. C. § 158 (b) (4).

[4] Section 7 reads: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 61 Stat. 140, 29 U. S. C. § 157.

[5] *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 481. There is in this case no question of violence or of the power of state courts to award damages. See generally, *San Diego Bldg. Trades Council* v. *Garmon, ante,* p. 236.

[6] "The term 'employer' . . . shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . . ." 61 Stat. 137, 29 U. S. C. § 152 (2).

In *Local 25, Int'l Bro. of Teamsters* v. *New York, N. H. & H. R. Co.*, 350 U. S. 155, we decided that a railroad could seek relief before the Board although railroads, like political subdivisions, are expressly excluded from the term "employer" in the Act.[7] Our opinion pointed out that "the N. L. R. B. is empowered to issue complaints whenever 'it is charged' that any person subject to the Act is engaged in any proscribed unfair labor practice," and that Board regulations allow such a charge to be filed by "any person" as defined in the Act, 350 U. S., at 160.[8] "Since railroads are not excluded from the Act's definition of 'person' . . ." [9] we held that "they are entitled to Board protection from the kind of unfair labor practice proscribed by § 8 (b)(4)(A)," reasoning that this result would best effectuate congressional policies of uniform control over labor abuses and protection of the parties injured by such practices. *Ibid.*

The position of a county and a railroad would seem to be identical under the Act, and the policy considerations which guided us in *Local 25*, like the statutory language there construed, would seem to apply equally here.[10]

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[7] "The term 'employer' . . . shall not include . . . any person subject to the Railway Labor Act . . . ." 61 Stat. 137, 29 U. S. C. § 152 (2). See 44 Stat. 577, as amended, 45 U. S. C. § 151.

[8] 29 CFR, 1958 Cum. Supp., § 102.9, states "A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person. . . ." The definition of "person" in the regulations is the same as that in the Act itself. 29 CFR, 1958 Cum. Supp., § 102.1.

[9] As defined in the Act, "The term 'person' *includes* one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers." 61 Stat. 137, 29 U. S. C. § 152 (1). (Italics added.)

[10] Significantly, before this Court's decision in *Local 25, Int'l Bro. of Teamsters* v. *New York, N. H. & H. R. Co.*, 350 U. S. 155, the N. L. R. B. agreed with respondents that political subdivisions were not "persons" under the Labor Act, but shortly after *Local 25* the Board reversed itself since it felt the basis of its prior rulings had been

Respondents attempt to distinguish the case by claiming that a political subdivision must be expressly included in a statute if it is to be considered within the law's coverage and that essential state functions will be impaired if the county is subjected to N. L. R. B. coverage. But this Court has many times held that government bodies not expressly included in a federal statute may, nevertheless, be subject to the law.[11] And Board jurisdiction to grant relief, far from interfering with county functions, serves to safeguard the interests of such political subdivisions. Accordingly, we find neither of respondents' contentions convincing.

We do not, of course, attempt to decide whether the Union's conduct in this dispute violates § 8 (b)(4), is protected by § 7, or is covered by neither provision of the Labor Act. Those are questions for the Board to determine in a proper proceeding brought before it. See, *e. g., Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, 481. We merely hold that the Board has jurisdiction in this case and that, therefore, it was error for the Wisconsin courts to exercise jurisdiction.

The judgment of the Supreme Court of Wisconsin is reversed and the cause is remanded to that court for action not inconsistent with this opinion.

Reversed and remanded.

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completely undercut by *Local 25.* Compare *Al J. Schneider Co.,* 87 N. L. R. B. 99; 89 N. L. R. B. 221; *Victor M. Sprys,* 104 N. L. R. B. 1128, with *Peter D. Furness,* 117 N. L. R. B. 437; *New Mexico Bldg. Branch, Assoc. Gen. Contractors,* CCH 1957–1958 Labor L. Rep. (4th ed.) ¶ 55,304.

[11] See, *e. g., Ohio* v. *Helvering,* 292 U. S. 360, 370–371 (a State is a "person" within the meaning of a federal law taxing persons engaged in the sale of liquor); *United States* v. *California,* 297 U. S. 175, 186 (a federal statute regulating common carriers by rail applies to a State); *Georgia* v. *Evans,* 316 U. S. 159 (a State is a "person" within the meaning of the Sherman Act, and may seek relief under that statute).

FRANK *v.* MARYLAND.

APPEAL FROM THE CRIMINAL COURT OF BALTIMORE, MARYLAND.

No. 278. Argued March 5, 1959.—Decided May 4, 1959.

A Baltimore City health inspector seeking the source of a rat infestation discovered evidence of such an infestation in the rear of appellant's home, and, having no search warrant, requested appellant's permission to inspect his basement in the day time. For refusing such permission, appellant was convicted and fined for a violation of § 120 of Art. 12 of the Baltimore City Code, which provides that, "Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar or enclosure, he may demand entry therein in the day time, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars." *Held:* Section 120 is valid, and appellant's conviction for resisting an inspection of his house without a warrant did not violate the Due Process Clause of the Fourteenth Amendment. Pp. 361–373.

Affirmed.

Benjamin Lipsitz argued the cause and filed a brief for appellant.

C. Ferdinand Sybert, Attorney General of Maryland, and *James H. Norris, Jr.,* Special Assistant Attorney General, argued the cause for appellee. With them on the brief were *Hugo A. Ricciuti* and *W. Thomas Gisriel.*

A brief urging affirmance was filed for the Member Municipalities of the National Institute of Municipal Law Officers, as *amici curiae,* by *Joe W. Anderson, Roger Arnebergh, John C. Banks, Alexander G. Brown, Nathaniel H. Goldstick, William N. Gurtman, Claude V. Jones, Ralph S. Locher, Walter J. Mattison, John C. Melaniphy, Barnett I. Shur, Charles H. Tenney, Charles S. Rhyne, Brice W. Rhyne* and *S. White Rhyne, Jr.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Acting on a complaint from a resident of the 4300 block of Reisterstown Road, Baltimore, Maryland, that there were rats in her basement, Gentry, an inspector of the Baltimore City Health Department, began an inspection of the houses in the vicinity looking for the source of the rats. In the middle of the afternoon of February 27, 1958, Gentry knocked on the door of appellant's detached frame home at 4335 Reisterstown Road. After receiving no response he proceeded to inspect the area outside the house. This inspection revealed that the house was in an "extreme state of decay," and that in the rear of the house there was a pile later identified as "rodent feces mixed with straw and trash and debris to approximately half a ton." During this inspection appellant came around the side of the house and asked Gentry to explain his presence. Gentry responded that he had evidence of rodent infestation and asked appellant for permission to inspect the basement area. Appellant refused. At no time did Gentry have a warrant authorizing him to enter. The next forenoon Gentry, in the company of two police officers, returned to appellant's house. After receiving no response to his knock, he reinspected the exterior of the premises. He then swore out a warrant for appellant's arrest alleging a violation of § 120 of Art. 12 of the Baltimore City Code. That section provides:

> "Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar or enclosure, he may demand entry therein in the day time, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars."

Appellant was arrested on March 5, and the next day was found guilty of the offense alleged in the warrant by a Police Justice for the Northern District of Baltimore and fined twenty dollars. On appeal, the Criminal Court of Baltimore, in a *de novo* proceeding, also found appellant guilty. The Maryland Court of Appeals denied certiorari. The case came here under a challenge, 28 U. S. C. § 1257 (2), to the validity of § 120 to determine whether appellant's conviction for resisting an inspection of his house without a warrant was obtained in violation of the Fourteenth Amendment.

The Health Code of the City of Baltimore, of which § 120 is an important part, deals with many of the multiform aspects of hygiene in modern urban areas. A vital portion concerns the hygiene of housing. Typical of the content and method of enforcing its provisions is the section requiring that "[e]very dwelling and every part thereof shall be kept clean and free from any accumulation of dirt, filth, rubbish, garbage or similar matter, and shall be kept free from vermin or rodent infestation." Baltimore City Code, Art. 12, § 112. If the occupant of a building fails to meet this standard, he is notified by the Commissioner of Health to abate the substandard conditions.[1] Failure to remove these hazards to community health gives rise to criminal prosecution. *Ibid.* The attempted inspection of appellant's home was merely to ascertain the existence of evils to be corrected upon due notification or, in default of such correction, to be made the basis of punishment.

We have said that "[t]he security of one's privacy against arbitrary intrusion by the police" is fundamental to a free society and as such protected by the Fourteenth

[1] If the nuisance constitutes an actual menace to health the Commissioner may abate it forthwith. Baltimore City Code, Art. 12, § 112.

Amendment. *Wolf* v. *Colorado,* 338 U. S. 25, 27. Application of the broad restraints of due process compels inquiry into the nature of the demand being made upon individual freedom in a particular context and the justification of social need on which the demand rests.

The history of the constitutional protection against official invasion of the citizen's home makes explicit the human concerns which it was meant to respect. In years prior to the Revolution leading voices in England and the Colonies protested against the ransacking by Crown officers of the homes of citizens in search of evidence of crime or of illegally imported goods. The vivid memory by the newly independent Americans of these abuses produced the Fourth Amendment as a safeguard against such arbitrary official action by officers of the new Union, as like provisions had already found their way into State Constitutions.

In 1765, in England, what is properly called the great case of *Entick* v. *Carrington,* 19 Howell's State Trials, col. 1029, announced the principle of English law which became part of the Bill of Rights and whose basic protection has become imbedded in the concept of due process of law. It was there decided that English law did not allow officers of the Crown to break into a citizen's home, under cover of a general executive warrant, to search for evidence of the utterance of libel. Among the reasons given for that decision were these:

> "It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty." *Id.*. at col. 1073.

495957 O–59–28

These were not novel pronouncements to the colonists. A few years earlier, in Boston, revenue officers had been authorized to use Writs of Assistance, empowering them to search suspected places, including private houses, for smuggled goods. In 1761 the validity of the use of the Writs was contested in the historic proceedings in Boston. James Otis attacked the Writ of Assistance because its use placed "the liberty of every man in the hands of every petty officer." [2] His powerful argument so impressed itself first on his audience and later on the people of all the Colonies that President Adams was in retrospect moved to say that "American Independence was then and there born." [3] Many years later this Court, in *Boyd* v. *United States,* 116 U. S. 616, carefully reviewed this history and pointed out, as did Lord Camden in *Entick* v. *Carrington,* that

> ". . . the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give

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[2] Tudor, Life of James Otis (1823), 66. No complete text of the Otis speech is extant, but see notes of Horace Gray, Jr. in Quincy's Massachusetts Reports for 1761–1762, App. I, pp. 469 *et seq.* Tudor's life contains an account of it as well as of the events leading to the speech and the reaction to it.

[3] *Id.,* at 61. Adams said:

"Otis was a flame of fire; with a promptitude of classical allusions, a depth of research, a rapid summary of historical events and dates, a profusion of legal authorities, a prophetic glance of his eyes into futurity, and a rapid torrent of impetuous eloquence, he hurried away all before him. American Independence was then and there born. The seeds of patriots and heroes, to defend the *Non sine Diis animosus infans;* to defend the vigorous youth, were then and there sown. Every man of an immense crouded audience appeared to me to go away as I did, ready to take arms against Writs of Assistance. Then and there, was the first scene of the first act of opposition, to the arbitrary claims of Great Britain. Then and there, the child Independence was born. In fifteen years, i. e. in 1776, he grew up to manhood and declared himself free." *Id.,* at 60–61.

> evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment." 116 U. S., at 633.

Against this background two protections emerge from the broad constitutional proscription of official invasion. The first of these is the right to be secure from intrusion into personal privacy, the right to shut the door on officials of the state unless their entry is under proper authority of law. The second, and intimately related protection, is self-protection: the right to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the state against the individual, information which may be used to effect a further deprivation of life or liberty or property. Thus, evidence of criminal action may not, save in very limited and closely confined situations, be seized without a judicially issued search warrant. It is this aspect of the constitutional protection to which the quoted passages from *Entick* v. *Carrington* and *Boyd* v. *United States* refer. Certainly it is not necessary to accept any particular theory of the interrelationship of the Fourth and Fifth Amendments [4] to realize what history makes plain, that it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures that the great battle for fundamental liberty was fought. While these concerns for individual rights were the historic impulses behind the Fourth Amendment and its analogues in state constitutions, the application

[4] The Court in *Boyd* v. *United States*, 116 U. S. 616, relied heavily on the interrelationship between the Fourth and Fifth Amendments, a view challenged by Professor Wigmore. See 8 Wigmore, Evidence (3d ed. 1940), § 2264.

of the Fourth Amendment and the extent to which the essential right of privacy is protected by the Due Process Clause of the Fourteenth Amendment are of course not restricted within these historic bounds.

But giving the fullest scope to this constitutional right to privacy, its protection cannot be here invoked. The attempted inspection of appellant's home is merely to determine whether conditions exist which the Baltimore Health Code proscribes. If they do appellant is notified to remedy the infringing conditions. No evidence for criminal prosecution is sought to be seized. Appellant is simply directed to do what he could have been ordered to do without any inspection, and what he cannot properly resist, namely, act in a manner consistent with the maintenance of minimum community standards of health and well-being, including his own. Appellant's resistance can only be based, not on admissible self-protection, but on a rarely voiced denial of any official justification for seeking to enter his home. The constitutional "liberty" that is asserted is the absolute right to refuse consent for an inspection designed and pursued solely for the protection of the community's health, even when the inspection is conducted with due regard for every convenience of time and place.

The power of inspection granted by the Baltimore City Code is strictly limited, more exacting than the analogous provisions of many other municipal codes. Valid grounds for suspicion of the existence of a nuisance must exist. Certainly the presence of a pile of filth in the back yard combined with the run-down condition of the house gave adequate grounds for such suspicion. The inspection must be made in the day time. Here was no midnight knock on the door, but an orderly visit in the middle of the afternoon with no suggestion that the hour was inconvenient. Moreover, the inspector has no power to force

entry and did not attempt it. A fine is imposed for resistance, but officials are not authorized to break past the unwilling occupant.

Thus, not only does the inspection touch at most upon the periphery of the important interests safeguarded by the Fourteenth Amendment's protection against official intrusion, but it is hedged about with safeguards designed to make the least possible demand on the individual occupant, and to cause only the slightest restriction on his claims of privacy. Such a demand must be assessed in the light of the needs which have produced it.

Inspection without a warrant, as an adjunct to a regulatory scheme for the general welfare of the community and not as a means of enforcing the criminal law, has antecedents deep in our history. For more than 200 years Maryland has empowered its officers to enter upon ships, carriages, shops, and homes in the service of the common welfare. In pre-revolutionary days trade, on which the viability of the struggling Colonies depended, was of primary concern. Thus, at a time when the tobacco trade was a vital part of Maryland's economy, inspections of ships and carriages without a warrant could be made to enforce uniform standards for packing and shipping tobacco.[5] Similarly, suspected evasion of import

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[5] Nearly all the early Maryland statutes are contained in Records of the States of the United States of America, a collection compiled by the Library of Congress in association with the University of North Carolina in 1949. This collection is on microfilm. Many volumes of the early Maryland Session Laws are available in various library collections throughout the country. No complete collection is known to exist. A typical tobacco inspection statute is Maryland Laws, November 1773, c. 1, §§ LXXIV, LXXX. At times a warrant was required for inspections of homes. *Id.*, § LXXIII. See also Maryland Laws, 1717, c. VII. Other Colonies also had statutes allowing inspection to enforce standards for the manufacture or shipping of various items of trade. See, *e. g.*, Virginia Laws, 15 Geo. II (1742),

duties on liquor and other goods could be found out by inspection of stores and homes.[6] Generally the power of entry was carefully limited, requiring that ground for suspicion must exist and that the inspection be conducted between "the rising and the setting of the sun." [7]

In 1776 the newly independent State of Maryland incorporated, as part of its basic Declaration of Rights, the principle

> "That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants—to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special—are illegal, and ought not to be granted." See 3 Thorpe, Federal and State Constitutions (1909), 1688.

This provision was a product of the same history of abuse and protest that gave birth to the Fourth Amendment.[8] It remains today as an essential part of Maryland's Constitution. Yet, the years following its proclamation saw not a decline but a marked increase in statutory authorization for inspection of the citizen's home. Not only were the old regulations continued, but the power of

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c. IV (pork and beef); Virginia Laws, 12 Geo. III (1772), c. II (flour and bread); Pennsylvania Laws, 1722, c. CCLII (flour and bread); Pennsylvania Laws, 1727, c. CCXCV (beef and pork); Pennsylvania Laws, 1729–1730, c. CCCXVI (hemp).

[6] See, *e. g.*, Maryland Laws, 1715, c. XLVI (tobacco); Maryland Laws, May 1756, p. 5, § XLVI; Maryland Laws, March 1758, p. 3, § X.

[7] *Ibid.*

[8] See *Givner* v. *State*, 210 Md. 484, 492–494, 124 A. 2d 764, 768–769. The Maryland Court of Appeals has said that this provision of its Declaration of Rights (originally Article 23, now Article 26) is *"in pari materia"* with the Fourth Amendment to the United States Constitution. *Id.*, at 492.

inspection was extended to new community concerns. In 1782, Commissioners were empowered to "enter upon the lots, grounds, and possessions, of any person or persons . . ." in order to regulate and keep in repair the common sewerage systems.[9] Five years later similar entries on private property were allowed for the purpose of keeping the public roads in repair.[10] Typical of the regulatory statutes enacted in this period was an act permitting the clerk of the market "to examine and weigh all such bread, and to seize, for the use of the poor of the county, all such as they shall find deficient in weight or fineness, and not baked or marked as aforesaid . . . ." [11] The penalty for resisting the entry of the clerk was "five pounds current money." And so, when, in 1801, the power of inspection without a warrant became an instrument of the enforcement of the Baltimore health laws, no novel or untried procedures were being invoked. The ordinance now challenged derives from this 1801 ordinance. It provided:

> "And be it enacted and ordained, That when, and as often as the said commissioners of health, or any of them, shall have cause to suspect a nuisance dangerous to the health of the city exists in any house, cellar or inclosure shut up from public view, they, or any one of them, may demand entry therein in the day time for the purpose of examining the same, and if the owner or occupier thereof shall refuse or delay

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[9] Maryland Laws, Nov. 1782, c. XVII, § VII. A similar law had been in force in Pennsylvania since 1761. Pennsylvania Laws, 1761–1762, c. CCCCLXXX.

[10] Maryland Laws, April 1787, c. XXIII. See also Pennsylvania Laws, 1782, c. MXXXI.

[11] Maryland Laws, Nov. 1789, c. VIII, § 5. See also Maryland Laws, Nov. 1792, c. LXV, § VII; Maryland Laws, 1793, c. LVI; Maryland Laws, 1784, c. VII.

> to open the same and to admit a free examination, he shall forfeit and pay for every such refusal the sum of twenty dollars, for the use of the corporation." [12]

From the passage of this ordinance to the present the prevention and abatement of "nuisances" on private property has been one of the chief concerns of the Baltimore City Health Department.[13] In the latter half of the nineteenth century, in the years following the ratification of the Fourteenth Amendment, thousands upon thousands of inspections were made under authority of this ordinance.[14] Thus the system of inspection here under attack, having its beginning in Maryland's colonial history, has been an integral part of the enforcement of Baltimore's health laws for more than a century and a half. The legal significance of such a long and consistent history of state practice has been illuminated for us by Mr. Justice Holmes:

> "The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it, ..." *Jackman* v. *Rosenbaum Co.,* 260 U. S. 22, 31. (As to the constitutional significance of a "time-honored procedure" see *Murray's Lessee* v. *Hoboken Land and Improvement Co.,* 18 How. 272, and *Ownbey* v. *Morgan,* 256 U. S. 94.)

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[12] Baltimore Ordinances, 1801–1802, No. 23, § 6. The Baltimore City Health Department may be the oldest in the country. See 35 Am. J. of Public Health (Jan. 1945), 49.

[13] See Howard, Public Health Administration and the Natural History of Disease in Baltimore, Maryland, 1797–1920 (1924), 140.

[14] See, *id.*, at 145–146. For example, in 1880 there were 4,292 nuisances inspected by sanitary inspectors. In 1890 there were 34,138 such inspections. *Ibid.*

Of course, this wise reminder, that what free people have found consistent with their enjoyment of freedom for centuries is hardly to be deemed to violate due process, does not freeze due process within the confines of historical facts or discredited attitudes.[15] "It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights." *Wolf* v. *Colorado,* 338 U. S. 25, 27.

The power here challenged rests not only on a long history of its exercise. It is a power which was continually strengthened and applied to wider concerns through those very years when the right of individuals to be free from peremptory official invasion received increasing legislative and judicial protection. Nor is this a situation where a new body of knowledge displaces previous premises of action. There is a total want of important modification in the circumstances or the structure of society which calls for a disregard of so much history. On the contrary, the problems which gave rise to these ordinances have multiplied manifold, as have the difficulties of enforcement. The need to maintain basic, minimal standards of housing, to prevent the spread of disease and of that pervasive breakdown in the fiber of a people which is produced by slums and the absence of the barest essentials of civilized living, has mounted to a major concern of American government. The growth of cities, the crowding of populations, the increased awareness of the responsibility of the state for the living conditions of its citizens, all have combined to create problems of the

[15] Compare *Kotch* v. *Board of River Port Pilot Comm'rs,* 330 U. S. 552, and *Ownbey* v. *Morgan,* 256 U. S. 94, with *Brown* v. *Board of Education,* 347 U. S. 483.

enforcement of minimum standards of far greater magnitude than the writers of these ancient inspection laws ever dreamed. Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the blanket requirement of the safeguards necessary for a search of evidence of criminal acts. The need for preventive action is great, and city after city has seen this need and granted the power of inspection to its health officials; and these inspections are apparently welcomed by all but an insignificant few.[16] Certainly, the nature of our society has not vitiated the need for inspections first thought necessary 158 years ago, nor has experience revealed any abuse or inroad on freedom in meeting this need by means that history and dominant public opinion have sanctioned.

That there is "a total unlikeness" between "official acts and proceedings," *Boyd* v. *United States,* 116 U. S. 616, 624, for which the legal protection of privacy requires a

[16] The Baltimore Health Department keeps a record of the number of inspections made annually. All but a few of these are inspections of dwellings. The figures for the last five years are as follows: 1954, 28,081 inspections; 1955, 25,021 inspections; 1956, 35,120 inspections; 1957, 33,573 inspections; 1958, 36,119 inspections. Memorandum of Appellee at Request of Court 2. The Health Commissioner of Baltimore estimates that the number of prosecutions under § 120 average one per year.

Of 57 cities whose health codes were studied by the Urban Renewal Administration, 36 empowered their officers to enter and inspect for violations. See Provisions of Housing Codes in Various American Cities, Urban Renewal Bulletin No. 3 (published by Urban Renewal Administration of the Housing and Home Finance Agency 1956).

For a discussion of some of the problems of Urban Renewal, see Note, 72 Harv. L. Rev. 504.

search warrant under the Fourteenth Amendment, and the situation now under consideration is laid bare by the suggestion that the kind of an inspection by a health official with which we are concerned may be satisfied by what is, in effect, a synthetic search warrant, an authorization "for periodic inspections." If a search warrant be constitutionally required, the requirement cannot be flexibly interpreted to dispense with the rigorous constitutional restrictions for its issue. A loose basis for granting a search warrant for the situation before us is to enter by way of the back door to a recognition of the fact that by reason of their intrinsic elements, their historic sanctions, and their safeguards, the Maryland proceedings requesting permission to make a search without intruding when permission is denied, do not offend the protection of the Fourteenth Amendment.

In light of the long history of this kind of inspection and of modern needs, we cannot say that the carefully circumscribed demand which Maryland here makes on appellant's freedom has deprived him of due process of law.

Affirmed.

MR. JUSTICE WHITTAKER, concurring.

The core of the Fourth Amendment prohibiting unreasonable searches applies to the States through the Due Process Clause of the Fourteenth Amendment. *Wolf* v. *Colorado,* 338 U. S. 25. I understand the Court's opinion to adhere fully to that principle. And being convinced that the health inspector's request for permission to enter petitioner's premises in midday for the sole purpose of attempting to locate the habitat of disease-carrying rodents known to be somewhere in the immediate area was not a request for permission to make, and that the Code procedures followed did not amount to enforce-

ment of, an unreasonable search within the meaning of the Fourth and Fourteenth Amendments, I join the opinion of the Court.

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

The decision today greatly dilutes the right of privacy which every homeowner had the right to believe was part of our American heritage. We witness indeed an inquest over a substantial part of the Fourth Amendment.

The question in this case is whether a search warrant is needed to enter a citizen's home to investigate sanitary conditions. The Court holds that no search warrant is needed, that a knock on the door is all that is required, that for failure of the citizen to open the door he can be punished. From these conclusions I am forced to dissent.

The Due Process Clause of the Fourteenth Amendment enjoins upon the States the guarantee of privacy embodied in the Fourth Amendment (*Wolf* v. *Colorado,* 338 U. S. 25)—whatever may be the means established under the Fourth Amendment to enforce that guarantee. The Court now casts a shadow over that guarantee as respects searches and seizures in civil cases. Any such conclusion would require considerable editing and revision of the Fourth Amendment. For by its terms it protects the citizen against unreasonable searches and seizures by government, whatever may be the complaint. The words are broad and inclusive:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Court said in *Wolf* v. *Colorado, supra,* at 27, that "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society." Now that resounding phrase is watered down to embrace only certain invasions of one's privacy. If officials come to inspect sanitary conditions, they may come without a warrant and demand entry as of right. This is a strange deletion to make from the Fourth Amendment. In some States the health inspectors are none other than the police themselves. In some States the presence of unsanitary conditions gives rise to criminal prosecutions. Baltimore City Code, Art. 12, §§ 112 and 119—the one involved in the present case—makes the failure to abate a nuisance a misdemeanor. The knock on the door in any health inspection case may thus lay the groundwork for a criminal prosecution. The resistance of the citizen in the present case led to the imposition of a fine. If a fine may be imposed, why not a prison term?

It is said, however, that this fine is so small as to amount only to an assessment to cover the costs of the inspection. Yet if this fine can be imposed, the premises can be revisited without a warrant and repeated fines imposed. The truth is that the amount of the fine is not the measure of the right. The right is the guarantee against invasion of the home by officers without a warrant. No officer of government is authorized to penalize the citizen because he invokes his constitutional protection.

Moreover, the protection of the Fourth Amendment has heretofore been thought to protect privacy when civil litigation, as well as criminal prosecutions, was in the offing. Why otherwise the great care exercised by the Court in restricting agencies like the Federal Trade Commission in making investigations in support of their power to issue cease and desist orders? Fear of trespassing on Fourth Amendment rights was expressly made the

ground for a narrow reading of statutory powers in *Federal Trade Comm'n* v. *American Tobacco Co.*, 264 U. S. 298, 307. The "fishing expeditions" there condemned, *id.*, at 306, led no more directly to possible criminal prosecutions than the knock on the door in the present case.

The Court misreads history when it relates the Fourth Amendment primarily to searches for evidence to be used in criminal prosecutions. That certainly is not the teaching of *Entick* v. *Carrington*, 19 Howell's St. Tr. col. 1029. At that time—1765—it was the search for the nonconformist that led British officials to ransack private homes. The commands of our First Amendment (as well as the prohibitions of the Fourth and the Fifth) reflect the teachings of *Entick* v. *Carrington, supra.* These three amendments are indeed closely related, safeguarding not only privacy and protection against self-incrimination but "conscience and human dignity and freedom of expression as well." See *Ullmann* v. *United States*, 350 U. S. 422, 445 *et seq.* (dissent); *Feldman* v. *United States*, 322 U. S. 487, 499 (dissent). It is only in that setting that *Entick* v. *Carrington, supra,* can be understood, as evidenced by Lord Camden's long review of the oppressive practices directed at the press by the Star Chamber, the Long Parliament, and the Licensing Acts. 19 Howell's St. Tr. cols. 1069–1072. It was in the setting of freedom of expression that Lord Camden denounced the general warrants. Taylor, The American Constitution (1911), p. 234, gives the correct interpretation of that historical episode:

> "In the effort to destroy the freedom of the press, by a strained exercise of the prerogative a general warrant was issued in 1763 for the discovery and apprehension of the authors and printers (not named) of the obnoxious No. 45 of the *North Briton,* which commented in severe and offensive terms on the

> King's Speech at the prorogation of Parliament and upon the unpopular Peace of Paris recently (February 10, 1763) concluded. Forty-nine persons, including Wilkes, were arrested under the general warrant; and when it was ascertained that Wilkes was the author, an information for libel was filed against him on which a verdict was obtained. In suits afterward brought against the Under-Secretary of State who had issued the general warrant, Wilkes, and Dryden Leach, one of the printers arrested on suspicion, obtained verdicts for damages. When the matter came before the King's Bench in 1765, Lord Mansfield and the other three judges pronounced the general warrant illegal, declaring that 'no degree of antiquity could give sanction to a usage bad in itself.'" And see 2 Paterson, Liberty of the Subject (1877), pp. 129–132.

This history, also recounted in *Boyd* v. *United States,* 116 U. S. 616, 625–626, was, in the words of Mr. Justice Bradley, "fresh in the memories of those who achieved our independence and established our form of government." The Fourth Amendment thus has a much wider frame of reference than mere criminal prosecutions.

The fallacy in maintaining that the Fourth Amendment was designed to protect criminals only was emphasized by Judge Prettyman in *District of Columbia* v. *Little,* 178 F. 2d 13, 16–17, aff'd on other grounds, 339 U. S. 1:

> "The argument is wholly without merit, preposterous in fact. The basic premise of the prohibition against searches was not protection against self-incrimination; it was the common-law right of a man to privacy in his home, a right which is one of the indispensable ultimate essentials of our concept of civilization. It was firmly established in the com-

> mon law as one of the bright features of the Anglo-Saxon contributions to human progress. It was not related to crime or to suspicion of crime. It belonged to all men, not merely to criminals, real or suspected. So much is clear from any examination of history, whether slight or exhaustive. The argument made to us has not the slightest basis in history. It has no greater justification in reason. To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity."

Judge Prettyman added that the Fourth Amendment applied alike to health inspectors as well as to police officers—indeed to every and any official of government seeking admission to any home in the country:

> "We emphasize that no matter who the officer is or what his mission, a government official cannot invade a private home, unless (1) a magistrate has authorized him to do so or (2) an immediate major crisis in the performance of duty affords neither time nor opportunity to apply to a magistrate. This right of privacy is not conditioned upon the objective, the prerogative or the stature of the intruding officer. His uniform, badge, rank, and the bureau from which he operates are immaterial. It is immaterial whether he is motivated by the highest public purpose or by the lowest personal spite." *Id.*, at 17. And see 44 Ill. L. Rev. 845.

The well-known protest of the elder Pitt against invasion of the home by the police, had nothing to do with criminal proceedings.

> "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof

> may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!"

While this statement did not specifically refer to the general warrant, it was said in reference to the danger of excise officers entering private homes to levy the "Cyder Tax." 15 Hansard, Parliamentary History of England (1753–1765) p. 1307.

Some of the statutes which James Otis denounced did not involve criminal proceedings. They in the main regulated customs and allowed forfeitures of goods shipped into the Colonies in violation of English shipping regulations.[1] The twenty-dollar forfeiture involved here is no different in substance from the ones that Otis and the colonists found so objectionable. For their objection went not to the amount or size of the forfeiture but to the lawless manner in which it was collected. "Every man prompted by revenge, ill humour, or wantonness to inspect the inside of his neighbour's house, may get a writ of assistance." Tudor, Life of James Otis (1823), p. 68. It was not the search that was vicious. It was the *absence of a warrant issued on a showing of probable cause* that Otis denounced—the precise situation we have here:

> "Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and every thing in their way:

[1] 6 Geo. 2, c. 13 (1733); 13 & 14 Car. 2, c. 11 (1662); 15 Car. 2, c. 7 (1663); 7 & 8 Will. 3, c. 22 (1696).

495957 O–59–29

> and whether they break through malice or revenge, no man, no court, can inquire. Bare suspicion without oath is sufficient." *Id.*, at 66–67.

The philosophy of the Fourth Amendment was well expressed by Mr. Justice Butler speaking for the Court in *Agnello* v. *United States,* 269 U. S. 20, 32. "The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws." We have emphasized over and again that a search without a warrant can be made only in exceptional circumstances. If a house is on fire or if the police see a fugitive enter a building, entry without a search warrant can of course be made. Yet absent such extraordinary situations, the right of privacy must yield only when a judicial officer issues a warrant for a search on a showing of probable cause. *Johnson* v. *United States,* 333 U. S. 10, 14; *Trupiano* v. *United States,* 334 U. S. 699, 705; *McDonald* v. *United States,* 335 U. S. 451, 454–455. As we said in *McDonald* v. *United States, supra,* 455–456:

> "The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse

> the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."

In the present case, the homeowner agreed to let the inspector in, if he got a search warrant. But none was ever sought. No excuse exists here for not getting a search warrant. A whole day elapsed between the first inspection and the arrest. The only reason given for not getting a warrant was the officer's convenience:

> "Q. Could you not just as well have made your inspection one hour or two hours later than at the time you demanded entry?
>
> "A. I could not. I had two students I had to release at three o'clock. I have to be in the office at three-thirty every day to take care of my reports."

That is indeed flimsy ground for denying this homeowner the constitutional protection afforded by a search warrant.

We have as little reason for excluding this search from the Fourth Amendment as we would for limiting that Amendment to the kinds of warrants James Otis inveighed against—the writs of assistance and the general warrants. Cf. *On Lee* v. *United States,* 343 U. S. 747, 762; *Schwartz* v. *Texas,* 344 U. S. 199, 205. For as Chief Justice Vinson wrote in *Nueslein* v. *District of Columbia,* 73 App. D. C. 85, 87, 115 F. 2d 690, 692, while the Fourth Amendment "was written against the background of the general warrants in England and the writs of assistance in the American colonies," it "gives a protection wider than these abuses." See 2 Ala. L. Rev. 314; 3 Vand. L. Rev. 820; 63 Harv. L. Rev. 349. It was designed to protect the citizen against uncontrolled invasion of his privacy. It does not make the home a place of refuge from the law. It only requires the sanction of the judiciary rather than

the executive before that privacy may be invaded. History shows that all officers tend to be officious; and health inspectors, making out a case for criminal prosecution of the citizen, are no exception.

We live in an era "when politically controlled officials have grown powerful through an ever increasing series of minor infractions of civil liberties." 17 U. of Chi. L. Rev. 733, 740. One invasion of privacy by an official of government can be as oppressive as another. Health inspections are important. But they are hardly more important than the search for narcotic peddlers, rapists, kidnappers, murderers, and other criminal elements. As we have seen, searches were once in their heyday when the government was out to suppress the nonconformists. That is the true explanation of *Entick* v. *Carrington, supra.* Many today would think that the search for subversives was even more important than the search for unsanitary conditions. It would seem that the public interest in protecting privacy is equally as great in one case as in another. The fear that health inspections will suffer if constitutional safeguards are applied is strongly held by some. Like notions obtain by some law enforcement officials who take shortcuts in pursuit of criminals. The same pattern appears over and again whenever government seeks to use its compulsive force against the citizen. Legislative Committees (*Watkins* v. *United States,* 354 U. S. 178; *Sweezy* v. *New Hampshire,* 354 U. S. 234), one-man grand juries (*In re Oliver,* 333 U. S. 257), fire marshals (*In re Groban,* 352 U. S. 330, 337), police (*Rochin* v. *California,* 342 U. S. 165; *On Lee* v. *United States, supra,* 762; *Leyra* v. *Denno,* 347 U. S. 556), sometimes seek to place their requirements above the Constitution. The official's measure of his own need often does not square with the Bill of Rights.

Certainly this is a poor case for dispensing with the need for a search warrant. Evidence to obtain one was

abundant. The house was in a state of extreme decay; and in the rear of the house was a pile of "rodent feces mixed with straw and debris to approximately half a ton." This is not to suggest that a health official need show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime. Where considerations of health and safety are involved, the facts that would justify an inference of "probable cause" to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken. Experience may show the need for periodic inspections of certain facilities without a further showing of cause to believe that substandard conditions dangerous to the public are being maintained. The passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of a warrant. The test of "probable cause" required by the Fourth Amendment can take into account the nature of the search that is being sought. This is not to sanction synthetic search warrants but to recognize that the showing of probable cause in a health case may have quite different requirements than the one required in graver situations. It can hardly be denied, unless history is ignored, that the policeman's or the inspector's knock on the door is one of these "official acts and proceedings" which *Boyd* v. *United States, supra,* 624, brought squarely within the Fourth Amendment. That being true, it seems to us plain that there is nothing in the Fourth Amendment that relieves the health inspector altogether from making an appropriate showing to a magistrate if he would enter a private dwelling without the owner's consent.

That problem, while important overall, is not important to the situation with which we deal. Figures submitted by the Baltimore Health Department show that citizens

are mostly cooperative in granting entrance to inspectors.[2] There were 28,081 inspections in 1954; 25,021 in 1955; 35,120 in 1956; 33,573 in 1957; and 36,119 in 1958. *And in all these instances the number of prosecutions was estimated to average one a year.* Submission by the overwhelming majority of the populace indicates there is no peril to the health program. One rebel a year (cf. Whyte, The Organization Man) is not too great a price to pay for maintaining our guarantee of civil rights in full vigor.

England—a nation no less mindful of public health than we and keenly conscious of civil liberties—has long proceeded on the basis that where the citizen denies entrance to a health inspector, a search warrant is needed. Public Health Act of 1936, 26 Geo. 5 & 1 Edw. 8, c. 49, §§ 285–287; *Vines* v. *Governors,* 63 J. P. 244 (Q. B. 1899); *Robinson* v. *Corporation of Sutherland,* [1899] 1 Q. B. 751; *Wimbledon Urban District Counsel* v. *Hastings,* 87 L. T. Rep. (5 N. S.) 118 (K. B. 1902); *Consett Urban District Council* v. *Crawford,* [1903] 2 K. B. 183; 24 Halsbury's Laws (2d ed. 1937), p. 102, note m.

We cannot do less and still be true to the command of the Fourth Amendment which protects even the lowliest home in the land from intrusion on the mere say-so of an official.

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[2] We are pointed to no body of judicial opinion which purports to authorize entries into private dwellings without warrants in search of unsanitary conditions. What is developed in the Court's opinion concerning Maryland's long-standing health measures may be only a history of acquiescence or a policy of enforcement which never tested the procedure in a definitive and authoritative way. Plainly we are not faced with a situation of constitutional adjudications of long duration, where change is resisted because community patterns have been built around them.

FEDERAL TRADE COMMISSION *v.* MANDEL BROTHERS, INC.

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

No. 234. Argued March 23, 1959.—Decided May 4, 1959.

1. The provisions of the Fur Products Labeling Act which prohibit false and deceptive invoicing apply to retail sales, and a retail sales slip is an "invoice" as that term is defined in § 2 (f) of the Act. Pp. 388–391.
2. In a proceeding charging a retail department store with misbranding its fur products in violation of the Fur Products Labeling Act, the Federal Trade Commission found that it had committed numerous violations of three of the six disclosure requirements of § 4 (2), but that there was no evidence of violations of the other three, and the Commission issued a cease-and-desist order against "misbranding" fur products by failing to affix labels showing each of the six categories of information required by § 4 (2). *Held:* The Commission did not abuse its discretion by making its order apply to all six categories. Pp. 391–393.
3. The Commission's order is to be rephrased so as not to suggest that the store had sold garments contrary to the disclosure requirements not found to have been violated here. P. 393.

254 F. 2d 18, reversed.

Daniel M. Friedman argued the cause for petitioner. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Hansen, Earl W. Kintner, James E. Corkey* and *Alvin L. Berman.*

Samuel H. Horne argued the cause for respondent. With him on the brief was *Anderson A. Owen.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner issued a complaint charging respondent, a retail department store, with violations of the Fur Products Labeling Act, 65 Stat. 175, 15 U. S. C. § 69.

Violations were found and a cease-and-desist order was issued. One of the principal violations found was that many of respondent's retail sales were falsely "invoiced" in violation of § 3 of the Act.[1] The term "invoice" is defined in § 2 (f) as "a written account, memorandum, list, or catalog, which is issued in connection with any commercial dealing in fur products or furs, and describes the particulars of any fur products or furs, transported or delivered to a purchaser, consignee, factor, bailee, correspondent, or agent, or any other person who is engaged in dealing commercially in fur products or furs." Section 5 (b) provides that a fur product or fur is falsely "invoiced" if it is not "invoiced" to show (a) the name of the animal that produced the fur; and, where applicable, that the product (b) contains used fur, (c) contains bleached, dyed, or otherwise artificially colored fur, (d) is composed in whole or substantial part of paws, tails, bellies, or waste fur; (e) the name and address of the person issuing the "invoice"; and (f) the country of origin of any imported furs.

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[1] Section 3 provides in part:

"(a) The introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product which is misbranded or falsely or deceptively advertised or invoiced, within the meaning of this Act or the rules and regulations prescribed under section 8 (b), is unlawful and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act.

"(b) The manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, and which is misbranded or falsely or deceptively advertised or invoiced, within the meaning of this Act or the rules and regulations prescribed under section 8 (b), is unlawful and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act."

The Commission found that respondent had violated the "invoice" provisions of the Act by failure to include in many of its retail sales slips of fur products, (a) its address, (b) whether the fur was bleached, dyed, or otherwise artificially colored, and (c) the correct name of the animal producing the fur.

The Act in § 4 also provides [2] that a fur product is misbranded (1) if it is "falsely or deceptively labeled . . . or identified," (2) if there is not affixed a label setting forth substantially the same six items of information required

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[2] Section 4 provides:

"For the purposes of this Act, a fur product shall be considered to be misbranded—

"(1) if it is falsely or deceptively labeled or otherwise falsely or deceptively identified, or if the label contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product;

"(2) if there is not affixed to the fur product a label showing in words and figures plainly legible—

"(A) the name or names (as set forth in the Fur Products Name Guide) of the animal or animals that produced the fur, and such qualifying statement as may be required pursuant to section 7 (c) of this Act;

"(B) that the fur product contains or is composed of used fur, when such is the fact;

"(C) that the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

"(D) that the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

"(E) the name, or other identification issued and registered by the Commission, of one or more of the persons who manufacture such fur product for introduction into commerce, introduce it into commerce, sell it in commerce, advertise or offer it for sale in commerce, or transport or distribute it in commerce;

"(F) the name of the country of origin of any imported furs used in the fur product;

"(3) if the label required by paragraph (2)(A) of this section sets forth the name or names of any animal or animals other than the name or names provided for in such paragraph."

for an "invoice," or (3) if the label designates the animal that produced the fur by some name other than that prescribed in the Fur Products Name Guide.[3] The Commission found that the labels on respondent's fur products were false in numerous instances by reason of the failure to include information in three of the categories listed under the second part of § 4. It held, however, that there was no evidence that the labels were deficient in the other three categories of information. Nevertheless, it issued a cease-and-desist order against misbranding by failure to include in the labels the required six categories of information, all of which were listed.

On appeal, the Court of Appeals *first* eliminated the prohibitions relating to invoicing on the ground that a retail sales slip was not an "invoice" within the meaning of the Act; and *second,* it struck from the order the prohibition against misbranding through omission of the three categories as to which no violations were found. 254 F. 2d 18. The case is here on a petition for a writ of certiorari. 358 U. S. 812.

I.

First, as to invoicing. We start with an Act whose avowed purpose, *inter alia,* was to protect "consumers . . . against deception . . . resulting from the misbranding, false or deceptive advertising, or false invoicing of fur products and furs." S. Rep. No. 78, 82d Cong., 1st Sess., p. 1. The House Report also emphasizes that the bill was "designed to protect consumers and others from widespread abuses" arising out of false and misleading matter in advertisements and otherwise. H. R. Rep. No. 546, 82d Cong., 1st Sess., p. 1. The Title of the Act (which, though not limiting the plain meaning of the text, is none-

[3] This is a register of the names of hair, fleece, and fur-bearing animals which § 7 of the Act requires the Commission to maintain.

theless a useful aid in resolving an ambiguity (see *Maguire* v. *Commissioner,* 313 U. S. 1, 9)), states that its purpose was to "protect consumers and others against . . . false invoicing of fur products and furs." 65 Stat. 175. So we have an avowed purpose to protect retail purchasers against improper "invoicing." We therefore should read § 2 (f) which contains the definition of "invoice" hospitably with that end in view. Section 2 (f) is not unambiguous. Yet we do not have here the problem of a penal statute that deserves strict construction. We deal with remedial legislation of a regulatory nature where our task is to fit, if possible, all parts into an harmonious whole. *Black* v. *Magnolia Liquor Co.,* 355 U. S. 24, 26.

Section 2 (f) uses "invoice" to include a "written account" and "memorandum." So far a retail sales slip is included. Section 2 (f) requires the "invoice" to be issued "in connection with any commercial dealing" in furs. A retail sale is plainly a "commercial dealing." Section 2 (f) requires the invoice to be issued to a "purchaser." There again a customer of a retailer is a "purchaser." The case for inclusion of a retail sales slip in "invoice," as that term is used in the Act, would therefore seem to be complete. What turned the Court of Appeals the other way was the last phrase in § 2 (f)—"or any other person who is engaged in dealing commercially in fur products or furs." It held that "engaged in dealing commercially" modifies not only "any other person" but also all the other preceding terms in the subsection including "purchaser." Cf. *United States* v. *Standard Brewery,* 251 U. S. 210, 218. That is a possible construction. We conclude, however, that this limiting clause is to be applied only to the last antecedent.[4] We think it would

[4] Cf. *United States* v. *Hughes,* 116 F. 2d 613, 616; *Puget Sound Electric R. Co.* v. *Benson,* 253 F. 710, 711; 2 Sutherland, Statutory Construction (3d ed. 1943), § 4921.

be a partial mutilation of this Act to construe it so that the "invoice" provisions were inapplicable to retail sales. In the first place, the language of § 2 (f) specifies in sweeping language the categories of persons for whose benefit the invoicing requirements were imposed, *viz.*, purchaser, consignee, factor, bailee, correspondent, or agent. Then as a general catch-all "any other person who is engaged in dealing commercially in fur products or furs" was added. In the second place, only by construing "invoice" to include retail sales slips can the full protection of the Act be accorded consumers. We do not agree with the point stressed by respondent that the consumer's protection is to be found solely in the label on the fur product and that invoices are required only at each antecedent step of delivery or transfer to a person dealing commercially in either furs or fur products. The advertising and mislabeling prohibitions in § 3 (b) of the Act [5] are plainly applicable to retail sales. Yet the prohibition of false invoices is contained in the same clause. If we held that Congress, in spite of its desire to protect consumers, withheld from them the benefits of reliable invoices, we would have to read the clauses of § 3 distributively, making only some of them applicable to retail sales. That would be a refashioning of § 3, an undertaking more consonant with the task of a congressional committee than with judicial construction.

Moreover, fur product "labels," we are advised, are not pieces of cloth sewn into garments but tags which the purchaser is likely to throw away after the purchase. The "invoice" is the only permanent record of the transaction that the retail purchaser has. Its importance was emphasized by the Commission:

> "Inasmuch as the invoice may serve as a documentary link connecting the sale of specific fur

[5] Note 1, *supra*.

products back through the retailer's records with advertisements therefor, the application of the invoicing provisions of the Act to transactions between retailers and consumers represents a key implement for effective administration of the Act."

The inclusion of retail sales slips in invoices has been the consistent administrative construction of the Act.[6] This contemporaneous construction is entitled to great weight (*United States* v. *American Trucking Assns.*, 310 U. S. 534, 549; *Black* v. *Magnolia Liquor Co., supra; Federal Housing Adm'n* v. *Darlington, Inc.*, 358 U. S. 84, 90) even though it was applied in cases settled by consent rather than in litigation.

Finally respondent urges that a retailer's sale is a local transaction not subject to the exercise by Congress of the commerce power. Misbranding a drug held for sale after shipment in interstate commerce was held to be within the commerce power in *United States* v. *Sullivan*, 332 U. S. 689. That decision and its predecessors sanction what is done here.

We conclude that a retail sales slip is an "invoice" within the meaning of the Act and accordingly the judgment of the Court of Appeals setting aside the part of the cease-and-desist order which requires this retailer to give a proper "invoice" to each purchaser is reversed.

II.

Second, as to false labeling. The Commission, as we have noted, found that respondent had committed numerous violations of three of the six disclosure requirements

[6] See *Ed Hamilton Furs, Inc.*, 51 F. T. C. 186. We are advised that since that case, decided in 1954, the Commission has issued 137 complaints charging violations of the Act involving false and deceptive retail invoicing. There are presently outstanding 110 cease-and-desist orders relating to retail invoicing. In 92 other cases furriers have agreed to discontinue false and deceptive retail invoicing.

contained in § 4 (2) of the Act,[7] noting that there was no evidence that it had not complied with the other three disclosure requirements of § 4 (2). The cease-and-desist order of the Commission was however directed against "misbranding fur products by: 1. Failing to affix labels to fur products showing" each of the six categories of information required by § 4 (2). The Court of Appeals struck from the order the prohibition with respect to the three categories as to which there was no evidence of violation.

We do not believe the Commission abused the "wide discretion" that it has in a choice of a remedy "deemed adequate to cope with the unlawful practices" disclosed by the record. *Jacob Siegel Co.* v. *Federal Trade Comm'n,* 327 U. S. 608, 611. It is not limited to prohibiting "the illegal practice in the precise form" existing in the past. *Federal Trade Comm'n* v. *Ruberoid Co.,* 343 U. S. 470, 473. This agency, like others, may fashion its relief to restrain "other like or related unlawful acts." *Labor Board* v. *Express Pub. Co.,* 312 U. S. 426, 436. The practice outlawed by § 4 is "misbranding." The disclosure required for a properly branded garment is specified. These disclosure requirements are so closely interrelated that the Commission might well conclude that a retailer who for example failed to disclose that the fur was bleached or dyed might well default when it came to disclosure of the fact that used fur was contained in the garment. One cannot generalize as to the proper scope of these orders. It depends on the facts of each case and a judgment as to the extent to which a particular violator should be fenced in. Here, as in Sherman Act decrees (*Local 167* v. *United States,* 291 U. S. 293, 299; *International Salt Co.* v. *United States,* 332 U. S. 392, 400–401; *International Boxing Club* v. *United States,* 358 U. S. 242,

[7] See note 2, *supra.*

253), the question of the extent to which related activity should be enjoined is one of kind and degree. We sit only to determine if the trier of facts has exercised an allowable discretion. Where the episodes of misbranding have been so extensive and so substantial in number as they were here,[8] we think it permissible for the Commission to conclude that like and related acts of misbranding should also be enjoined as a prophylactic and preventive measure.

Respondent objects to the wording of the cease-and-desist order saying it suggests that the store has sold garments contrary to the disclosure requirements not found to have been violated here. The Commission bows to the suggestion that Part A, par. 1 of the cease-and-desist order be rephrased to enjoin "misbranding fur products by failing to affix labels to fur products showing each element of information required by the Act." We so order.

On this phase of the case the judgment of the Court of Appeals is also reversed, the cease-and-desist order to be rephrased as we have indicated.

It is so ordered.

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[8] The Commission found 12 instances of failure to label the product with the correct name of the animal producing the fur, 15 instances of failure to disclose that the product was bleached, dyed or otherwise artificially colored, and 58 instances of failure to show the country of origin of imported furs. There were in addition 187 other violations of the rules of the Commission which provide additional labeling requirements and standards. See 16 CFR, Pt. 301.

IRVIN *v.* DOWD, WARDEN, INDIANA STATE PRISON.

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

No. 63. Argued January 15, 1959.—Decided May 4, 1959.

In an Indiana State Court, petitioner was convicted of murder and sentenced to death. He escaped from custody and, while he was still at large, his counsel made a timely motion for a new trial, specifying 415 grounds of error constituting an alleged denial of federal constitutional rights. The trial court, in denying the motion, noted that petitioner was an escapee when the motion was made and decided. After his return to custody, petitioner filed a timely appeal to the State Supreme Court from the judgment of conviction, assigning as the only error the denial of the motion for a new trial. Under Indiana law, the appeal presented the State Supreme Court with two issues: (1) Whether the motion for a new trial was correctly denied because petitioner was an escapee at the time it was made, or (2) whether it was correctly denied because the trial did not, as petitioner alleged, deprive him of his constitutional rights. The Indiana Supreme Court discussed both issues in its opinion affirming the denial of the motion for a new trial. Subsequently, petitioner applied to a Federal District Court for a writ of habeas corpus under 28 U. S. C. § 2241. The District Court dismissed the writ on the ground that petitioner had not exhausted his state remedies, as required by 28 U. S. C. § 2254, and the Court of Appeals affirmed. Both Courts considered that the judgment of the Indiana Supreme Court rested on a holding that petitioner's motion for a new trial was properly denied because he was an escapee at the time it was made. *Held:*

1. The opinion of the Indiana Supreme Court is more reasonably read as resting the judgment on the holding that the petitioner's constitutional claim is without merit. In this way, the State Supreme Court discharged its obligation to "guard, enforce, and protect every right granted or secured by the Constitution of the United States." *Robb* v. *Connolly,* 111 U. S. 624, 637. Pp. 403–404.

2. The doctrine of exhaustion of state remedies, which was codified in 28 U. S. C. § 2254, does not bar resort to federal habeas

corpus if the petitioner has obtained a decision on his constitutional claims from the highest court of a State, even though, as here, that court could have based its decision on another ground. *Brown* v. *Allen*, 344 U. S. 443, distinguished. Pp. 404–406.

3. The question is not reached whether federal habeas corpus would have been available to petitioner had the Indiana Supreme Court rested its decision on the escape ground. P. 406.

4. The judgment of the Court of Appeals is reversed and the case is remanded to that Court, which may decide the merits of petitioner's constitutional claim or remand to the District Court for further consideration of that claim. Pp. 406–407.

251 F. 2d 548, reversed.

James D. Lopp and *Theodore Lockyear, Jr.* argued the cause for petitioner. With them on the brief was *James D. Nafe.*

Richard M. Givan, Assistant Attorney General of Indiana, argued the cause for respondent. With him on the brief was *Edwin K. Steers,* Attorney General of Indiana.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner brought this habeas corpus proceeding in the District Court for the Northern District of Indiana under 28 U. S. C. § 2241,[1] claiming that his conviction for murder in the Circuit Court of Gibson County, Indiana, was obtained in violation of the Fourteenth Amendment.

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[1] Section 2241 provides in pertinent part:

"(a) Writs of habeas corpus may be granted by the . . . district courts . . . within their respective jurisdictions.

. . . . . .

"(c) The writ of habeas corpus shall not be extended to a prisoner unless . . .

. . . . . .

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . ."

The District Court dismissed the writ, 153 F. Supp. 531, under the provision of 28 U. S. C. § 2254 that habeas corpus "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state . . . ."[2] The Court of Appeals for the Seventh Circuit affirmed. 251 F. 2d 548. We granted certiorari, 356 U. S. 948.[3]

The constitutional claim arises in this way. Six murders were committed in the vicinity of Evansville, Indiana, two in December 1954, and four in March 1955. The crimes, extensively covered by news media in the locality, aroused great excitement and indignation throughout Vanderburgh County, where Evansville is located, and adjoining Gibson County, a rural county of approximately 30,000 inhabitants. The petitioner was arrested on April 8, 1955. Shortly thereafter, the Prosecutor of Vanderburgh County and Evansville police

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[2] The full text of § 2254 is as follows:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

[3] The case was here previously on Irvin's petition seeking direct review on certiorari to the Indiana Supreme Court from that court's decision in *Irvin* v. *State*, 236 Ind. 384, 139 N. E. 2d 898. Certiorari was denied "without prejudice to filing for federal habeas corpus after exhausting state remedies." 353 U. S. 948. The Indiana Assistant Attorney General, on the oral argument here, advised that there was not then, nor is there now, any state procedure available for the petitioner to obtain a determination of his constitutional claim.

officials issued press releases, which were intensively publicized, stating that the petitioner had confessed to the six murders. The Vanderburgh County Grand Jury soon indicted the petitioner for the murder which resulted in his conviction. This was the murder of Whitney Wesley Kerr allegedly committed in Vanderburgh County on December 23, 1954. Counsel appointed to defend petitioner immediately sought a change of venue from Vanderburgh County, which was granted, but to adjoining Gibson County. Alleging that the widespread and inflammatory publicity had also highly prejudiced the inhabitants of Gibson County against the petitioner, counsel, on October 29, 1955, sought another change of venue, from Gibson County to a county sufficiently removed from the Evansville locality that a fair trial would not be prejudiced. The motion was denied, apparently because the pertinent Indiana statute allows only a single change of venue.[4]

The *voir dire* examinations of prospective jurors began in Gibson County on November 14, 1955. The averments as to the prejudice by which the trial was allegedly environed find corroboration in the fact that from the first day of the *voir dire* considerable difficulty was experienced in selecting jurors who did not have fixed opinions that the petitioner was guilty. The petitioner's

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[4] Burns' Ind. Stat. Ann., 1956 Replacement Vol., § 9–1305, provides:

"When affidavits for a change of venue are founded upon excitement or prejudice in the county against the defendant, the court, in all cases not punishable by death, may, in its discretion, and in all cases punishable by death, shall grant a change of venue to the most convenient county. The clerk must thereupon immediately make a transcript of the proceedings and orders of court, and, having sealed up the same with the original papers, shall deliver them to the sheriff, who must, without delay, deposit them in the clerk's office of the proper county, and make his return accordingly: Provided, however, That only one [1] change of venue from the judge and only one [1] change from the county shall be granted."

counsel therefore renewed his motion for a change of venue, which motion was denied. He renewed the motion a second time, on December 7, 1955, reciting in his moving papers: "in the voir dire examination of 355 jurors called in this case to qualify as jurors 233 have expressed and formed their opinion as stated in said voir dire, that the defendant is guilty . . . ." Again the motion was denied. Alternatively, on each of eight days over the four weeks required to select a jury, counsel sought a continuance of the trial on the ground that a fair trial at that time was not possible in the prevailing atmosphere of hostility toward the petitioner. All of the motions for a continuance were denied. The State Prosecutor, in a radio broadcast during the second week of the *voir dire* examination, stated that "the unusual coverage given to the case by the newspapers and radio" caused "trouble in getting a jury of people who are not [*sic*] unbiased and unprejudiced in the case."

The petitioner's counsel exhausted all 20 of his peremptory challenges, and when 12 jurors were ultimately accepted by the court also unsuccessfully challenged all of them for alleged bias and prejudice against the petitioner, complaining particularly that four of the jurors, in their *voir dire* examinations, stated that they had an opinion that petitioner was guilty of the murder charged.[5]

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[5] The trial judge qualified the jurors in question under the authority of Burns' Ind. Stat. Ann., 1956 Replacement Vol., § 9–1504, which provides:

"The following shall be good causes for challenge to any person called as a juror in any criminal trial:

. . . . . .

"Second. That he has formed or expressed an opinion as to the guilt or innocence of the defendant. But if a person called as a juror states that he has formed or expressed an opinion as to the guilt or innocence of the defendant, the court or the parties shall thereupon proceed to examine such juror on oath as to the ground of such opin-

Also, at the trial, the State's Prosecuting Attorney took the stand as part of his presentation of the State's case, and over petitioner's objection was allowed to testify that the petitioner, five days after his arrest, on April 13, 1955, had orally confessed the murder of Kerr to him. The Prosecuting Attorney was also permitted in summation, again over petitioner's objection, to vouch his own testimony by commenting to the jury, "I testified myself what was told me."

The opinions of the Indiana Supreme Court and the District Court held the constitutional claim to be without merit. *Irvin* v. *State,* 236 Ind. 384, 392–394, 139 N. E. 2d 898, 902; *Irvin* v. *Dowd,* 153 F. Supp. 531, 535–539. On the other hand, Chief Judge Duffy of the Court of Appeals, concurring in the affirmance of the dismissal by the District Court, reached a contrary conclusion: "Irvin was not accorded due process of law in the trial which resulted in his conviction and death sentence. In my judgment, he did not receive a fair trial because some of the jury had preconceived opinions as to defendant's guilt, and also because of the conduct of the prosecuting attorney." 251 F. 2d 548, 554.

The Gibson County jury returned its verdict on December 20, 1955, and assessed the death penalty. Indiana law allows 30 days from the date of the verdict within which to file a motion for a new trial in the trial court. Burns' Ind. Stat. Ann., 1956 Replacement Vol.,

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ion; and if it appears to have been founded upon reading newspaper statements, communications, comments or reports, or upon rumors or hearsay, and not upon conversation with witnesses of the transaction, or reading reports of their testimony, or hearing them testify, and the juror states on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case."

§ 9–1903. The petitioner's counsel, on January 19, 1956, the 30th day, filed such a motion specifying 415 grounds of error constituting the alleged denial of constitutional rights. However, the petitioner had escaped from custody the night before, January 18, 1956, and on January 23, 1956, the trial court overruled the motion, noting that the petitioner had been an escapee when the motion was filed and was still at large. The petitioner was captured in California about three weeks later and, on February 17, 1956, was confined in the Indiana State Prison.

Under Indiana law the denial of the new trial was not appealable, but was reviewable by the Indiana Supreme Court only if assigned as error in the event of an appeal from the judgment of conviction. The State Supreme Court has held:

> "The statute [providing for appeal] does not authorize an appeal from every ruling which a court may make against a defendant in a criminal action, but only authorizes an appeal 'from any judgment . . . against him,' and provides for review, upon such appeal, of decisions and rulings of the court made in the progress of the case. This court has construed the statute as authorizing an appeal only from a final judgment in a criminal action. The action of a trial court in overruling a motion for a new trial may be reviewed upon an appeal from a judgment of conviction rendered against a defendant, but the overruling of a motion for a new trial must be assigned as error. In such case the appeal is from the judgment of conviction and not from the ruling upon the motion for a new trial. The overruling of a motion for a new trial does not constitute a judgment and an appeal does not lie from the court's action in overruling such motion." *Selke* v. *State,* 211 Ind. 232, 234, 6 N. E. 2d 570, 571.

The judgment of conviction imposing the death sentence was entered January 9, 1956. The petitioner was entitled to appeal, as a matter of right, from that judgment, provided, in compliance with a State Supreme Court rule,[6] the appeal was perfected by filing with the Clerk of the Supreme Court a transcript of the trial record and an assignment of errors within 90 days of the judgment. The Supreme Court may, in its discretion, extend the time on proper motion made within the 90-day period. The questions before the Supreme Court are those raised by the appellant in his assignment of errors.

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[6] Rule 2–2 of the Supreme Court of Indiana, Burns' Ind. Stat. Ann., 1946 Replacement Vol. 2, pt. I, p. 8, provides:

"Time for appeal or review.—In all appeals and reviews the assignment of errors and transcript of the record must be filed in the office of the clerk of the Supreme Court within 90 days from the date of the judgment or the ruling on the motion for a new trial, unless the statute under which the appeal or review is taken fixes a shorter time, in which latter event the statute shall control. If within the time for filing the assignment of errors and transcript, as above provided, it is made to appear to the court to which an appeal or review is sought, notice having been given to the adverse parties, that notwithstanding due diligence on the part of the parties seeking an appeal or review, it has been and will be impossible to procure a bill of exceptions or transcript to permit the filing of the transcript within the time allowed, the court to which the appeal or review is sought may, in its discretion, grant a reasonable extension of time within which to file such transcript and assignment of errors. When the appellant is under legal disability at the time the judgment is rendered, he may file the transcript and assignment of errors within 90 days after the removal of the disability."

The statutory provision for appeal is Burns' Ind. Stat. Ann., 1956 Replacement Vol., § 9–2301, which provides:

"Appeal by defendant—Decisions and orders reviewed.—An appeal to the Supreme Court . . . may be taken by the defendant as a matter of right, from any judgment in a criminal action against him, in the manner and in the cases prescribed herein; and, upon the appeal, any decision of the court or intermediate order made in the progress of the case may be reviewed."

On March 22, 1956, the petitioner applied for an extension of time within which to file the trial transcript and his assignment of errors. This was after he was returned to the custody of the State and well within 90 days from January 9, 1956, the date of the judgment of conviction. We were advised on oral argument that the State objected to this motion "because he [petitioner] had escaped," and a hearing was held on the objection by the State Supreme Court. Petitioner's motion was granted and the time was extended to June 1, 1956. The assignment of errors, timely filed with the trial transcript of some 5,000 pages, assigned only one ground of error—that "the [trial] Court erred in overruling appellant's motion for new trial." The petitioner's brief of over 700 pages opened by advising the State Supreme Court that "Under this single assignment of error, the appellant has combined all errors alleged to have been committed prior to the filing of the motion for a new trial." In short, the form of the assignment was a shorthand way of specifying the 415 grounds stated in the motion for new trial as constituting the claimed denial of constitutional rights. Indeed the only arguments made in the lengthy brief related to the constitutional claim. The State's brief devoted some 70 pages to answering these contentions, and in 7 additional pages argued that in any event the Circuit Court had not erred in denying the motion for a new trial because the petitioner was an escapee at the time it was filed and decided.

The case before the Indiana Supreme Court was thus an appeal perfected in full compliance with Indiana procedure; therefore, the court was required under Indiana law to pass on the merits of the petitioner's assignment of error. That the assignment of error was sufficient to present the constitutional claim is evident from the court's acceptance of it as the basis for considering the 415 grounds of alleged error constituting that claim.

However, under the single assignment of error, the judgment of conviction could be affirmed by the State Supreme Court if, for any reason finding support in the record, the motion for a new trial was properly overruled. The State argued that the overruling should be upheld on either of two grounds: one, because the petitioner was an escapee at the time the motion was made and decided, and, two, because the trial itself was fair and without error. Petitioner's appeal clearly raised both of these issues and the Indiana Supreme Court discussed both in its opinion.

We think that the District Court and Court of Appeals erred in concluding that the State Supreme Court decision rested on the ground that the petitioner was an escapee when his motion for a new trial was made and decided. On the contrary, the opinion to us is more reasonably to be read as resting the judgment on the holding that the petitioner's constitutional claim is without merit. As we have shown, under the state procedure, the State Supreme Court could have rested its decision solely on the federal constitutional claim.[7] This, we think, is what the Indiana high court did. The opinion discusses both issues. The discussion of the escape issue concludes with the statement, "No error could have been committed in overruling the motion for a new trial under the circumstances." 236 Ind., at 392, 139 N. E. 2d, at 902. But the opinion proceeds: "Our decision on the point under examination makes it unnecessary for us to consider the other contentions of the appellant; however, because of the finality of the sentence in the case we have reviewed the evidence to satisfy ourselves that there is no miscarriage of justice in the case." 236 Ind., at 392–393, 139 N. E. 2d, at 902. The conclusion reached after discussion of the merits is: "It does not appear from the record and argument had,

[7] This conclusion was also expressed on the oral argument in this Court by the State's Assistant Attorney General.

that the appellant was denied due process of law under the Fourteenth Amendment . . . ." 236 Ind., at 394, 139 N. E. 2d, at 902. The court's statement that its conclusion on the escape point made it "unnecessary" to consider the constitutional claim was not a holding that the judgment was rested on that ground. Rather the court proceeded to determine the merits "because of the finality of the sentence" and "to satisfy ourselves that there is no miscarriage of justice." In this way, in our view, the State Supreme Court discharged the obligation which rests upon "the State courts, equally with the courts of the Union, . . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . ." *Robb* v. *Connolly,* 111 U. S. 624, 637. We thus believe that the opinion is to be read as rested upon the State Supreme Court's considered conclusion that the conviction resulting in the death sentence was not obtained in disregard of the protections secured to the petitioner by the Constitution of the United States.

In this posture, 28 U. S. C. § 2254 does not bar the petitioner's resort to federal habeas corpus. The doctrine of exhaustion of state remedies in federal habeas corpus was judicially fashioned after the Congress, by the Act of February 5, 1867, greatly expanded the habeas corpus jurisdiction of the federal courts to embrace "all cases where any person may be restrained of his . . . liberty in violation of the constitution, or of any treaty or law of the United States . . . ." 14 Stat. 385. Although the statute has been re-enacted with minor changes at various times the sweep of the jurisdiction granted by this broad phrasing has remained unchanged.[8]

Since there inhered in this expanded grant of power, beside the added burden on the federal courts, the poten-

[8] The substance of the original Act of 1867 is now found in 28 U. S. C. § 2241, see note 1, *supra.*

tiality of conflict between federal and state courts, this Court, starting with the decision in *Ex parte Royall,* 117 U. S. 241, developed the doctrine of exhaustion of state remedies, a "rule . . . that the . . . Courts of the United States, while they have power to grant writs of *habeas corpus* for the purpose of inquiring into the cause of restraint of liberty of any person in custody under the authority of a State in violation of the Constitution, . . . yet, except in cases of peculiar urgency, ought not to exercise that jurisdiction by a discharge of the person in advance of a final determination of his case in the courts of the State, . . ." *Tinsley* v. *Anderson,* 171 U. S. 101, 104–105. The principles are now reasonably clear. "Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted." *Ex parte Hawk,* 321 U. S. 114, 116–117. The principles of the doctrine have been embodied in 28 U. S. C. § 2254 which was enacted by Congress to codify the existing habeas corpus practice. See *Darr* v. *Burford,* 339 U. S. 200, 210–214; *Young* v. *Ragen,* 337 U. S. 235, 238, note 1; *Brown* v. *Allen,* 344 U. S. 443, 447–450. As is stated in the Reviser's Note: "This new section is declaratory of existing law as affirmed by the Supreme Court." [9]

The petitioner in this case plainly invoked "all state remedies available" and obtained "a final determination" of his constitutional claim from the Indiana Supreme Court. Certainly *Brown* v. *Allen,* 344 U. S. 443, relied

[9] For the legislative history, see H. R. Rep. No. 2646, 79th Cong., 2d Sess., p. A172; H. R. 3214, 80th Cong., 1st Sess.; H. R. Rep. No. 308, 80th Cong., 1st Sess., p. A180; S. Rep. No. 1559, 80th Cong., 2d Sess., pp. 9–10.

upon by the Court of Appeals, does not bear on his situation. In that case the two petitioners in *Daniels* v. *Allen* had 60 days in which to make and serve a statement of the case on appeal from a conviction in the state trial court. Counsel failed to serve this statement until 61 days had expired, and the trial judge struck the appeal as out of time. The pertinent North Carolina rule provided that the time limitation was "mandatory," and precluded an appeal to the State Supreme Court. The State Supreme Court dismissed petitioners' attempted appeal on the ground that no appeal had been filed. This Court held that under the doctrine of exhaustion of state remedies habeas corpus ought not be granted since petitioners had sought too late to invoke North Carolina's "adequate and easily-complied-with method of appeal." 344 U. S., at 485. In contrast, the petitioner's appeal from his judgment of conviction to the Indiana Supreme Court raising the constitutional claim was timely and was accepted by that court as fully complying with all pertinent procedural requirements. Furthermore, the State Supreme Court did reach and decide petitioner's federal constitutional claim.

We therefore hold that the case is governed by the principle that the doctrine of exhaustion of state remedies embodied in 28 U. S. C. § 2254 does not bar resort to federal habeas corpus if the petitioner has obtained a decision on his constitutional claims from the highest court of the State, even though, as here, that court could have based its decision on another ground. *Wade* v. *Mayo,* 334 U. S. 672. In this view, we do not reach the question whether federal habeas corpus would have been available to the petitioner had the Indiana Supreme Court rested its decision on the escape ground.

The judgment of the Court of Appeals is reversed and the case is remanded to that court. The Court of Appeals

may decide the merits of petitioner's constitutional claim, or remand to the District Court for further consideration of that claim, as the Court of Appeals may determine.

It is so ordered.

MR. JUSTICE STEWART concurs in the judgment and the opinion of the Court, with the understanding that the Court does not here depart from the principles announced in *Brown* v. *Allen,* 344 U. S. 443.

MR. JUSTICE FRANKFURTER, dissenting.

The problem represented by this case is as old as the Union and will persist as long as our society remains a constitutional federalism. It concerns the relation of the United States and the courts of the United States to the States and the courts of the States. The federal judiciary has no power to sit in judgment upon a determination of a state court unless it is found that it must rest on disposition of a claim under federal law.* This is so whether a state adjudication comes directly under

*The formulation by Mr. Chief Justice Fuller, for the Court, of this jurisdictional *sine qua non* in *California Powder Works* v. *Davis,* 151 U. S. 389, 393, represents the undeviating practice of the Court until today:

"It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a State in which a decision in the suit could be had, it must appear affirmatively not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any Federal question that may also have been presented."

review in this Court or reaches us by way of the limited scope of habeas corpus jurisdiction originating in a District Court. (Judicial power is not so restrictively distributed in other federalisms comparable to ours. Neither the Canadian Supreme Court nor the Australian High Court is restricted to reviewing Dominion and Commonwealth issues respectively. The former reviews decisions of provincial courts turning exclusively on provincial law and the latter may review state decisions resting exclusively on state law.) To such an extent is it beyond our power to review state adjudications turning on state law that even in the high tide of nationalism following the Civil War, this Court felt compelled to restrict itself to review of federal questions, in cases coming from state courts, by limiting broadly phrased legislation that seemingly gave this Court power to review all questions, state and federal, in cases jurisdictionally before it. It refused to impute to Congress such a "radical and hazardous change of a policy vital in its essential nature to the independence of the State courts . . . ." *Murdock* v. *Memphis,* 20 Wall. 590, 630. This decision has not unjustifiably been called one of "the twin pillars" (the other is *Martin* v. *Hunter's Lessee,* 1 Wheat. 304) on which have been built "the main lines of demarcation between the authority of the state legal systems and that of the federal system." Hart, The Relations Between State and Federal Law, 54 Col. L. Rev. 489, 503–504.

Something that thus goes to the very structure of our federal system in its distribution of power between the United States and the States is not a mere bit of red tape to be cut, on the assumption that this Court has general discretion to see justice done. Nor is it one of those "technical" matters that laymen, with more confidence than understanding of our constitutional system, so often disdain.

In view of so vital a limitation on our jurisdiction, this Court has, until relatively recently, been very strict on insisting on an affirmative showing on the record, when review is here sought, that it clearly appear that the judgment complained of rested on the construction of federal law and was not supportable on a rule of local law beyond our power to question. Particularly in cases where life or liberty is at stake, the Court has relaxed this insistence to the extent of giving state courts an opportunity to clarify a decision that could fairly be said to be obscure or ambiguous in establishing that it rested or could rest on an interpretation of state law. No doubt this procedure makes for delay in ultimate decision. But it ensures that there is no denial of the right to resort to this Court for the vindication of a federal right when a state court's adjudication leaves fair ground for doubt whether a federal right controlled the issue. Experience shows that this procedure for clarification at times establishes that it was, in fact, federal law on which the state decision rested, while in other instances the state court removed all doubt that state law supported its decision, and there was an end of the matter. Compare *Whitney* v. *California,* 274 U. S. 357, and *Herb* v. *Pitcairn,* 324 U. S. 117, 325 U. S. 77, with *State Tax Comm'n* v. *Van Cott,* 306 U. S. 511, and *Van Cott* v. *State Tax Comm'n,* 98 Utah 264, 96 P. 2d 740; *Minnesota* v. *National Tea Co.,* 309 U. S. 551, and *National Tea Co.* v. *State,* 208 Minn. 607, 294 N. W. 230; *Williams* v. *Georgia,* 349 U. S. 375, and *Williams* v. *State,* 211 Ga. 763, 88 S. E. 2d 376.

Even the most benign or latitudinarian attitude in reading state court opinions precludes today's decision. It is not questioned that the Indiana Supreme Court discussed two issues, one indisputably a rule of local law and the other a claim under the Fourteenth Amendment. That court discussed the claim under the Fourteenth Amendment rather summarily, after it had dealt

extensively with the problem of local law. If the Indiana court's opinion had stopped with its lengthy discussion of the local law and had not gone on to consider the federal issue, prefacing its consideration with the introductory sentence that "[o]ur decision on the point under examination makes it unnecessary for us to consider the other contentions of the appellant; however, because of the finality of the sentence in the case we have reviewed the evidence to satisfy ourselves that there is no miscarriage of justice in this case . . ." (*Irvin* v. *State*, 236 Ind. 384, 392–393, 139 N. E. 2d 898, 902), it is inconceivable that, on the proceeding before us, we would entertain jurisdiction. What this Court is therefore saying, in effect, is that it interprets the discussion of the Fourteenth Amendment problem which follows the elaborate and potentially conclusive discussion of the state issue not as resting the case on two grounds, state and federal, but as a total abandonment of the state ground, a legal erasing of the seven-page discussion of state law. Concededly, if a state court rests a decision on both an adequate state ground and a federal ground, this Court is without jurisdiction to review the superfluous federal ground. For while state courts are subject to the Supremacy Clause of the United States Constitution (Art. VI, § 2), they are so subject only if that Clause becomes operative, and they need not pass on a federal issue if a relevant rule of state law can dispose of the litigation.

It may be that it is the unwritten practice of the Indiana Supreme Court to have an "unnecessary" consideration of a federal issue wipe out or displace a prior full discussion of a controlling state ground. Maybe so. But it is surely not a self-evident proposition that discussion of a federal claim constitutes abandonment of a prior disposition of a case on a relevant and conclusive state ground. The frequency with which state court opinions indulge in the superfluity of dealing with a federal issue,

after resting a case on a state ground, affords abundant proof that we cannot take judicial notice of an inference that a federal question discussion following a state-ground disposition spells abandonment of the latter. Perhaps if counsel had documented such an Indiana practice, had supplied us with a basis for drawing that conclusion regarding the appropriate way of reading Indiana opinions, this Court itself would be entitled to find that such is the way in which Indiana decisions must be read. But we cannot extemporize the existence of such an Indiana practice as a basis for our jurisdiction. Restricted, as we are restricted, to the text of what the Supreme Court of Indiana wrote in 236 Ind. 384, 139 N. E. 2d 898, in ascertaining what it is that the Indiana Supreme Court meant to do when it first enlarged upon a controlling state ground and then, *ex gratia,* dealt with an "unnecessary" federal ground, we are not free to pluck from the air an undocumented state practice on the strength of which we are to ignore the bulk of the state court's opinion and treat it as though it had not been written or its significance had been discredited by the Indiana Supreme Court.

In the most compassionate mood, all we are entitled to do in a case like this, where life is at stake, is to afford an opportunity for the Indiana Supreme Court to tell us whether, in fact, it abandoned its state ground and rested its decision solely on the "unnecessary" federal ground. Thus only could this Court acquire jurisdiction over the federal question. Such a remission to the Indiana Supreme Court, by an appropriate procedure, for a clarification of its intention in writing this double-barreled opinion would be in full accord with the series of cases in which the state court was given opportunity to clarify its purpose. To assume, as the Court does, that the Indiana Supreme Court threw into the discard an elaborately considered local law rule is, I most respectfully submit, to assume a jurisdiction that we do not have. This assumption of

495957 O-59-31

jurisdiction cannot help but call to mind the admonition of Benjamin R. Curtis, one of the notable members in the Court's history, that "questions of jurisdiction were questions of power as between the United States and the several States." 2 Cliff. 614 (1st Cir.).

With due regard to the limits of our jurisdiction there is only one other mode of reading the opinion of the Indiana Supreme Court, one other mode, that is, by which the meaning of its opinion is to be decided by that court and not this. That is the mode which my brother HARLAN has explicated, and it is entirely consistent with the governing considerations which I have tried to set forth for me also to join, as I do join, his dissenting opinion.

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

Although I agree that federal consideration of petitioner's constitutional claims is not foreclosed by the decision of the Supreme Court of Indiana, I think that the Court's disposition of the matter, which contemplates the overturning of petitioner's conviction without the necessity of further proceedings in the state courts if his constitutional contentions are ultimately federally sustained, rests upon an impermissible interpretation of the opinion of the State Supreme Court (236 Ind. 384, 139 N. E. 2d 898), and that a different procedural course is required if state and federal concerns in this situation are to be kept in proper balance.

It is clear that the federal courts would be without jurisdiction to consider petitioner's constitutional claims on habeas corpus if the Supreme Court of Indiana rejected those claims because, irrespective of their possible merit, they were not presented to it in compliance with the State's "adequate and easily-complied-with

method of appeal." *Brown* v. *Allen,* 344 U. S. 443, 485. The first question that concerns us, therefore, is whether the state court's judgment affirming the conviction rests independently on such a state ground.

At the outset we must keep in mind several aspects of Indiana criminal procedure, and the manner in which petitioner's attorneys presented his appeal to the Indiana Supreme Court, all as noted in this Court's opinion. The procedural aspects are (1) that no appeal lies from an order denying a new trial as such, that kind of an order being reviewable only in connection with an appeal from the final judgment in the case; (2) an escapee, such as this petitioner was, has no standing to make a motion for a new trial, at least if he is at large throughout the period available for the making of such a motion, 236 Ind., at 386–392, 139 N. E. 2d, at 898–902; and (3) an appellant must perfect his appeal by filing assignments of error and a transcript of the record. In the taking of petitioner's appeal from the judgment of conviction the *only* assignment of error filed related to the trial court's denial of the motion for a new trial. While that assignment was supported by a detailed specification of petitioner's constitutional claims, none of such claims was independently filed as an assignment of error.

Had the State Supreme Court declined without more to reach petitioner's constitutional contentions because (1) his motion for a new trial had been forfeited by reason of escape, and (2) such claims had not independently been assigned as error, the federal courts would not, as has been said, be entitled to consider them. The difficulty here is that the state court did not stop at this juncture, but, after pointing out that petitioner had assigned as error only the denial of his motion for a new trial and holding that such denial was not error because of petitioner's escape, went on to consider and find without merit petitioner's constitutional claims.

This Court infers from the fact that the Indiana court considered petitioner's constitutional contentions that its affirmance of his conviction rested entirely on the denial of those claims. It reads the state court's opinion as saying that although that court could under state law properly rest its affirmance of the conviction on petitioner's failure to assign as error anything but the denial of his motion for a new trial, which, as we have seen, was held to have been properly denied under the State's "escapee" rule, it would not do so but would treat petitioner's constitutional claims as if they had themselves been presented as assignments of error, rather than only as grounds supporting the error assigned to the trial court's order denying a new trial. I think this reading of the state court's opinion defies its plain language.

The state court devotes no less than seven pages of its nine-page opinion to an exhaustive discussion of the rule of state law which requires denial of a new trial motion made by an escapee still at large. At the close of this discussion it says:

> "The action upon which the appellant predicates error in this appeal is based solely upon the overruling of a motion for a new trial. There is no other error claimed. Since appellant had no standing in court at the time he filed a motion for a new trial the situation is the same as if no motion for a new trial had been filed, or he had voluntarily permitted the time to expire for such filing. His letter reveals he was aware of this right, and had talked with his attorneys about a new trial and an appeal.
>
> "No error could have been committed in overruling the motion for a new trial under the circumstances.
>
> "Our decision on the point under examination makes it unnecessary for us to consider the other

> contentions of the appellant; however, because of the finality of the sentence in the case we have reviewed the evidence to satisfy ourselves that there is no miscarriage of justice in this case. . . ." 236 Ind., at 392–393, 139 N. E. 2d, at 901–902.

The opinion then reviews the petitioner's constitutional contentions, and concludes with the statement:

> "It does not appear from the record and argument had, that the appellant was denied due process of law under the Fourteenth Amendment, or due course of law under the Bill of Rights, or that there was any miscarriage of justice when he was convicted and given the death penalty." 236 Ind., at 394, 139 N. E. 2d, at 902.

This Court's reading of the Indiana opinion makes the exhaustive discussion in that opinion of the status of an escapee under Indiana law entirely unnecessary and meaningless. While I agree with the Court that the Indiana Supreme Court reached a "considered conclusion that the conviction resulting in the death sentence was not obtained in disregard of the protections secured to the petitioner by the Constitution of the United States," it is fully apparent that the state court ultimately rested its judgment of affirmance squarely on the ground that the petitioner's *sole* assignment of error, the denial of his motion for a new trial, was without merit because he was an escapee when that motion was made, and when it was denied. The fact that the Indiana court also reached a conclusion that petitioner's claims of constitutional deprivation were not made out does not entitle us to ignore the fact that it was on a point of state procedure that it ultimately rested.

Nevertheless, I do not think that in the circumstances of this case the State's contention that the federal courts

lack jurisdiction to deal with petitioner's constitutional points can be accepted. The State has conceded that its Supreme Court was empowered in its discretion to disregard the procedural defects in petitioner's appeal. That being so, the state court's constitutional discussion takes on, for me, a vital significance in connection with its procedural holding under state law, namely, that affirmance of petitioner's conviction was rested on this state ground only *after* the Indiana court, displaying a meticulous concern that state procedural requirements should not be allowed to work a "miscarriage of justice," particularly in view of "the finality of the sentence," had satisfied itself that petitioner's constitutional contentions were untenable. Such a reading of the state court's opinion is required to give meaning to its constitutional discussion, for if petitioner's procedural failures inexorably prevented the state appellate court from reaching his constitutional claims their discussion in its opinion would appear to have been wholly pointless. At the same time this view of the opinion deprives Indiana's procedural holding of vitality as a bar to consideration of petitioner's constitutional claims by the federal courts on habeas corpus, for the decision as to those claims was inextricably a part of that holding. I therefore think that the two courts below should have dealt with the merits of petitioner's constitutional points.

However, even were the federal courts ultimately to hold that petitioner was denied due process, it would not be within their province thereupon to order his release. At that point it would unmistakably be the prerogative of the Indiana Supreme Court to decide whether on different postulates of federal constitutional law it would nevertheless hold that under Indiana law petitioner would still be barred from being heard because of his failure to comply with the State's procedural rules. For just as it

is the federal courts' responsibility and duty finally to decide the federal questions presented in this case, it belongs to the Indiana Supreme Court finally to decide the state questions presented in the light of federal decision as to the commands of the Fourteenth Amendment. Hence if petitioner ultimately prevails on his constitutional claims, further proceedings in the state courts will be unavoidable.

In this state of affairs I think our proper course should be to proceed ourselves to a decision of the constitutional issues, rather than remand the case to the Court of Appeals. If the judgment of the Indiana Supreme Court is potentially going to be called into question because of a federal court's conclusion that it is based in part on erroneous constitutional postulates, I believe that Indiana is entitled to have that conclusion authoritatively pronounced by this Court. Moreover, the District Court, and one judge of the Court of Appeals, have already given clear (and conflicting) statements of their views as to the merits of such issues. The questions have been exhaustively briefed and fully argued before us. And this course would avoid further protracted delay.

Were we to conclude that the Indiana Supreme Court was correct in its premise that petitioner's constitutional points are without merit, the judgment of the Court of Appeals dismissing the writ of habeas corpus should of course be affirmed. If, on the other hand, we should decide that petitioner was in fact deprived of due process at trial, I would hold the case and give petitioner a reasonable opportunity to seek, through such avenues as may be open to him, a determination by the Indiana Supreme Court as to whether, in light of such a decision, it would nevertheless hold that petitioner's failure to comply with the State's procedural rules required affirmance of his conviction. Cf. *Patterson* v. *Alabama,* 294 U. S. 600;

Williams v. *Georgia,* 349 U. S. 375. Should no such avenues be open to petitioner in Indiana, it would then be time enough to decide what final disposition should be made of this case.

For these reasons I concur in the view that federal consideration of petitioner's constitutional claims is not precluded, and in all other respects dissent from the Court's opinion.

ARROYO *v.* UNITED STATES.

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

No. 246. Argued March 2, 1959.—Decided May 4, 1959.

Section 302 (b) of the Labor Management Relations Act, 1947, makes it unlawful for a representative of any employees subject to the Act "to receive or accept . . . from the employer of such employees any money . . ."; but § 302 (c) makes this prohibition inapplicable "(5) with respect to money . . . paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer . . ." Employers of members of a union represented by petitioner issued and delivered to petitioner checks intended and designated as contributions to a union welfare fund of the kind described in § 302 (c); but petitioner appropriated the funds to his own use. *Held:* Petitioner's conduct was reprehensible and immoral and may be assumed to have violated local criminal law; but it did not constitute a violation of § 302 (b) of the Act. Pp. 420–427.

(a) On the record in this case, it is clear that what petitioner received were checks "paid to a trust fund" within the meaning of § 302 (c) (5); and, therefore, the receipt of such checks was not a violation of § 302 (b). Pp. 421–424.

(b) Its legislative history shows that § 302 (b) was not intended to duplicate state criminal laws but was concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with possible abuse by union officers of the power that they might achieve if welfare funds were left to their sole control. Pp. 424–427.

256 F. 2d 549, reversed.

John R. Hally argued the cause for petitioner. With him on the brief was *Robert W. Meserve.*

Eugene S. Grimm argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg.*

MR. JUSTICE STEWART delivered the opinion of the Court.

Section 302 (b) of the Labor Management Relations Act of 1947 provides: "(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value." Under § 302 (c) of the Act this broad prohibition is made inapplicable in five situations, one being, "with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer . . ." provided that the trust fund meets certain standards specified in that subsection.[1]

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[1] The relevant text of § 302 (c), as it appears in 29 U. S. C. § 186 (c) is as follows: "(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that

The petitioner, a representative of employees in an industry affecting commerce, was convicted in the United States District Court for Puerto Rico of violating § 302 (b) of the Act by receiving $15,000 from two of their employers.[2] The judgment of conviction was affirmed by the Court of Appeals for the First Circuit. 256 F. 2d 549. Certiorari was granted because the case presents an important question as to the scope of this provision of the Labor Management Relations Act of 1947. 358 U. S. 812.

The facts are substantially undisputed. In 1953 the petitioner was president of a union which represented the employees of two affiliated corporations. In that capacity he negotiated a collective bargaining agreement with the employers. This agreement provided for the establishment of a welfare fund, which, it is unquestioned, met the requisite criteria of § 302 (c)(5) of the Act. It was agreed that the petitioner would be the union representative on the joint committee which was to administer

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the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities."

[2] Sentence was imposed under authority of § 302 (d) of the Act, which provides: "(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both. . . ."

the fund.[3] After the agreement was signed, the petitioner told the employers' representative that there was to be a union meeting that evening, and that he wanted to exhibit the welfare fund checks to the union members. Accordingly, the petitioner was given two checks for $7,500. Attached vouchers identified the checks as the employers' contributions to the welfare fund.

Instead of subsequently depositing the checks in the existing welfare fund bank account, however, the petitioner used them to open an account in the name of the fund in another bank. A few days thereafter, he gave the bank a purported resolution from the union's board of directors authorizing withdrawals from this account upon his signature alone. As soon as the employers learned what had happened, they attempted to secure performance of the agreement for joint administration of the fund. Over a period of several months, however, the petitioner used the money for his own personal purposes and, after transferring the funds to another account, for nonwelfare union purposes as well.

The Government does not maintain that embezzlement by an employee representative from an employer-financed welfare fund would violate the federal statute under which the petitioner was convicted.[4] It contends, however, that

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[3] The fund was to be identical in amount and purpose to a welfare fund which had been created in 1952 under a previous collective bargaining agreement. The petitioner had also been the union representative on the committee which administered that fund.

[4] Compare S. 3974, § 109 (a), 85th Cong., 2d Sess., the so-called Kennedy-Ives bill, which would have provided criminal penalties of up to five years' imprisonment and a fine of $10,000 for "Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or the use of another any of the moneys, funds, securities, property, or other assets of an organization which is exempt from taxation under section 501 (a) of the Internal Revenue Code of 1954 of which he is an officer or by whom he is employed directly or indirectly . . . ."

in this case the jury could properly find that the petitioner when he accepted the two checks intended to use the funds for his personal purposes, and that he was therefore guilty not of embezzlement, but of conduct amounting to larceny by trick. We agree that the evidence could properly support an inference that the petitioner's purpose from the outset was to appropriate the two checks for his own use. We cannot agree, however, that this conduct violated § 302 (b) of the Act.

Section 302 (b) is a reciprocal of § 302 (a), applicable to employers, which provides that "(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce." The good faith of the employers in delivering the two checks to the petitioner—their intent that the money go to the welfare fund created by the collective bargaining agreement—was not questioned throughout the trial and is not questioned here.[5] The sole purpose of the delivery of the checks, therefore, was to make a lawful payment. What the petitioner received were checks "paid to a trust fund." The transaction, therefore, was within the precise language of § 302 (c), and thus was not a violation of § 302 (b).

This is not to say that the statute requires mutuality of guilt for the conviction of either the employer or the representative of employees. An employer might be guilty under subsection (a) if he paid money to a repre-

[5] In argument to the trial court, government counsel made the following statement: "The employer in this case, I would like to say, complied with the law. The employer set up a welfare fund in accordance with the law, and in accordance with the testimony by Mr. Goyco and other documentary evidence, the letter to the Banco de Ponce, the employer did all it could to make compliance with the law, because there could be a lawful welfare fund, so that's as far as the employer is concerned."

sentative of employees even though the latter had no intention of accepting. Cf. *Lunsford* v. *United States,* 200 F. 2d 237; *Schneider* v. *United States,* 192 F. 2d 498. A representative might be guilty if he coerced payments from an innocent and unwilling employer. Cf. *United States* v. *Waldin,* 149 F. Supp. 912, aff'd 253 F. 2d 551. Both would be guilty if the payment were ostensibly made for one of the lawful purposes specified in § 302 (c) if both knew that such a purpose was merely a sham.

The present case, however, is not an analogue to any of those situations. The checks were drawn by the employers and delivered to the petitioner as payment to a union welfare fund. Their receipt by him, therefore, was not a violation of the federal statute, whether his intent to misappropriate existed at the time of receipt or was formed later.

We construe a criminal statute. "It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States* v. *Wiltberger,* 5 Wheat. 76, 95; *United States* v. *Halseth,* 342 U. S. 277; *Krichman* v. *United States,* 256 U. S. 363. We are mindful, of course, that, "though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature." *United States* v. *Wiltberger, supra,* at 95. As Mr. Justice Holmes put it, "We agree to all the generalities about not supplying criminal laws with what they omit, but there is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen* v. *Ward,* 279 U. S. 337, 339.

An examination of the legislative history confirms that a literal construction of this statute does no violence to common sense. When Congress enacted § 302 its purpose was not to assist the States in punishing criminal conduct traditionally within their jurisdiction, but to deal with

problems peculiar to collective bargaining. The provision was enacted as part of a comprehensive revision of federal labor policy in the light of experience acquired during the years following passage of the Wagner Act, and was aimed at practices which Congress considered inimical to the integrity of the collective bargaining process.

Throughout the debates in the Seventy-ninth and Eightieth Congresses there was not the slightest indication that § 302 was intended to duplicate state criminal laws.[6] Those members of Congress who supported the amendment were concerned with corruption of collective bargaining through bribery of employee representa-

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[6] Section 302 had its origin in an amendment to the Case bill, H. R. 4908, 79th Cong., 2d Sess., proposed by Senator Byrd, 92 Cong. Rec. 4809, which prohibited payment by an employer, or receipt by a representative, of any money or other thing of value unless the payment was for wages or for union dues withheld by the employer under a checkoff agreement. After several modifications, including one substantially similar to subsection (c)(5) which was proposed by Senators Taft and Ball, the amendment was agreed to by the Senate, 92 Cong. Rec. 5521–5522, and the Case bill passed. 92 Cong. Rec. 5739. The House accepted the Senate amendments, 92 Cong. Rec. 5946, but the President vetoed the bill, 92 Cong. Rec. 6674–6678, and it failed of passage over his veto. 92 Cong. Rec. 6678.

In the Eightieth Congress the Senate Committee on Labor and Public Welfare reported out an original bill, S. 1126, containing no reference to payments by an employer to a representative other than that which had been contained in § 8 (2) of the Wagner Act. A minority of the Committee, including Senators Taft and Ball, filed their "Supplemental Views" in which they stated their intention to offer from the floor "an amendment reinserting in the bill a provision regarding so-called welfare funds similar to the section in the Case bill approved by the Senate at the last session." S. Rep. No. 105, 80th Cong., 1st Sess., p. 52. The amendment was adopted by the Senate, 93 Cong. Rec. 4754, accepted by the Conference Committee, H. R. Rep. No. 510, 80th Cong., 1st Sess., pp. 24–25, 67, and enacted as § 302 of the Labor Management Relations Act.

tives by employers,[7] with extortion by employee representatives,[8] and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control. Congressional attention was focussed particularly upon the latter problem because of the demands which had then recently been made by a large international union for the establishment of a welfare fund to be financed by employers' contributions and administered exclusively by union officials. See *United States* v. *Ryan,* 350 U. S. 299.

Congress believed that if welfare funds were established which did not define with specificity the benefits payable thereunder, a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain. See 92 Cong. Rec. 4892–4894, 4899, 5181, 5345–5346; S. Rep. No. 105, 80th Cong., 1st Sess., at 52; 93 Cong. Rec. 4678, 4746–4747. To remove these dangers, specific standards were established to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for the purposes for which they were established. See Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 Harv. L. Rev. 274, 290. Continuing compliance with these standards in the

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[7] In explaining the necessity for adoption of the amendment which he offered to the Case bill, Senator Byrd stated: "My amendment would prevent an employer from paying a royalty to the representative of a union. He would be clearly liable, under the provisions of this amendment, if he paid a royalty or other money to the representative of a labor union, the purpose of which was to bribe that representative." 92 Cong. Rec. 4893. See also 92 Cong. Rec. 5428; 93 Cong. Rec. 4678.

[8] Senator Taft, in speaking for the amendment to S. 1126 which had previously been proposed on the floor of the Senate by Senator Ball, stated that it was intended to deal with "extortion or a case where the union representative is shaking down the employer." 93 Cong. Rec. 4746.

administration of welfare funds was made explicitly enforceable in federal district courts by civil proceedings under § 302 (e).[9] The legislative history is devoid of any suggestion that defalcating trustees were to be held accountable under federal law, except by way of the injunctive remedy provided in that subsection.

Without doubt the petitioner's conduct was reprehensible and immoral. It can be assumed also that he offended local criminal law. But, for the reasons stated, we hold that he did not criminally violate § 302 (b) of the Labor Management Relations Act of 1947.

Reversed.

MR. JUSTICE CLARK, with whom MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS and MR. JUSTICE WHITTAKER join, dissenting.

The Court sets petitioner free. In so doing, it assumes that he violated local criminal law, but holds that he did not offend § 302 (b) of the Labor Management Relations Act of 1947. It is admitted that the petitioner, as a representative of employees who are employed in an industry affecting commerce, accepted two checks for $7,500 each from employers. Instead of subsequently depositing these checks in the existing welfare fund bank account, withdrawals from which required the joint signatures of the petitioner and a representative of the employers, he deposited the checks in another bank. Six days thereafter he presented to the latter bank a spurious resolution authorizing withdrawals from this account upon peti-

[9] "(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of sections 101–110 and 113–115 of this title." 29 U. S. C. § 186 (e).

495957 O–59–32

tioner's signature alone. Admittedly petitioner used the money in this account for his own personal purposes. Several months thereafter the balance in the account was transferred to another account in another bank and the funds therefrom were likewise used for nonwelfare purposes. The theory of the Court seems to be that since the employers issued the two checks in good faith, with the intent that the money go to the welfare fund of the union, the receipt of the checks was therefore for the sole purpose of completing this lawful payment. Hence, the Court reasons, "[w]hat the petitioner received were checks 'paid to a trust fund.' The transaction, therefore, was within the precise language of § 302 (c), and thus was not a violation of § 302 (b)." The Court further states that this conclusion would follow "whether his [petitioner's] intent to misappropriate existed at the time of receipt or was formed later."

It is true that the employers had written on the vouchers attached to the checks, "Covering: Welfare fund for the year 1953, in accordance with contract signed on Feb. 21, 1953." The Court says that by these tags you shall know the nature of this fund. I think the Court has reached the wrong result by a failure to distinguish between the lawful fund set up under the collective bargaining agreement, and the spurious fund set up by petitioner.

It is well that we review the uncontradicted evidence. The bargaining agreement provided that each employer should establish a $15,000 welfare fund which "shall be used to furnish and provide the workers of the Employer covered by this Agreement and the members of their direct family" with certain welfare benefits. It further provided that the fund should be administered by a committee appointed by mutual agreement. This committee was composed of the petitioner and the representative of the employers. The evidence showed that the fund was to be identical in amount and purpose to a welfare fund

which had been created in 1952 in a previous collective bargaining agreement. An existing bank account at the Banco de Ponce contained the balance left over from the 1952 welfare fund. In previous years the employer contributions to the welfare fund had been deposited directly by the employers into this welfare account. It was a joint account authorizing withdrawal of funds only on the joint signature of the employer representative as well as the petitioner.

It appears, however, that after the signing of the 1953 agreement the petitioner requested the employers to issue the checks and give them to him on the ruse that he would like to exhibit them to the union meeting which was to be held that evening. The employers issued and delivered the checks to the petitioner for deposit in the existing trust fund. The checks were made payable, however, to the union, rather than to the welfare fund; and, as I have stated, the petitioner opened up a new bank account in the National City Bank instead of depositing the checks in the old trust fund account. This new account was in the name of the union, and, while it was labeled as a welfare fund, withdrawals therefrom could be made on the signature of the petitioner alone. After so establishing the account under his exclusive control, petitioner then withdrew large sums of money for his personal use.

The indictment charged petitioner with receiving the $15,000 for his own use and specifically charged "nor was such sum of money received as a payment to a trust fund." As the Court says, the evidence properly supports "an inference that the petitioner's purpose from the outset was to appropriate the two checks for his own use." The fact of the matter is that the evidence shows that the petitioner's action in so receiving the checks was contrary to the agreement between the parties and in no wise complied with provisions of § 302 (c)(5). In the light of the circumstances, as the jury found, there was no payment

to a trust fund as specifically required by the provisions of the Act.

I am sure that the Court agrees that the petitioner's conduct came within the "broad prohibition" of § 302 (b). The only question, therefore, is whether he may properly be exculpated by the provisions of subsection (c)(5), which is quoted in full in the margin.[1] Two conclusions,

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[1] "(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in the event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of

implicitly drawn by the jury, emerge as indisputable when the evidence is compared with this subsection. In the first place, the statutory exception applies only when the money or other thing of value is "paid to a trust fund," and it is clear that insofar as a lawful fund was in existence the checks were not "paid" to it. They were made out payable to the union. Neither the checks nor the money from them ever came near the bona fide trust fund account at the Banco de Ponce. From the moment they were received by petitioner, he had complete control over them.[2]

Secondly, even a casual reading of the subsection shows, as I am sure the Court itself would agree, that the spurious fund established by the petitioner in the National City Bank failed to comply with the statute in almost every respect. Since the checks were deposited in a union account and subject to the control of petitioner, the payments were not held in trust, as required by the subsection. Moreover, the fund which he created by depositing the checks was not subject to the administration of both the employees and the employers, but was subject to the sole control of the petitioner. As the judge instructed the jury, "a plan does not exist, lawfully exist, until it meets all those requirements" of the subsection. Since the sole purpose of the exception as set out in the Act was to permit the creation of a bona fide trust fund, it is obvious that the purposes of the Act were not complied with here because petitioner established no trust fund whatsoever. On the contrary, the checks were made

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providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities."

[2] If the voucher had said "in payment of 1952 federal income taxes," and petitioner had put the checks in a bank account labeled "United States Treasury," *query:* would the companies' income taxes have been "paid"?

payable to, and deposited in the name of, the union of which the petitioner was the President. His was the only authorized signature permitting withdrawals from the fund. In fact, the receipt of the checks by the petitioner as trust fund moneys was merely a sham. It does not matter what the intent of the employers was in delivering the checks since, as the Court itself says, the statute does not require mutuality of guilt.[3] The petitioner, by receiving the checks from the employers and through artifice and deceit, has deprived the employees of their benefits and stands guilty under § 302 (b) of the Act.

Moreover, the legislative history shows that that was the specific intent of the Congress. I need only quote one statement of the managers of the bill in the Senate:

> "[U]nless we make sure that such [trust] funds, when they are established, are really trust funds . . . for the benefit to employees specified in the agreement, there is very grave danger that the funds will be used for the personal gain of union leaders . . . ." 93 Cong. Rec. 4678.

Furthermore, the Court itself recognizes this to be the purpose of the Congress in enacting the subsection. As the Court says:

> "Congress believed that if welfare funds were established which did not define with specificity the benefits payable thereunder, a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain . . . . To remove these dangers, specific standards were established to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for purposes for which they were established."

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[3] We in nowise intimate or suggest that these employers violated the Act.

Unfortunately, the Court has converted the "substantial danger" into an immunity bath. Section 302 (b) is in all practical effect repealed. All that labor racketeers, or, for that matter, employers as well, need do is to negotiate an agreement containing a qualifying "welfare fund" and then make sure that the vouchers on the employer checks contain some kind of notation that the money is paid for that fund. Although the Court says, "Both would be guilty if the payment were ostensibly made for one of the lawful purposes specified in § 302 (c) if both knew that such a purpose was merely a sham," it is clear that the injection of this subtle and elusive mental element of duplicity is enough to make successful prosecution next to impossible.

Nor is the fact that the petitioner might be prosecuted under state law any answer to the problem. In a long line of cases coming to this Court involving industrial controversies where the State exercised authority, it has been held that the area involved had been pre-empted by the National Labor Relations Act and the Labor Management Relations Act. See *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468 (1955). It is a strange contradiction here for the Court to force employees to go to the state courts for redress of this most important sanction of the Labor Management Relations Act. Petitioner argues, and the Court sustains him, that he can only be prosecuted for embezzlement, a felony under the laws of Puerto Rico;[4] that he cannot be convicted of this misdemeanor under the Taft-Hartley law.[5] The opinion today may make this common, but it does not make it sense. I would affirm.

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[4] Laws of Puerto Rico Ann., Tit. 33, §§ 1721, 1731, 1683.

[5] Petitioner's argument in this regard also shows that this is not an instance where, even in the absence of bad faith, a man is sent to jail for an inadvertent failure to comply with rigid bookkeeping requirements. Cf. Sayre, The Present Signification of Mens Rea in the Criminal Law, Harvard Legal Essays (1934), 399, 409.

GROCERY DRIVERS UNION LOCAL 848 ET AL. *v.* SEVEN UP BOTTLING CO. OF LOS ANGELES, INC.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 169. Decided May 4, 1959.

Appeal dismissed; certiorari granted; judgment vacated and cause remanded for modification.

Reported below: 49 Cal. 2d 645, 320 P. 2d 492.

John C. Stevenson, Clarence E. Todd and *Herbert M. Ansell* for appellants.

Thomas P. Menzies and *Carl M. Gould* 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 granted. The judgment of the Supreme Court of California is vacated and the cause remanded for modification in light of *San Diego Building Trades Council* v. *Garmon*, *ante*, p. 236.

Vacated and remanded.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

ST. PETER'S ROMAN CATHOLIC PARISH *v.* URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT.

No. 749. Decided May 4, 1959.

Appeal dismissed and certiorari denied.

Reported below: 394 Pa. 194, 146 A. 2d 724.

Louis C. Glasso for appellant.

Theodore L. Hazlett, Jr. and *R. J. Hopkins* for appellees.

PER CURIAM.

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

MILWAUKIE COMPANY OF JEHOVAH'S WITNESSES *v.* MULLEN ET AL.

APPEAL FROM THE SUPREME COURT OF OREGON.

No. 767. Decided May 4, 1959.

Appeal dismissed and certiorari denied.
Reported below: —— Ore. ——, 330 P. 2d 5.

Hayden C. Covington 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.

MINNEY *v.* CITY OF AZUSA.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 768. Decided May 4, 1959.

Appeal dismissed for want of a properly presented federal question.
Reported below: 164 Cal. App. 2d 12, 330 P. 2d 255.

Hayden C. Covington for appellant.

PER CURIAM.

The appeal is dismissed for want of a properly presented federal question.

DICK *v.* NEW YORK LIFE INSURANCE CO.

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

No. 58. Argued January 12, 1959.—Decided May 18, 1959.

In this case federal jurisdiction was based on diversity of citizenship and the issue was whether an insured died as a result of suicide or accident. He was alone when he met his death from two wounds from his double-barreled shotgun. In such circumstances applicable state law presumes that death was accidental and places on the insurer the burden of proving that death resulted from suicide. So instructed, the jury found that death was accidental and returned a verdict for the beneficiary. The evidence was entirely circumstantial and could support such a verdict. The District Court denied the insurer's motions for a directed verdict, judgment notwithstanding the verdict and a new trial and entered judgment for the beneficiary. After reviewing the record, the Court of Appeals concluded that the gun could not have been fired without someone or something pulling or pushing the trigger and that the evidence did not justify submitting the issue to the jury, and it reversed with directions to dismiss the complaint. *Held:* The District Court properly submitted the issue to the jury, and the judgment of the Court of Appeals is reversed. Pp. 437–447.

252 F. 2d 43, reversed.

Philip B. Vogel argued the cause for petitioner. With him on the brief were *Pershing Boe* and *Donald C. Holand.*

Norman G. Tenneson argued the cause for respondent. With him on the brief was *Harold W. Bangert.*

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

The question in this case is whether the Court of Appeals for the Eighth Circuit, under the applicable principles hereinafter discussed, properly held that it was error to submit to a jury's determination whether an insured died as a result of suicide or accident.

Petitioner is the beneficiary of two policies issued by respondent in 1944 and 1949 insuring the life of her now-deceased husband, William Dick. Each policy contained a clause which provided that double indemnity would be payable upon receipt of proof that the death of the insured "resulted directly, and independently of all other causes, from bodily injury effected solely through external violent and accidental means," but that the double indemnity would not be payable if the insured's death resulted from "self-destruction, whether sane or insane."

Mr. Dick met his death while alone in the silage shed of his farm. The death resulted from two wounds caused by the discharge of his shotgun.[1] Petitioner filed proofs of death but respondent rejected her claim for double indemnity payments on the ground that Mr. Dick had committed suicide. Petitioner then filed suit in the North Dakota courts. Her complaint set forth the policies in issue, the facts surrounding her husband's death, an allegation that the death was accidental, and a demand for payment. Respondent removed the case to the United States District Court for the District of North Dakota on the grounds of diversity of citizenship and jurisdictional amount. It then filed an answer to the complaint in which it set up suicide as an affirmative defense to the demand for double indemnity payments. Respondent admitted liability for the face amounts of the policies ($7,500) and no issue is presented concerning those amounts.

Trial proceeded before the district judge and jury. The evidence showed that the Dicks, who had been happily married since 1926, lived on a farm near Lisbon, North

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[1] The gun was a Stevens, 12 gauge, double barreled shotgun with two triggers placed one behind the other. It weighed approximately seven pounds. It had an over-all length of 46 inches and measured 32 inches from muzzle to triggers.

Dakota, where they raised sheep, cattle and field crops. Five of the six quarter sections of the farm were unmortgaged and Mr. Dick, who was not known to have any financial problems, had nearly $1,000 in the bank. He was known as a "husky," "strong," "jolly" man who was seldom moody. "If he had anything on his chest, he would get it off and forget about it." Dick got along well with his neighbors and was well liked in the community. He was 47 at the time of his death. He was five feet seven inches tall, weighed approximately 165 pounds, and was generally healthy. The coroner, who was also Dick's personal doctor, testified that Dick was a mature, muscular, physically able workman who, three weeks before his death, was bright and cheerful. About a year and a half before his death, Mr. Dick visited the doctor and complained that he felt tired and pepless. His condition was diagnosed as mild to moderate non-specific prostatitis for which he received sulfa treatments and hormone shots. But the record is devoid of evidence that the condition was serious or particularly painful or that Mr. Dick was especially concerned with it. The Dicks reared five children. One daughter still lived with them and attended high school in nearby Elliott. Dick got along well with his whole family.

The evening before he died, the family returned from Elliott and ate ice cream and watched television together. Mr. Dick helped his daughter with a school problem in general science explaining to her the intricacies of a transformer. He slept soundly that night. He intended to help his cousin—a neighbor—make sausage the following day. He arose the next morning, milked the cows, ate a hearty breakfast, and spoke with his wife about their plans for the day. He said nothing to indicate that he contemplated doing anything out of the ordinary. About 8:30 a. m., Mrs. Dick drove their daughter to school. Mr. Dick backed the car out of the garage for his wife and said

goodbye in a normal way. He was then in the process of feeding milk to the pigs and silage to the cattle.

Mrs. Dick returned in about a half hour and proceeded to work in the house. Later, when she thought it was time to leave for the cousin's house, she went to locate Mr. Dick. She walked to the barn and called for him but there was no answer. She then went to the little 8 foot by 12 foot silage shed adjacent to the barn and saw Mr. Dick lying on the floor. He was fully clothed for the zero weather Lisbon was then experiencing and he wore bulky gloves and a heavy jacket which was fully zipped up. Near him lay his shotgun. A good part of his head appeared blown off and she knew from his appearance that he was dead. She hurriedly returned to the house and called Mr. Dick's brother who lived nearby. He came immediately and at Mrs. Dick's direction went to the silage shed. There he saw Mr. Dick lying with his head to the northwest and his feet to the southeast of the shed. The body was along the south wall with the feet near the corner. Later, when he examined the shed more closely, he found a concentration of shotgun pellets high in the northwest corner of the shed and other pellets four to five feet from the floor in the southeast corner. He also noticed a sprinkle of frozen silage on the floor of the shed and on the steps leading to the door from the shed.

James Dick, the deceased's nephew, also responded to Mrs. Dick's call. He stated that upon arriving at the Dicks' house, he saw a tub newly filled with ground corn in the silage yard and that normally his uncle fed silage with a topping of ground corn to the cattle. He also stated that the cattle were just then finishing the silage presumably laid out by Mr. Dick before his death.

At about 11 a. m., the sheriff arrived. Mr. Dick was still lying where he had died. The sheriff examined Mr. Dick's shotgun and found two discharged shells in its chamber. The gun was dry and clean and there were no

bloodstains on it or on the gloves which Dick was still wearing. The sheriff also noticed some of the shot patterns found by Dick's brother and saw some brain tissue splattered on the southeast corner. He found a screwdriver lying on the floor about a foot from the gun. The Dicks used the screwdriver to open and close the door to the silage shed because the doorknob was missing.

Soon thereafter the coroner arrived. He testified that Mr. Dick's body contained a shotgun wound on the left side and one on the head. The body wound was mortal, but not immediately fatal. It consisted of a gouged out wound on the left lateral chest wall which removed skin, fat, rib muscles and portions of rib from the body. In addition, other ribs were fractured and Dick's left lung was collapsed. In the coroner's opinion, it was the type of wound which would have had to result in immense pain, although it probably would not have made it impossible for Dick again to discharge the gun. The wound to the head caused immediate death. According to the testimony of the sheriff and a member of the Fargo police department, both wounds were received from the front. In the sheriff's opinion, the chest wound was received from an upward shot into Dick's body, but this testimony conflicted with another statement of the sheriff indicating that the wound was received from a downward shot.

It was clear from the testimony that Mr. Dick was an experienced hunter. Petitioner testified that he kept the shotgun in the barn because of attacks on his sheep by vicious dogs during the preceding year. A number of the sheep had been killed in this manner. In addition, Dick had mentioned seeing foxes near the barn. Mrs. Dick testified that when her husband went hunting, he sometimes borrowed his father's gun because he didn't trust his own. She was with him once when the gun wouldn't fire and had been told that occasionally it fired accidentally. In addition, Dick's brother testified that while hunting

with Dick he heard a shot at an unexpected time which Dick explained as an accidental discharge that occurred "once in a while." The gun was over 26 years old.

The sheriff testified that after the death he tested Dick's gun by cocking and dropping it a number of times.[2] The triggers did not release on any of these occasions. The sheriff also explained that the gun had a safety and could not discharge with the safety on. The safety was off during each of his tests. Finally, the sheriff stated that each trigger had approximately a seven-pound trigger pull.

No suicide notes were found. Mr. Dick had said nothing to his relatives or friends concerning suicide. He left no will.

At the conclusion of the evidence, respondent unsuccessfully moved for a directed verdict. The court charged the jury that under state law accidental death should be presumed and that respondent had the burden to show by a fair preponderance of the evidence that Dick committed suicide. The jury returned a verdict of $7,500 for petitioner. Respondent's motions for judgment notwithstanding the verdict and for new trial were denied.

In this Court and before the Court of Appeals, both parties assumed that the propriety of the District Court's refusal to grant respondent's motions was a matter of North Dakota law. Under that law, it is clear that under the circumstances present in this case a presumption arises, which has the weight of affirmative evidence, that death was accidental. *Svihovec* v. *Woodmen Accident*

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[2] The sheriff stated that he did not "pretend to be an expert as far as shotguns are concerned." His tests consisted of dropping the gun with the muzzle down ten times from a height of ten inches and holding the gun with the butt down about ten inches from the floor and dropping it on a board eight or ten times. He also placed the gun in a normal shooting position against his shoulder and swung the barrel against an obstacle three or four times.

Co., 69 N. D. 259, 285 N. W. 447. See *Paulsen* v. *Modern Woodmen of America*, 21 N. D. 235, 130 N. W. 231; *Clemens* v. *Royal Neighbors of America*, 14 N. D. 116, 103 N. W. 402; *Stevens* v. *Continental Casualty Co.*, 12 N. D. 463, 97 N. W. 862.[3] Proof of coverage and of death by gunshot wound shifts the burden to the insurer to establish that the death of the insured was due to his suicide. *Svihovec* v. *Woodmen Accident Co., supra.* Under North Dakota law, this presumption does not disappear once the insurer presents any evidence of suicide. *Ibid.* Rather, the presumed fact (accidental death) continues and a plaintiff is entitled to affirmative instructions to the jury concerning its existence and weight.[4] This is not to say that under North Dakota law the presumption of accidental death may not be overcome by so much evidence that the insurer is entitled to a directed verdict. For it is clear that where "there is no evidence in the record that can be said to be inconsistent with the conclusion of death by suicide," or "the facts and circumstances surrounding the death [can] not be reconciled with any reasonable theory of accidental or nonintentional injury," the state court may direct a verdict for the insurer even though the insurer is charged with the burden of proving that death was caused by suicide.[5] These state rules determine when

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[3] This statement of the presumption and its weight accords with the requirements of N. D. Rev. Code, 1943, § 31–1101, which provides:

"A presumption, unless declared by law to be conclusive, may be controverted by other direct or indirect evidence but unless so controverted, the jurors are bound to find according to the presumption."

[4] Respondent's argument below that the court should adopt the "modern" rule on the effect of presumptions, see, *e. g.*, 9 Wigmore On Evidence (3d ed. 1940) § 2491, was rejected. The "modern" rule was applied by this Court in *New York Life Ins. Co.* v. *Gamer*, 303 U. S. 161, a decision predating *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. For the subsequent history of the *Gamer* case, see 106 F. 2d 375.

[5] *Svihovec* v. *Woodmen Accident Co., supra; Clemens* v. *Royal Neighbors of America, supra.*

495957 O–59–33

the evidence in a "suicide" case is sufficient to go to a jury. They are not directed at determining when the presumption of accidental death is rebutted, and thus excised from the case, because, as stated above, the presumed fact of accidental death continues throughout the trial and has the weight of affirmative evidence.

The Court of Appeals, in its opinion, reviewed the evidence in detail and resolved at least one disputed point in respondent's favor. It found, as "definitely established by the evidence," that "neither barrel [of the shotgun] could have been fired unless someone or something either pulled or pushed one of the triggers." It stated that "[o]ne can believe that even an experienced hunter might accidentally shoot himself once, but the asserted theory that he could accidentally shoot himself first with one barrel and then with the other stretches credulity beyond the breaking point." [6] And it concluded that the facts and circumstances could not "be reconciled with any reasonable theory of accident, and that, under the evidence, the question whether the death was accidental was not a question of fact for the jury." Judgment was reversed with directions to dismiss the complaint. 252 F. 2d 43. We granted certiorari, 357 U. S. 925.

Lurking in this case is the question whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction

[6] The Court of Appeals admitted the improbability of Dick's being able to pull the triggers with bulky gloves on but believed that this was offset by the probability that he used the screwdriver to push the triggers. This resolution of the facts seems strained indeed. The presence of the screwdriver was accounted for by testimony indicating that it was used to open the silage shed door. And the jury could reject as improbable the court's implicit theory that a man mortally wounded in the chest and bulkily clothed could hold a heavy shotgun at arm's length and shoot off his head particularly when he was wearing heavy gloves that could only be inserted in the trigger guard with difficulty.

is rested on diversity of citizenship. On this question, the lower courts are not in agreement. Compare *Rowe* v. *Pennsylvania Greyhound Lines,* 231 F. 2d 922; *Cooper* v. *Brown,* 126 F. 2d 874; *Lovas* v. *General Motors Corp.,* 212 F. 2d 805, with *Davis Frozen Foods* v. *Norfolk Southern R. Co.,* 204 F. 2d 839; *Reuter* v. *Eastern Air Lines,* 226 F. 2d 443; *Diederich* v. *American News Co.,* 128 F. 2d 144. And see Morgan, Choice of Law Governing Proof, 58 Harv. L. Rev. 153, 174, and 5 Moore's Federal Practice (2d ed. 1951) § 38.10. But the question is not properly here for decision because, in the briefs and arguments in this Court, both parties assumed that the North Dakota standard applied.[7] Moreover, although the Court of Appeals appears to have applied the state standard, that court did not discuss the issue. Under these circumstances, we will not reach out to decide this important question particularly where, in the context of this case, the two standards are substantially the same.[8] A decision as to which standard should be applied can well be left to another case where the question is briefed and argued. This case can be decided on the simple issue stated at the outset of the opinion.

In our view, the Court of Appeals improperly reversed the judgment of the District Court. It committed its basic error in resolving a factual dispute in favor of respondent that the shotgun would not fire unless someone or something pulled the triggers. Petitioner's evidence on this score, despite the "tests" performed by the sheriff, could support a jury conclusion that the gun might have

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[7] Respondent argued that the North Dakota rule on presumptions should be abandoned in favor of the "modern" rule, see note 4, *supra,* but the record does not show that it argued for the application of the federal standard of sufficiency of the evidence.

[8] Compare *Brady* v. *Southern R. Co.,* 320 U. S. 476, 479–480, and *Bailey* v. *Central Vermont R. Co.,* 319 U. S. 350, 353, with *Svihovec* v. *Woodmen Accident Co., supra.*

fired accidentally from other causes. Once an accidental discharge is possible, a jury could rationally conceive of a number of explanations of accidental death which were consistent with evidence which the jury might well have believed showed the overwhelming improbability of suicide. The record indisputably shows lack of motive—in fact there is affirmative evidence from which the jury could infer that Dick was a most unlikely suicide prospect. He was relatively healthy, financially secure, happily married, well liked, and apparently emotionally stable. He left nothing behind to indicate that he had committed suicide and nothing in his conduct before death indicated an intention to destroy himself. The timing of the death, while in the midst of normal chores and immediately preceding a planned appointment with neighbors, militates against such a conclusion. Dick's presence in the shed and the accessibility of the gun are explicable in view of the fact that dogs had previously attacked his sheep and the fact that the door in the shed provided a convenient exit to the adjoining fields. And a jury could well believe it improbable that a man would not even bother to remove his bulky gloves, or thick jacket, when he intended to commit suicide even though those articles of clothing made it difficult to turn the gun on himself.

In a case like this one, North Dakota presumes that death was accidental and places on the insurer the burden of proving that death resulted from suicide. *Stevens* v. *Continental Casualty Co., supra; Paulsen* v. *Modern Woodmen of America, supra.* Under the *Erie* rule,[9] presumptions (and their effects) and burden of proof are "substantive" and hence respondent was required to shoulder the burden during the instant trial. *Palmer* v. *Hoffman,* 318 U. S. 109; *Cities Service Oil Co.* v. *Dunlap,* 308 U. S. 208. And see *Balchunas* v. *Palmer,* 151 F. 2d

[9] *Erie R. Co.* v. *Tompkins,* 304 U. S. 64.

842; *Sylvania Electric Products* v. *Barker,* 228 F. 2d 842; *Matsumoto* v. *Chicago & N. W. R. Co.,* 168 F. 2d 496. After all the evidence was in, the district judge, who was intimately concerned with the trial and who has a first-hand knowledge of the applicable state principles, believed that the case should go to the jury. Under all the circumstances, we believe that he was correct and that reasonable men could conclude that the respondent failed to satisfy its burden of showing that death resulted from suicide.

Reversed.

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

MR. JUSTICE STEWART, concurring.

I concur in the judgment, believing that the district judge correctly followed applicable North Dakota law in submitting this case to the jury. Not having been a member of the Court when the petition for certiorari was granted, 357 U. S. 925, I consider it inappropriate now to express a view as to the wisdom of bringing here a case like this.

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

On several occasions I have stated the reasons for my adherence to the traditional practice of the Court not to note dissent from the Court's disposition of petitions for certiorari.[1] Different considerations apply once a case is decided.

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[1] *E. g., Maryland* v. *Baltimore Radio Show, Inc.,* 338 U. S. 912; *Bondholders, Inc.,* v. *Powell,* 342 U. S. 921; *Chemical Bank & Trust Co.* v. *Group of Institutional Investors,* 343 U. S. 982; *Rosenberg* v. *United States,* 344 U. S. 889.

Establishment of intermediate appellate courts in 1891 [2] was designed by Congress to relieve the overburdened docket of the Court.[3] The Circuit Courts of Appeals were to be equal in dignity to the Supreme Courts of the several States.[4] The essential purpose of the Evarts Act was to enable the Supreme Court to discharge its indispensable functions in our federal system by relieving it of the duty of adjudication in cases that are important only to the litigants.[5] The legislative history of the Evarts Act demonstrates that it was clear in 1891 no less than today that litigation allowed to be brought into the federal courts solely on the basis of diversity of citizenship is rarely of moment except to the parties.[6] The Act provided, therefore, that in diversity cases "the judgments or decrees of the circuit courts of appeals shall be final." [7] In a provision which Senator Evarts referred to as a "weakness" in the Act,[8] this Court was given the discretionary power to grant certiorari in these cases, to be exercised if some question of general interest, outside the limited scope of an ordinary diversity litigation, was also involved.[9]

Any hesitance which Senator Evarts may have felt was not justified by the early history of use of this certiorari power. The Court, mindful of the reasons for the restriction, so long and eagerly sought by the Court itself, on its obligatory jurisdiction, and faithful to the complementary obligation imposed upon it by its newly

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[2] Act of March 3, 1891, 26 Stat. 826 (commonly known as the Evarts or Circuit Courts of Appeals Act).

[3] H. R. Rep. No. 1295, 51st Cong., 1st Sess. 3.

[4] *Ibid.*

[5] See 21 Cong. Rec. 3403–3405, 10220–10222; 22 Cong. Rec. 3585.

[6] *Ibid.*

[7] 26 Stat. 828.

[8] 21 Cong. Rec. 10221.

[9] 26 Stat. 828.

conferred power to control its docket, exercised the greatest restraint and caution in granting certiorari in cases resting solely on diversity of citizenship.[10]

Time and again in the years immediately following the passage of the Evarts Act this Court stated that it was only in cases of "gravity and general importance" or "to secure uniformity of decision" that the certiorari power should be exercised.[11] Mr. Justice Brewer explained the Court's wariness in granting certiorari in terms of the purpose of the Act:

> "Obviously, a power so broad and comprehensive, if carelessly exercised, might defeat the very thought and purpose of the act creating the courts of appeal. So exercised it might burden the docket of this court with cases which it was the intent of Congress to terminate in the Courts of Appeal, and which, brought here, would simply prevent that promptness of decision which in all judicial actions is one of the elements of justice." [12]

In order to justify the establishment of the Circuit Courts of Appeals it was necessary to view certiorari as

> "a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that

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[10] See the expressions of the necessity of restraint in granting writs of certiorari which the Court voiced in *Lau Ow Bew*, 141 U. S. 583; *In re Woods*, 143 U. S. 202; *Lau Ow Bew* v. *United States*, 144 U. S. 47; *American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372; *Forsyth* v. *Hammond*, 166 U. S. 506; *Fields* v. *United States*, 205 U. S. 292; *United States* v. *Rimer*, 220 U. S. 547. On March 27, 1893, two years after the enactment of the Evarts Act, the Court could write that only two petitions for certiorari had been granted. *American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.*, *supra*, at 383.

[11] See cases cited, note 10, *supra*.

[12] *Forsyth* v. *Hammond*, 166 U. S. 506, 513.

> the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise." [13]

These considerations have led the Court in scores of cases to dismiss the writ of certiorari even after oral argument when it became manifest that the writ was granted under a misapprehension of the true issues.[14] Cases which raised as their sole question the sufficiency of evidence for submission to a jury were not regarded as complying with the standards necessitated by the purposes of

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[13] *Id.*, at 514–515.

[14] In *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, after listing some sixty relevant cases, this Court said:

"Only in the light of argument on the merits did it become clear in these numerous cases that the petitions for certiorari should not have been granted. In some instances an asserted conflict turned out to be illusory; in others, a federal question was wanting or decision could be rested on a non-federal ground; in a number, it became manifest that the question was of importance merely to the litigants and did not present an issue of immediate public significance." 349 U. S., at 79, note 2.

In an earlier case Mr. Justice Stone, in a dissent joined by Mr. Justice Brandeis, had written:

"It thus appears that the construction of the statute which we were asked to review is not in the case, and even if it were, it is of local significance only. The conflict of decisions asserted is not shown. Plainly the question is not of such general interest or importance as under the rules and practice of this Court warrants its review upon certiorari. For these reasons it is the duty of this Court to dismiss the writ as improvidently granted." *Washington Fidelity National Ins. Co.* v. *Burton*, 287 U. S. 97, 100, 101–102. See also *United States* v. *Knight*, 336 U. S. 505, 509 (dissenting opinion). Nor need we rummage in the recesses of our memories: see *Triplett* v. *Iowa*, 357 U. S. 217; *Hinkle* v. *New England Mutual Ins. Co.*, 358 U. S. 65; *Joseph* v. *Indiana*, 359 U. S. 117.

the Evarts Act for limiting the power of review by certiorari.[15]

To strengthen further this Court's control over its docket and to avoid review of cases which in the main raise only factual controversies, Congress in 1916 made cases arising under the Federal Employers' Liability Act final in the Courts of Appeals, reviewable by this Court only when required by the guiding standards for exercising its certiorari jurisdiction.[16] The Senate Report which accompanied this bill to the floor of the Senate suggested that this change would allow the Supreme Court more time for "expeditious determination of those [cases] having real substance." [17]

In 1925 Congress enacted the "Judges' Bill," [18] called such because it was drafted by a committee of this Court composed of Van Devanter, McReynolds, and Sutherland, JJ.[19] At the hearings on the bill these Justices and Mr. Chief Justice Taft explained the bill and also the Court's past practice in respecting the limitations

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[15] See *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440. In *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267–268, the Court said: "The great purpose of the act of 1891, however, to which all its provisions are subservient, is to distribute the jurisdiction of the courts of the United States, and thus to relieve the docket of this court by casting upon the Circuit Courts of Appeal the duty of finally deciding the cases over which the jurisdiction of those courts is by the act made final. The power to certiorari in accordance with the act, in its essence, is only a means to the end that this imperative and responsible duty may be adequately performed."

[16] Act of Sept. 6, 1916, § 3, 39 Stat. 727.

[17] S. Rep. No. 775, 64th Cong., 1st Sess. 3. See also H. R. Rep. No. 794, 64th Cong., 1st Sess. 3.

[18] Act of Feb. 13, 1925, 43 Stat. 936.

[19] For a summary of the history of the bill see Frankfurter and Landis, The Business of the Supreme Court, 273–280. The authors also analyze the Act. *Id.*, at 280–294.

of its certiorari jurisdiction.[20] These authoritative expositions and assurances to Congress, on the basis of which Congress sharply restricted the Court's obligatory jurisdiction, admit of no doubt, contain no ambiguity. Mr. Chief Justice Taft said:

> "No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal." [21]

The House Report, in recommending to the House of Representatives passage of the bill, stated the matter succinctly:

> "The problem is whether the time and attention and energy of the court shall be devoted to matters of large public concern, or whether they shall be con-

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[20] Hearings before the Committee on the Judiciary of the House of Representatives on H. R. 10479, 67th Cong., 2d Sess.; Hearing before a Subcommittee of the Senate Committee on the Judiciary on S. 2060 and S. 2061, 68th Cong., 1st Sess.; Hearing before the Committee on the Judiciary of the House of Representatives on H. R. 8206, 68th Cong., 2d Sess.

[21] Hearings before the Committee on the Judiciary of the House of Representatives on H. R. 10479, 67th Cong., 2d Sess. 2. Writing for the Court in *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163, Mr. Chief Justice Taft said: "The jurisdiction [to review decisions of the Courts of Appeals] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

> sumed by matters of less concern, without especial general interest, and only because the litigant wants to have the court of last resort pass upon his right." [22]

Though various objections to certain jurisdictional changes worked by the bill were voiced on the floor of the Senate, even critical Senators recognized the great difference between the Supreme Court and other appellate tribunals. Thus Senator Copeland:

> "The United States Supreme Court is one of the three great coordinate branches of the Government, and its time and labor should, generally speaking, be devoted to matters of general interest and importance and not to deciding private controversies between citizens involving no questions of general public importance." [23]

In correspondence between Senator Copeland and Mr. Chief Justice Taft, the latter wrote: "The appeal to us should not be based on the right of a litigant to have a second appeal." [24]

This understanding of the role of the Supreme Court and the way in which it is to be maintained in observing the scope of certiorari jurisdiction, are clearly set forth in a contemporary exposition by Mr. Chief Justice Taft of the purposes of the Judiciary Act of 1925:

> "The sound theory of that Act [Act of 1891] and of the new Act is that litigants have their rights sufficiently protected by a hearing or trial in the courts of first instance, and by one review in an intermediate appellate Federal court. The function of the Supreme Court is conceived to be, not the remedying of a particular litigant's wrong, but the considera-

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[22] H. R. Rep. No. 1075, 68th Cong., 2d Sess. 2.

[23] 66 Cong. Rec. 2755.

[24] *Id.*, at 2920.

> tion of cases whose decision involves principles, the application of which are of wide public or governmental interest, and which should be authoritatively declared by the final court." [25]

Questions of fact have traditionally been deemed to be the kind of questions which ought not to be recanvassed here unless they are entangled in the proper determination of constitutional or other important legal issues. In *Newell* v. *Norton*, 3 Wall. 257, Mr. Justice Grier stated the considerations weighing against Supreme Court review of factual determinations: "It would be a very tedious as well as a very unprofitable task to again examine and compare the conflicting statements of the witnesses in this volume of depositions. And, even if we could make our opinion intelligible, the case could never be a precedent for any other case, or worth the trouble of understanding." 3 Wall., at 267. And he issued this caveat: "Parties ought not to expect this court to revise their decrees merely on a doubt raised in our minds as to the correctness of their judgment, on the credibility of witnesses, or the weight of conflicting testimony." 3 Wall., at 268. In *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440, certiorari was dismissed as improvidently granted after it became apparent that the only question in the case was the "propriety of submitting" certain questions to the jury and this "depended essentially upon an appreciation of the evidence." 245 U. S., at 441. Testifying before the Senate Judiciary Committee in hearings concerning the Judges' Bill, Mr. Justice Van Devanter related a similar incident.[26] The proper use of the dis-

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[25] Taft, The Jurisdiction of the Supreme Court Under the Act of February 13, 1925, 35 Yale L. J. 1, 2 (1925).

[26] Hearing before a Subcommittee of the Senate Committee on the Judiciary on S. 2060 and S. 2061, 68th Cong., 1st Sess. 31.

cretionary certiorari jurisdiction was on a later occasion thus expounded by Mr. Chief Justice Hughes:

> "Records are replete with testimony and evidence of facts. But the questions on certiorari are questions of law. So many cases turn on the facts, principles of law not being in controversy. It is only when the facts are interwoven with the questions of law which we should review that the evidence must be examined and then only to the extent that it is necessary to decide the questions of law.
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> "This at once disposes of a vast number of factual controversies where the parties have been fully heard in the courts below and have no right to burden the Supreme Court with the dispute which interests no one but themselves." [27]

What are the questions which petitioner here presses upon us? The petition for certiorari sets forth as the questions presented: (1) was petitioner deprived of her constitutional right to a jury trial guaranteed by the Seventh Amendment? (2) did the Court of Appeals refuse to follow North Dakota law as it was required to do under *Erie R. Co.* v. *Tompkins,* 304 U. S. 64? If this case raises a question under the Seventh Amendment, so does every granted motion for dismissal of a complaint calling for trial by jury, every direction of verdict, every judgment notwithstanding the verdict. Fabulous inflation cannot turn these conventional motions turning on appreciation of evidence into constitutional issues, nor can the many diversity cases sought to be brought here on contested questions of evidentiary weight be similarly transformed by insisting before this Court that the Constitution has been violated. This verbal smoke screen cannot obscure the truth that all that is involved is an appraisal of the

[27] Printed in S. Rep. No. 711, 75th Cong., 1st Sess. 40.

fair inferences to be drawn from the evidence. Chief Judge Magruder has expressed the common sense of the matter:

> "If an appellate court is of the view that the trial court made an error of judgment in withdrawing a case from the jury, or in entering judgment for the defendant notwithstanding a plaintiff's verdict, a reversal [by a Court of Appeals] is no doubt called for; but we cannot see that anything is gained by blowing up that error of judgment into a denial of the constitutional right to a jury trial as guaranteed by the Seventh Amendment." [28]

Petitioner's insistence that the Court of Appeals ignored or acted at variance with the law of North Dakota is disproved by the citation and discussion of the relevant North Dakota decision in the opinion below. See 252 F. 2d 43, 46. The test of sufficiency applied by the Court of Appeals below is the same test which petitioner asks us to apply, and is the test established by the North Dakota Supreme Court in *Svihovec* v. *Woodmen Acc. Co.*,

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[28] *Smith* v. *Reinauer Oil Transport, Inc.*, 256 F. 2d 646, 649.

Negligence litigation occupies a substantial portion of the time of federal district judges. "During the last year I myself have calculated with some care that over half the days when I was taking evidence, I was taking evidence in cases involving negligence, either diversity jurisdiction cases, Jones Act, FELA, Federal Tort Claim, or the lot." Judge Charles E. Wyzanski, Jr., Proceedings of the Attorney General's Conference on Court Congestion (1958), 137. Every negligence case, when tried before a jury, necessitates a decision on sufficiency of evidence for submission to a jury. In many cases it is the only issue. We ought not, with due regard to our special functions, encourage the bringing of such cases here. We could not possibly review all the cases sought to be brought here. But if we occasionally review such a case, we discriminate against the others, since no rational classification can justify taking one but not all. That is why all are appealable to the Courts of Appeals.

69 N. D. 259, 285 N. W. 447. "Our conclusion," the opinion below announced, "is that the infliction of two wounds in succession, one in the left side in close proximity to the heart, and the other in the head, cannot be reconciled with any reasonable theory of accident, and that, under the evidence, the question whether the death was accidental was not a question of fact for the jury." 252 F. 2d 43, 47. Thus, as the record was interpreted by the Court of Appeals the evidence fell short of the requirements of North Dakota law for submission to a jury. It might be noted that its interpretation of the record would have required the same result were federal law to determine sufficiency. We have held that "[w]hatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." [29]

Alike in Congress and here it has been repeatedly insisted that a question like that raised by petitioner—was there sufficient evidence for submission to a jury—is not proper for review in this Court. The circumstances in the type of situation before us are infinite in their variety. Judicial judgments upon such circumstances are bound to vary with the particularities of the individual situation. The decision in each case is a strictly particular adjudication—a unique case since it turns on unique facts—and cannot have precedential value. Of course it is of interest, perhaps of great importance to the parties, but only as such and not independently of any general public interest.

The considerations that demand strict adherence by the Court to the rules it has laid down for the bar in

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[29] *Galloway* v. *United States*, 319 U. S. 372, 395.

applying for the exercise of the Court's "sound judicial discretion" in granting a writ of certiorari are not technical, in the invidious sense of the term. They go to the very heart of the effective discharge of this Court's functions. To bring a case here when there is no "special and important" [30] reason for doing so, when there is no reason other than the interest of a particular litigant, especially when the decision turns solely on a view of conflicting evidence or the application of a particular local doctrine decided one way rather than another by a Court of Appeals better versed in the field of such local law than we can possibly be, works inroads on the time available for due study and reflection of those classes of cases for the adjudication of which this Court exists.

The conditions that are indispensable for enabling this Court adequately to discharge the duties in its special keeping cannot be too consciously and too persistently kept in mind. The far-reaching and delicate problems that call for the ultimate judgment of the Nation's highest tribunal require vigor of thought and high effort, and their conservation, even for the ablest judges. Listening to arguments, examining records and briefs, analyzing the issues, investigating materials beyond what partisan counsel offer, constitute only a fraction of what goes into the judicial process of this Court.

For one thing, the types of cases that now come before the Court (as the present United States Reports compared with those of even a generation ago bear ample testimony) require to a considerable extent study of materials outside the legal literature. More important, however, the judgments of this Court are collective judgments. Such judgments presuppose ample time and freshness of mind for private study and reflection in preparation for discussion at Conference. Without adequate study there can-

[30] Rule 19, Rules of the Supreme Court of the United States.

not be adequate reflection; without adequate reflection there cannot be adequate discussion; without adequate discussion there cannot be that fruitful interchange of minds which is indispensable to thoughtful, unhurried decision and its formulation in learned and impressive opinions. It is therefore imperative that the docket of the Court be kept down so that its volume does not preclude wise adjudication. This can be avoided only if the Court rigorously excludes any case from coming here that does not rise to the significance of inescapability in meeting the responsibilities vested in this Court.

Adjudication is, of course, the most exacting and most time-consuming of the Court's labors; it is by no means the whole story. In 1925 the Congress, by withdrawing all but a few categories of cases which can come to the Court as a matter of right, gave to the Court power to control its docket, to control, that is, the volume of its business. Congress conferred this discretionary power on the Court's own urging that this was necessary if the proper discharge of the Court's indispensable functions were to be rendered feasible. The process of screening those cases which alone justify adjudication by the Supreme Court is in itself a very demanding aspect of the Court's work. The litigious tendency of our people and the unwillingness of litigants to rest content with adverse decisions after their cause has been litigated in two and often in three courts, lead to attempts to get a final review by the Supreme Court in literally thousands of cases which should never reach the highest Court of the land.[31] The examination of the papers in these cases, to sift out the few that properly belong in this Court from the very many that have no business here, is a laborious

[31] In the last three Terms of Court preceding the current Term there were filed, respectively, 1,382, 1,473, and 1,407 petitions for certiorari on the appellate and miscellaneous dockets.

process in a Court in which every member is charged and properly charged with making an independent examination of the right of access to the Court.[32]

Every time the Court grants certiorari in disregard of its own professed criteria, it invites disregard of the responsibility of lawyers enjoined upon the bar by the Court's own formal rules and pronouncements. It is idle to preach obedience to the justifying considerations for filing petitions for certiorari, which Mr. Chief Justice Taft and his successors and other members of the Court have impressively addressed to the bar year after year, if the Court itself disregards the code of conduct by which it seeks to bind the profession. Lawyers not unnaturally hope to draw a prize in the lottery and even conscientious lawyers who feel it their duty, as officers of the Court, to obey the paper requirements of a petition for certiorari, may feel obligated to their clients not to abstain where others have succeeded. No doubt the most rigorous adherence to the criteria for granting certiorari will not prevent too many hopeless petitions for certiorari from being filed. But laxity by the Court in respecting its own rules is bound to stimulate petitions for certiorari with which the Court should never be burdened.

Therefore, ever since Congress, in 1891, established the Courts of Appeals as the customary tribunal for final adjudication of the class of cases to which the present

[32] "We have to consider the *certiorari* because it was only after effort that we got a bill passed that makes an appeal to our court dependent upon our discretion in many cases in which until lately it was matter of right. Let it ever be understood that the preliminary judgment was delegated, I should expect the law to be changed back again very quickly with the result that we should have to hear many cases that have no right to our time; as it is we barely keep up with the work." Mr. Justice Holmes, writing under date of August 30, 1929, to Sir Frederick Pollock, 2 Holmes-Pollock Letters (Howe ed. 1941) 251.

belongs, this Court has, as a rule, been resolute in guarding against abuse of its closely restricted discretionary certiorari jurisdiction. Due regard for our practice and for the vital jurisdictional principle which underlies it, compels the conclusion that this writ of certiorari should never have issued.

However, if we are to review facts, we must establish and adhere to a rational standard of review. In so doing we cannot ignore the relevance to this task of the many expressions of the impropriety of such review. If it is unwise for this Court to grant review of cases turning solely on questions of fact, how much less wise to undertake to reassess the record in disregard of the reasoned assessment of the evidence by the Court of Appeals.

> "The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues.
>
> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way." [33]

It is the staple business of Courts of Appeals to examine records for the sufficiency of evidence. To undertake an independent review of the review by the Court of Appeals of evidence is neither our function nor within our special aptitude through constant practice. Such disregard of

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[33] *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502–503. See also *Labor Board* v. *American National Ins. Co.*, 343 U. S. 395, 409–410; *McAllister* v. *United States*, 348 U. S. 19, 24 (separate opinion).

sound judicial administration is emphasized by the fact that the judges of the Court of Appeals are, by the very nature of the business with which they deal, far more experienced than we in dealing with evidence, ascertaining the facts, and determining the sufficiency of evidence to go to a jury.[34] If due regard be paid to the weighing of conflicting evidence and inferences drawn therefrom by these experienced judges, can it be fairly said that there was no reasoned justification for their conclusion and that their judgment was baseless? If not, we should leave undisturbed the judgment below.[35] After all, we are reviewing the judgment of the Court of Appeals, and it is its judgment that must be subjected to the rule of reason. Comparison of the Court of Appeals' opinion with the record made at the trial manifests scrupulous

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[34] The Circuit Judges who decided this case have had the following judicial experience:

Judge Sanborn: District Court of Minnesota, 1922–1925; United States District Court for the District of Minnesota, 1925–1932; United States Court of Appeals for the Eighth Circuit, since 1932.

Judge Woodrough: County Court, Ward County, Texas, 1894–1896; United States District Court for the District of Nebraska, 1916–1933; United States Court of Appeals for the Eighth Circuit, since 1933.

Judge Johnsen: Supreme Court of Nebraska, 1939–1940; United States Court of Appeals for the Eighth Circuit, since 1940.

If a claim were made that the Court of Appeals had "departed from the accepted and usual course of judicial proceedings," Rule 19, Rules of the Supreme Court of the United States, that it had, for instance, manifested a strong bias for or against a particular class of litigants, a proper case would be presented for "an exercise of this court's power of supervision." Rule 19, Rules of the Supreme Court of the United States. No suggestion has been made that the decision of the Court of Appeals reflected a bias in favor of an insurance company. On the contrary, animadversion against the complete disinterestedness of the court was disavowed at the bar.

[35] See *Federal Trade Comm'n* v. *American Tobacco Co.*, 274 U. S. 543.

deference to the local law of North Dakota, as pronounced by its Supreme Court, and unmistakable care by the Court of Appeals in considering all the evidence and the inferences which the evidence reasonably yields. Whether we agree or disagree with its evaluation of the evidence, a tolerant judgment can surely not conclude that it does not represent a fair, judicial determination. If we are to consider the merits of the case, I would affirm the judgment of the Court of Appeals.

T. I. M. E. INCORPORATED *v.* UNITED STATES.

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

No. 68. Argued January 20, 1959.—Decided May 18, 1959.*

A shipper of goods by a motor carrier certificated by the Interstate Commerce Commission under the Motor Carrier Act of 1935 cannot challenge in post-shipment litigation the reasonableness of the carrier's past charges, which were made in accordance with the applicable tariffs filed under § 217 of the Act. Pp. 465–480.

(a) The structure and history of Part II of the Interstate Commerce Act (the Motor Carrier Act)—when compared with Parts I and III, which expressly grant such rights to shippers by rail and water—lead to the conclusion that §§ 216 (b) and (d) were not intended to give shippers by motor carriers a statutory cause of action for recovery of past charges at allegedly unreasonable rates or to enable them to assert "unreasonableness" as a defense in suits by motor carriers to recover past charges at applicable tariff rates. Pp. 468–472.

(b) The Motor Carrier Act does not contemplate that shippers shall have a right at common law to dispute in court litigation the reasonableness of past charges at applicable tariff rates subject to determination of the issue of reasonableness by referral to the Commission. Pp. 472–480.

252 F. 2d 178 and 104 U. S. App. D. C. 72, 259 F. 2d 802, reversed.

W. D. Benson, Jr. argued the cause and filed a brief for petitioner in No. 68.

Bryce Rea, Jr. argued the cause for petitioner in No. 96. With him on the brief was *Edgar Watkins.*

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

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*Together with No. 96, *Davidson Transfer & Storage Co., Inc.*, v. *United States*, on certiorari to the United States Court of Appeals for the District of Columbia Circuit.

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioners are interstate motor common carriers, certificated by the Interstate Commerce Commission (I. C. C.) under the Motor Carrier Act of 1935.[1] Section 217 of that Act, 49 U. S. C. § 317, requires such carriers to file their transportation charges as tariffs with the I. C. C. These tariffs remain effective until suspended or changed in accordance with specified procedures, and so long as they are effective carriers are forbidden to charge or collect any rate other than that provided in the applicable tariff.[2]

These cases present in common a single question under the Motor Carrier Act: Can a shipper of goods by a certificated motor carrier challenge in post-shipment litigation the reasonableness of the carrier's charges which were made in accordance with the tariff governing the shipment?

In No. 68, T. I. M. E. transported several shipments of scientific instruments for the United States from Oklahoma to California. One of the shipments, illustrative of all involved in this litigation, originated at Marion, Oklahoma, and was carried over the lines of petitioner and a connecting carrier to Planehaven, California. At the time, the petitioning carrier had on file with the I. C. C. a tariff relating to such shipments which specified a through rate from Marion to Planehaven of $10.74 per hundredweight. Petitioner was also subject to tariffs which provided a rate of $2.56 per hundredweight from Marion to El Paso, Texas, and of $4.35 per hundredweight from El Paso to Planehaven. The through rate thus

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[1] Interstate Commerce Act, Part II, 49 Stat. 543, as amended, 49 U. S. C. § 301 *et seq.*

[2] See Motor Carrier Act §§ 216 (e), (g), 217 (b), (c), 49 U. S. C. §§ 316 (e), (g), 317 (b), (c).

exceeded the combination rate by $3.83. T. I. M. E. charged and collected on the basis of the through rate. On postpayment audit by the General Accounting Office under § 322 of the Transportation Act of 1940, 54 Stat. 955, 49 U. S. C. § 66, that office concluded that the combination rather than the through rate was applicable to this shipment and required T. I. M. E. to refund the difference between the sum collected under the through tariff and that which would have been due under the combination tariffs. This T. I. M. E. did under protest.

Thereafter T. I. M. E. brought suit under the Tucker Act, 28 U. S. C. § 1346 (a)(2), claiming that the through tariff was applicable to the shipment and that it was thus entitled to recover the difference between the through and combination rates. The Government defended on the ground that the combination rate was applicable, and alternatively contended that if the through tariff were applicable the rate specified therein was unreasonably high insofar as it exceeded the combination rate. It asked that T. I. M. E.'s suit be stayed to permit the Government to bring a proceeding before the I. C. C. to determine the reasonableness of the through rate. The District Court in an unreported opinion held that the through rate was applicable, and that neither it nor the I. C. C. had power to pass upon the Government's contention that such rate was *as to the past* unreasonable. Accordingly, the District Court entered summary judment for T. I. M. E.

The Government appealed, accepting the District Court's determination as to the applicability of the through rate, but contending that the District Court had erred in refusing to refer to the I. C. C. the issue of the reasonableness of that rate as to past shipments. The Court of Appeals reversed, holding that the Government was entitled to an I. C. C. determination upon the question of reasonableness, and that the fact that the Motor

Carrier Act gives the I. C. C. no power to award reparations as to admittedly governing past rates does not prevent that body from passing on the question of past reasonableness when that issue arises in litigation in the courts. 252 F. 2d 178.

In No. 96, petitioner Davidson transported four shipments of goods for the United States from Poughkeepsie, N. Y., to Bellbluff, Va., and billed the United States on the basis of concededly applicable filed tariffs. On post-payment audit the General Accounting Office concluded that a part of these charges was unreasonable and should be refunded to the United States.[3] Davidson refunded under protest the sum demanded, which amounted to $18.34, and then brought suit under the Tucker Act to recover the refund. The Government defended on the sole ground that the applicable rate had been unreasonable. The District Court, without opinion, granted Davidson summary judgment, but on the Government's appeal the judgment was reversed, the Court of Appeals holding that the Government could defend on "unreasonableness" grounds, and directing a referral to the I. C. C. of the issue as to the reasonableness of the rate in question. 104 U. S. App. D. C. 72, 259 F. 2d 802.

We granted certiorari in both cases because of the suggestion that the result reached by the Courts of Appeals

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[3] This part of the charges was that represented by a "New York State Surcharge," included by Davidson in its rate to recoup the cost of a New York ton-mile truck tax. The tariff including the surcharge had been filed to become effective October 8, 1951. The I. C. C. had suspended the tariff for the maximum period permitted by the Act, but since the inquiry as to its reasonableness was not completed within the suspension period it went into effect on May 8, 1952, and was in effect at the time of shipment. The I. C. C. subsequently found the surcharge to be unreasonable and ordered its excision from Davidson's rates, 62 M. C. C. 117. This order was purely prospective and did not affect the shipments involved here.

conflicted with this Court's decision in *Montana-Dakota Utilities Co.* v. *Northwestern Pub. Serv. Co.*, 341 U. S. 246, and in order to settle the questions of statutory interpretation involved.[4] 358 U. S. 810.

The courts below held that the right of the United States to resist on the ground of unreasonableness the payment of the charges incurred by it was one deriving from the common law and preserved by § 216 (j) of the Motor Carrier Act.[5] In this Court the Government, although defending this ground of decision, relies primarily on the proposition that the Motor Carrier Act itself creates a judicially enforceable right in a shipper to be free from the exaction of unreasonable charges as to past shipments even though such charges reflect applicable rates duly filed with the I. C. C. The Government concedes that whatever the source of the asserted right may be, the question of the reasonableness of past rates cannot itself be decided in the courts, but takes the position that when such question arises in court litigation it may properly be referred to the I. C. C. for decision, and the results of that adjudication used to determine the respective rights of the litigants.

I.

The contention that the Motor Carrier Act itself creates a cause of action or affords a defense with respect to the recovery of unreasonable rates rests on the provisions of

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[4] In our view of these cases it becomes unnecessary to consider Davidson's alternative contention that in any event the General Accounting Office had no right under § 322 of the Transportation Act of 1940 to deduct from the carrier's charges the amount claimed by the United States to have been unreasonable.

[5] Section 216 (j), 49 U. S. C. § 316 (j), provides that "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."

§§ 216 (b) and (d) of the Act, 49 U. S. C. §§ 316 (b), (d), which provide as to interstate motor carriers:

> "(b) It shall be the duty of every [such] common carrier . . . to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto . . . .
>
> . . . . .
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> "(d) All charges made for any service rendered or to be rendered by any [such] common carrier . . . shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. . . ."

The Government urges that this language imposes a statutory duty on motor carriers not to charge or collect other than "reasonable" rates, and asks us to imply a cause of action under the Motor Carrier Act for any shipper injured by violation of that duty. We cannot agree.

As this Court recognized in *Montana-Dakota Utilities Co.* v. *Northwestern Pub. Serv. Co.*, 341 U. S. 246, 251, language of this sort in a statute which entrusts rate regulation to an administrative agency in itself creates only a "criterion for administrative application in determining a lawful rate" rather than a "justiciable legal right." In *Montana-Dakota* it was held that the Federal Power Act, which like the Motor Carrier Act expressly declares unreasonable rates to be "unlawful," [6] does not create a cause of action for the recovery of allegedly unreasonable past

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[6] Section 205 (a) of the Power Act, 49 Stat. 851, 16 U. S. C. § 824d (a), provides that "All rates and charges . . . and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

rates. In the absence of any indication that Congress intended that despite the absence of any reparations power in the Federal Power Commission the federal courts should entertain suits for reparation of unreasonable rates, and refer to the Commission the controlling issue of past unreasonableness, the Court declined to permit the Commission to accomplish indirectly through such a proceeding that which Congress did not allow it to accomplish directly.

It is true that under Parts I and III of the Interstate Commerce Act, relating respectively to rail and water carriers, a shipper may litigate as to the reasonableness of past charges even if those charges were based on the applicable and effective filed rates. The structure and history of Part II (the Motor Carrier Act), however, lead to the conclusion that here, as in the Federal Power Act, Congress did not intend to give shippers a statutory cause of action for the recovery of allegedly unreasonable past rates, or to enable them to assert "unreasonableness" as a defense in carrier suits to recover applicable tariff rates.

The very provisions of Part I, and their counterparts in Part III, which give a right of action to shippers against carriers for damages incurred by carrier violations of the Act and provide the mechanics for the enforcement of that right are conspicuously absent in the Motor Carrier Act. Thus, whereas § 8 of Part I [7] provides that "any common carrier subject to the provisions of this chapter [who] shall do . . . any act . . . in this chapter . . . declared to be unlawful . . . shall be liable to the person or persons injured thereby for the full amount of the damages sustained . . . ," Part II has no comparable provision. Again, whereas § 9 of Part I [8] gives an injured shipper the right to sue in the I. C. C. or in the Federal District Court,

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[7] 49 U. S. C. § 8.

[8] 49 U. S. C. § 9.

Part II contains no comparable provision. In addition, §§ 13 (1) and 16 of Part I [9] give a shipper claiming reparation the right to proceed in the Commission and to enforce his reparation award in the courts, and Part II contains no comparable provisions.

To hold that the Motor Carrier Act nevertheless gives shippers a right of reparation with respect to allegedly unreasonable past filed tariff rates would require a complete disregard of these significant omissions in Part II of the very provisions which establish and implement a similar right as against rail carriers in Part I. We find it impossible to impute to Congress an intention to give such a right to shippers under the Motor Carrier Act when the very sections which established that right in Part I were wholly omitted in the Motor Carrier Act.

Further, the I. C. C. itself has consistently recognized that nothing in Part II creates a statutory liability on the part of the carrier for past allegedly unreasonable filed rates. In the hearings which preceded the passage of legislation in 1949 adding to the Motor Carrier Act a statute of limitations on suits to recover amounts paid to carriers in excess of applicable filed rates, proposals were also made to amend the statute by adding to it provisions similar to those already found in §§ 8, 9, 13, and 16 of Part I. The Commission noted that the proposal "would add to the Interstate Commerce Act a number of new sections which would make common carriers by motor vehicle . . . liable for the payment of damages to persons injured by them through violations of the act. At present this liability exists only in respect of carriers subject to parts I and III . . . ." [10] The suggested changes were not adopted. And in 1957 the Commission again

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[9] 49 U. S. C. §§ 13 (1), 16.

[10] Hearings before Senate Committee on Interstate and Foreign Commerce on S. 1194, 80th Cong., 2d Sess., pp. 1, 5, 11–12.

recommended amendment of the Motor Carrier Act to provide a remedy for violation of the statute to persons injured thereby,[11] and once more the measure failed of adoption.

In light of the statute and its history, it is plain that if a shipper has a "justiciable legal right" to recover or resist past motor carrier charges alleged to have been unreasonable, it is necessary to look beyond the Motor Carrier Act for the source of that right.

II.

The Government urges that even if the Motor Carrier Act does not grant the right which is claimed here, the Act must at least be read to preserve a pre-existing common-law right of that kind. It relies on § 216 (j) of the statute, 49 U. S. C. § 316 (j), as showing a congressional intention to confirm such a right in its statement that nothing in § 216 "shall be held to extinguish any remedy or right of action not inconsistent herewith." The contention is that the common law recognized the right of a shipper by common carrier to recover exorbitant rates paid under protest,[12] and that although the doctrine of primary jurisdiction requires that the issue of whether rates which are retrospectively challenged were in fact "unreasonable" be determined by the I. C. C., the common-law right may be vindicated in a suit in the courts through referral of the issue of "unreasonableness" to the Commission.

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[11] See Hearings before Senate Committee on Interstate and Foreign Commerce on S. 378, 85th Cong., 2d Sess., pp. 3, 12.

[12] Such a right was assumed by this Court to have existed at common law in *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436, and *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370. But see Aitchison, Fair Reward and Just Compensation, Common Carrier Service, p. 10, suggesting that the common-law right is one to be free from undue discrimination, rather than from mere exorbitance.

The saving clause of § 216 (j) must be read in light of the judicial decisions interpreting Part I of the Interstate Commerce Act before 1935, for the course of those decisions illuminates the significance of the striking differences which Congress saw fit to make between the provisions of Part I and those of the Motor Carrier Act. The landmark case is *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. There a shipper sued in a state court to recover the difference between an allegedly unreasonable charge exacted from it by a rail carrier pursuant to tariffs filed by the carrier with the I. C. C. and what was claimed would have been a just and reasonable charge. One of the issues before this Court was whether any common-law right to recover an exorbitant common carrier freight charge paid under protest survived the passage of the Interstate Commerce Act. The Court held, despite the existence in Part I of a saving clause much broader in scope than that here involved,[13] that because under the statutory scheme only the I. C. C. could decide in the first instance whether any filed rate was "unreasonable" either as to the past or future, any common-law right was necessarily extinguished as "absolutely inconsistent" with recognition of the Commission's primary jurisdiction. It is important to note that this conclusion did not rest upon the fact that under Part I the I. C. C. had reparations authority with respect to unreasonable charges paid by shippers, but instead was evidently dictated by the broader conclusion that the crucial question of reasonableness could not be decided by the courts.

Since the Government concedes that under Part II, as under Part I, the issue of the unreasonableness of rates

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[13] Section 22 of the Interstate Commerce Act provided at the time of the *Abilene* case, and continues in substance to provide, that: "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

cannot be adjudicated in the courts, it would seem to follow that the common-law right which the Government urges as surviving under § 216 (j) cannot in fact survive, since that clause preserves only "any remedy or right of action not inconsistent" with the statutory scheme. The Government urges, however, that there is nothing actually inconsistent with the Commission's primary jurisdiction in recognizing the survival of a common-law right, because the demands of primary jurisdiction can be satisfied by referral of the question of the reasonableness of the assailed rate to the I. C. C., and that although the Commission concededly has no independent authority to entertain and adjudicate a claim for reparations, it nevertheless should be permitted in effect to exercise such an authority as an adjunct to a judicial proceeding.

The question is, of course, one of statutory intent. We do not think that Congress, which we cannot assume was unaware of the holding of the *Abilene* case that a common-law right of action to recover unreasonable common carrier charges is incompatible with a statutory scheme in which the courts have no authority to adjudicate the primary question in issue, intended by the saving clause of § 216 (j) to sanction a procedure such as that here proposed. It would be anomalous to hold that Congress intended that the sole effect of the omission of reparations provisions in the Motor Carrier Act would be to require the shipper in effect to bring two lawsuits instead of one, with the parties required to file their complaint and answer in a court of competent jurisdiction and then immediately proceed to the I. C. C. to litigate what would ordinarily be the sole controverted issue in the suit. No convincing reason has been suggested to us why Congress would have wished to omit a direct reparations procedure, as it has concededly here done, and yet leave open to the shipper the circuitous route contended for.

To permit a utilization of the procedure here sought by the Government would be to engage in the very "improvisation" against which this Court cautioned in *Montana-Dakota, supra,* in order to permit the I. C. C. to accomplish indirectly what Congress has not chosen to give it the authority to accomplish directly. In the absence of the clearest indication that Congress intended that the Motor Carrier Act should preserve rights which could be vindicated only by such an improvisation, we must decline to consider a defense which "involves only issues which a federal court cannot decide and can only refer to a body which also would have no independent jurisdiction to decide . . . ." [14] *Montana-Dakota, supra,* at p. 255. The Government's reliance upon *United States* v. *Western Pacific R. Co.,* 352 U. S. 59, is misplaced, for in that case, involving Part I of the Interstate Commerce Act, the authority of the I. C. C. to determine the reasonableness of past filed rates in aid of court litigation was undoubted. The case decided no more than that referral to the I. C. C. of the issue of "unreasonableness" involved in the shipper's defense to the carrier's timely Tucker Act suit was not foreclosed by the fact that affirmative reparations relief before the Commission would have been barred by limitations. It has no bearing on the question whether

[14] It is noteworthy that in 1949, when Congress added to the Motor Carrier Act a statute of limitations provision governing suits by and against carriers involving charges, such provision was made applicable only to suits for "overcharges," defined to mean "charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission." 49 U. S. C. § 304a. It would be surprising, given the policy of uniformity reflected in this provision, for Congress not to have also added a statute of limitations provision applicable to suits on account of unreasonable rates, had a cause of action with respect to such rates been deemed to exist. Compare 49 U. S. C. § 16 (3)(b), providing a limitations provision for complaints for the recovery of damages "not based on overcharges" from rail carriers.

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a judicial remedy in respect of allegedly unreasonable past rates survived the passage of the Motor Carrier Act.

It is pointed out that the I. C. C. has long claimed the authority to make findings as to the reasonableness of past motor carrier rates embodied in tariffs duly filed with the Commission. It is true that in a series of cases beginning with *Barrows Porcelain Enamel Co.* v. *Cushman Motor Delivery Co.*, 11 M. C. C. 365, decided in 1939, divisions of the Commission, and eventually the Commission itself, *Bell Potato Chip Co.* v. *Aberdeen Truck Line*, 43 M. C. C. 337, announced that the I. C. C. possessed such authority. But in these cases the anterior question now before us, whether a shipper has a right, derived from outside the statute, to put the question of the reasonableness of past rates in issue in judicial proceedings, was given only cursory consideration or else wholly ignored.[15] The cases devoted themselves to searching out authorization in the Act for I. C. C. participation, by adjudication as to past unreasonableness, in the vindication of whatever reparation rights might exist.[16] The

[15] See, *e. g.*, *United States* v. *Davidson Transfer & Storage Co., Inc.*, 302 I. C. C. 87, 90–91, involving the same parties as those now before us in No. 96. *Barrows*, relied on heavily in the dissenting opinion because it was decided by a Division of the I. C. C. of which Commissioner Eastman, previously Federal Coordinator of Transportation and a principal architect of the Motor Carrier Act, was a member, does not even suggest that a common-law action to recover unreasonable rates might be maintainable. Rather it referred to findings as to the reasonableness of past rates only as "valuable future guides to shippers and carriers." 11 M. C. C., at 367.

[16] The *Bell* case purported to find such authorization in §§ 216 (e) and 204 (c) (49 U. S. C. §§ 316 (e), 304 (c)), although both these provisions appear in terms directed only to the authorization of findings and orders operating solely prospectively. It relied also on the provisions of the statute which impose on the carrier the duty of maintaining reasonable and nondiscriminatory rates. 49 U. S. C. § 316 (b), (d). But see *Montana-Dakota Utilities Co.* v. *Northwestern Pub. Serv. Co.*, *supra*.

Government is able to point to only two cases in addition to the present ones, in the 24 years since passage of the Motor Carrier Act, in which courts have appeared to assume that the issue of reasonableness of past motor carrier rates was litigable,[17] and in neither of these cases was the question given other than the most cursory attention. Under these circumstances the issue before us cannot fairly be said to be foreclosed by long-standing interpretation and understanding.

We are told that Congress has long been aware that the Commission was of the view that a common-law action for recovery of unreasonable rates paid to a motor carrier, with referral to the Commission of the issue of unreasonableness, would lie, and that its failure to legislate in derogation of this view implies an approval and acceptance of it. But it appears that each time the Commission's views in this regard were communicated to committees of Congress, it was in connection with a request by the Commission for legislation which would have given to shippers a cause of action under the statute and granted to the Commission the authority to award reparations, and each time that request was rejected.[18]

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[17] *New York & New Brunswick Auto Express Co.* v. *United States,* 130 Ct. Cl. 339, 126 F. Supp. 215; *United States* v. *Garner,* 134 F. Supp. 16 (D. C. E. D. N. C.).

[18] See notes 10, 11, *supra.*

It is suggested that Congress was fully informed at the time of passage of the Transportation Act of 1940 of "an existing interpretation" of the Motor Carrier Act which would allow common-law actions for the recovery of unreasonable rates. We do not so read the legislative history relied upon. On the contrary, Commissioner Eastman, testifying before the Senate Committee, appeared to distinguish between the availability of a judicial remedy in respect of inapplicable tariff rates and the unavailability of such a remedy in respect of rates claimed to be "unreasonable" though embodied in a filed tariff. The Commissioner said:

"So far as reparation is concerned, there is no reason why these

Had Congress been asked legislatively to overrule the doctrines enunciated in *Bell Potato Chip, supra,* and declined to do so, that fact would no doubt have been entitled to some weight in our interpretation of the Act. But we do not think that from the failure of Congress to grant a new authority any reliable inference can permissibly be drawn to the effect that any authority previously claimed was recognized and confirmed.

Finally, it is contended that denial of a remedy to the shipper who has paid unreasonable rates is to sanction

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provisions should not be applied to motor carriers as well as to railroads. They were omitted from the Motor Carrier Act only because of the desire to lighten the burdens of the motor carriers in the early stages of regulation, in the absence of any strong indication of public need. Motor carriers have practically no traffic which is noncompetitive, and there is little danger that they will exact exorbitant charges. Since the Motor Carrier Act became effective in 1935, the Commission has not once had occasion to condemn motor-carrier rates as unreasonably high. I don't think we have had any complaints to that effect. It follows that there is nothing to indicate that shippers need provisions to enable the Commission to award reparation for damages suffered because of unreasonable charges.

"The occasion for reparation from motor carriers would chiefly arise, therefore, in the event of overcharges above published tariff rates. Shippers can recover *such overcharges* in court as the law now stands." (Emphasis added.) Hearings before Senate Interstate Commerce Committee on S. 1310, S. 2016, S. 1869, and S. 2009, 76th Cong., 1st Sess., pp. 791–792.

See also Hearings at p. 132, where Senator Reed asked a truckers' representative opposing the addition of reparations provisions to the Motor Carrier Act "[I]f a shipper by railroad, which is one form of common carrier, now has a remedy at law in the way of damages which he may have suffered through a collection of an unreasonable rate, and if we are trying to make uniform regulations, why should a common carrier by truck be exempted from the right or remedy of the shipper against an unreasonable charge any more than any other form of common carrier?" The reparations provision was subsequently stricken from the bill.

injustice.[19] The fact that during the 24-year history of the Motor Carrier Act shippers have sought to secure adjudications in the I. C. C. as to the reasonableness of past rates on only a handful of occasions, despite the Commission's invitation to shippers to pursue that course in the line of cases culminating in *Bell Potato Chip, supra,* strongly suggests that few occasions have arisen where the application of filed rates has aggrieved shippers by motor carrier.[20] Furthermore, this contention overlooks the fact that Congress has in the Motor Carrier Act apparently sought to strike a balance between the interests of the shipper and those of the carrier, and that the statute cut significantly into pre-existing rights of the carrier to set his own rates and put them into immediate effect, at least so long as they were within the "zone of reasonableness." Under the Act a trucker can raise its rates only on 30 days' prior notice, and the I. C. C. may, on its own initiative or on complaint, suspend the effectiveness of the

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[19] But see Jaffe, Primary Jurisdiction Reconsidered, 102 U. of Pa. L. Rev. 577, 589, commenting on *Bell Potato Chip, supra:* "It is, to be sure, doubtful that reparations in such a case serve a useful function. Rates are under continuous scrutiny. Administrative condemnation implies new circumstances or new understanding rather than serious past injustice. And, as Mr. Justice Jackson observes in the *Montana-Dakota* case, the overcharge has usually been passed along by the one who paid it to some undiscoverable and unreimbursable consumer."

[20] It was recognized at the time of passage of the Motor Carrier Act that competitive conditions in the trucking industry were such that the possibility of unreasonably high rates presented no problem. Commissioner Eastman, who had conducted an inquiry into the motor carrier industry, stated during the hearings preceding passage of the Act that "I do not recall that there were any complaints based upon excessive charges." Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 5262, 6016, 74th Cong., 1st Sess., p. 32. See also his 1939 statement before the Interstate Commerce Committee of the Senate, quoted at note 18, *supra.*

proposed rate for an additional seven months while its reasonableness is scrutinized.[21] Even if the new rate is eventually determined to be reasonable, the carrier concededly has no avenue whereby to collect the increment of that rate over the previous one for the notice or suspension period. Thus although under the statutory scheme it is possible that a shipper will for a time be forced to pay a rate which he has challenged and which is eventually determined to be unreasonable as to the future, as when the suspension period expires before the I. C. C. has acted on the challenge, it is ordinarily the carrier, rather than the shipper, which is made to suffer by any period of administrative "lag." [22]

For the foregoing reasons the judgment of the Court of Appeals in each of these cases must fall.

Reversed.

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

There can be no serious doubt that at common law a cause of action existed against carriers who charged unreasonable rates. See *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436; *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 383.[1] Nor

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[21] See Motor Carrier Act, §§ 217 (c), 216 (g), 49 U. S. C. §§ 317 (c), 316 (g).

[22] Counsel for the Government stated on oral argument that the situation presented in No. 96, where the suspension period expired before the adjudication of the reasonableness of the challenged rate had been completed, arises very infrequently, since the suspension period is ordinarily ample to permit such adjudication.

[1] "The exaction of unreasonable rates by a public carrier was forbidden by the common law. . . . The public policy which underlay this rule could . . . be vindicated . . . in an action brought by him who paid the excessive charge, to recover damages thus sustained." 284 U. S., at 383.

can it be questioned that the Motor Carrier Act confirmed the common-law policy against unreasonable rates and in fact expressly made such rates illegal.[2] It is also clear that the Act attempted to preserve all pre-existing remedies which did not directly conflict with its aims.[3] Nevertheless the Court today holds that the statute abolished the common-law remedy by implication and left shippers helpless against carriers who have charged unreasonable and therefore illegal rates. To accomplish this result the Court relies essentially on two prior decisions of this Court; *Montana-Dakota Utilities Co.* v. *Northwestern Pub. Serv. Co.*, 341 U. S. 246, which I believe has virtually nothing to do with the issue, and *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, which, I think, supports a holding opposite to that which the Court makes today. Moreover, in reaching its conclusion, the Court overturns a long-standing and consistent I. C. C. interpretation of the Motor Carrier Act—an interpretation which was based in large part on the *Abilene* case, which was first formulated by men who helped draft the Act, and which has been generally accepted by shippers, carriers, and Congress alike. I am unable to understand why the Court strains so hard to reach so bad a result.

The Motor Carrier Act, though largely patterned after the Interstate Commerce Act of 1887 regulating rail-

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[2] 49 Stat. 543, as amended, 49 U. S. C. §§ 301–327. Section 216 (d) of the Act, as amended, 49 U. S. C. § 316 (d), reads in part: "All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property . . . shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful." See also § 216 (b), 49 U. S. C. § 316 (b).

[3] Section 216 (j), 49 U. S. C. § 316 (j) states "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."

roads, had no counterpart of §§ 8, 9, 13 and 16 of that Act.[4] These sections provided two remedies either of which a shipper could pursue to recover damages suffered as a result of unlawful carrier rates or practices. One remedy was by complaint to the Commission the other by suit brought in an appropriate District Court of the United States. Both these remedies authorized imposition of reasonable attorneys' fees on a carrier should a claim reach the court and be decided in the shipper's favor. See *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 432–433.

In *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, this Court considered the effect of these reparation sections on common-law actions by shippers for damages caused by rates alleged to be unlawful because unreasonable. The Court implied that the state court in which the shipper had sued had no jurisdiction since the congressional remedies in the reparation sections were complete and exclusive in themselves and supplanted the pre-existing common-law right of shippers to sue for damages caused by unreasonable rates, this right being deemed inconsistent with the statutory remedies; and held that the power to determine the reasonableness of rates was primarily and exclusively vested by the Act in the Commission. It did not hold, as the Court now assumes, that the existence of primary jurisdiction alone destroyed all court remedies. Accordingly, since the *Abilene* case, when the question of unreasonableness has arisen in court proceedings courts have often refused to dismiss the cause but have stayed the action pending I. C. C. determination of that issue. See, *e. g.*, *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247; *General Am. Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, 432–433; *United States* v. *Western P. R.*

[4] See 24 Stat. 382–384, as amended, 49 U. S. C. §§ 8, 9, 13, 16.

Co., 352 U. S. 59, 62–70.[5] The Court today seems to decide instead that primary jurisdiction is inconsistent with court remedies of any kind, and that the mere omission of reparations provisions in the Motor Carrier Act showed a congressional purpose to deprive shippers of the common-law right to obtain damages resulting from unreasonable rates. It reaches this conclusion although to do so leaves shippers with no remedy at all however unreasonable and unlawful a past rate may have been, and although there is not a word in the Act, and nothing to which we have been directed in its history, that shows any congressional purpose to take away the pre-existing remedy.

On the contrary, since passage of the Motor Carrier Act in 1935, a steady line of decisions by the I. C. C. has interpreted that Act as leaving shippers the right to sue in the courts for damages resulting from unlawful rates. This action lay only where the rates had not previously been held reasonable by the Commission, cf. *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 387–388, and consisted of two parts, (1) a suit by a shipper in a court, (2) a determination by the Commission that the rates sued on had, in fact, been unreasonable or otherwise unlawful when charged. The first case of this kind, *Barrows Porcelain Enam. Co.* v. *Cushman Motor Deliv. Co.*, 11 M. C. C. 365, was submitted to the Commission in April 1938, and handed down in February 1939. It was decided by Division 5 which was specially charged

[5] Conversely many instances have been cited of shippers seeking only a determination of the reasonableness of a past practice from the I. C. C. and reserving their rights to obtain damages later in the courts. See generally the discussion of this problem in *United States* v. *Interstate Commerce Comm'n*, 337 U. S. 426, 464–466 (dissenting opinion). See also *United States* v. *Interstate Commerce Comm'n*, 337 U. S. 426 (opinion of the Court).

with the administration of the Motor Carrier Act and was concurred in by Commissioner Eastman who had by then served on the Commission or as Coordinator of the Transportation System of the country for 17 years. He had drafted the 1935 Act and probably knew more about what it meant than anybody on this Court then or now.[6] Admitting that the Commission could not itself award reparations, Division 5 held, in *Barrows,* that it did have authority to pass on the reasonableness of past rates since unreasonable rates were unlawful under the Act. Significantly Division 5 stated, "This conclusion is, we believe, supported by the reasoning of the United States Supreme Court in *Texas & P. Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426." 11 M. C. C., at 367. *Barrows* was reaffirmed in early 1940 with Commissioner Eastman again on the panel.[7]

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[6] See Hearings, Senate Committee on Interstate Commerce on S. 1310, S. 2016, S. 1869, S. 2009, 76th Cong., 1st Sess. 756–757, 762, 785.

[7] *Dixie Mercerizing Co.* v. *ET & WNC Motor Transp. Co.,* 21 M. C. C. 491. The Court suggests that this line of cases gave only cursory treatment to the question of whether a court remedy existed. But in *Bell Potato Chip Co.* v. *Aberdeen Truck Line,* 43 M. C. C. 337, 341–343, the I. C. C. stated in part:

"To hold that a motor carrier which has violated any of these prescribed duties is immune to civil liability to one injured thereby while rail and water carriers similarly offending must respond in damages would be not only at variance with the fundamental rule of *ubi jus ibi remedium* but would also disregard the provisions of sections 216 (j), 217 (b), and 22, which preserve all common-law and statutory remedies. The statute, by declaring unlawful and prohibiting unreasonable and discriminatory rates, has superseded the common-law right but has not abrogated remedies heretofore recognized. See *Texas & P. Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426; *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.,* 230 U. S. 247, 258. . . .

"How, then, is a shipper who has been injured by the exaction of

In September 1940, after very extensive hearings, the Interstate Commerce Act was amended and broadened in many respects.[8] At the same time, water carriers were brought under Commission regulation. To achieve uniformity between the different parts of the Act, efforts were made to subject motor carriers to reparation proceedings before the Commission.[9] The representative of the motor carriers strenuously objected. The hearings before the Senate Committee on Interstate Commerce show that the objections were directed against subjection of motor carriers to *Commission* reparations not to common-law actions in the *courts*. Commission actions, it was stated, might result in the taxing of attorneys' fees in addition to damages and might thereby encourage "claim chasers." [10] The Committee members and the witnesses before Congress all appeared to recognize that suits could be filed in court. Thus the Chairman of the Committee stated "He has that right now. It does not add anything, as a matter of fact, to the rights of the shipper .... [I]f

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an unlawful motor-carrier rate to obtain redress against an unwilling carrier? The answer is, in the courts. . . .

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". . . In this connection, it may be noted that it is a recognized practice to hold in abeyance court proceedings pending the determination by the Commission of administrative questions. *Eastern-Central Motor Carriers Assn.* v. *United States*, 321 U. S. 194; *General American Tank Car Corp.* v. *El Dorado Term. Co.*, 308 U. S. 422; *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co., supra; Morrisdale Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 304, 314; *Southern Ry. Co.* v. *Tift*, 206 U. S. 428, 434."

[8] 54 Stat. 898.

[9] See, *e. g.*, statement of Senator Reed, Hearings, Senate Committee on Interstate and Foreign Commerce on S. 1310, S. 2016, S. 1869, S. 2009, 76th Cong., 1st Sess. 132.

[10] *Id.*, at 129–133.

you were afraid that the railroad might go and stir up a claim against [the truckers], they can do that now." [11] And the representative of the truckers answered "We are not fearful of that, but we are fearful of practices occurring where [the truckers] will be constantly harassed." To which a member of the Committee added "The objection is that under the existing law you have to go to the court to get relief and under the proposed law the Interstate Commerce Commission could give you relief?" [12] Commissioner Eastman also appeared before the Committee, two months after the *Barrows* opinion came down, and stated

> "[M]otor carrier tariffs have been, by and large, very imperfect products, and while the situation is improving continually, much room for improvement remains.
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> "Where tariffs are poorly worded and imperfectly constructed, experienced traffic experts can often raise troublesome questions as to the applicability of the rates charged, and there are those who make this their business, obtaining their compensation from such reparation awards as they are successful in securing.
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> . . . . .
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> "In the early stages of their regulation and tariff development, it was thought that the motor carriers might well be spared the burden of defending such claims before the Commission." [13]

Accordingly the Committee Report on the 1940 Act stated that the paragraph of the bill which would have

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[11] *Id.*, at 130.

[12] *Ibid.*

[13] *Id.*, at 792.

subjected the motor carriers to reparation claims before the Commission was changed

> "because of motor carrier objections to awards of reparation *by the Commission.* Shippers *have the right to recover in court* any damages *resulting from violations of the law by motor carriers* or carriers by water." S. Rep. No. 433, 76th Cong., 1st Sess. 18. (Emphasis supplied.) [14]

It seems clear, therefore, that when the 1940 Motor Carrier Act was adopted, at least the Senate Committee was fully informed of an existing interpretation of the 1935 Act under which shippers could sue for damages on the basis of unreasonable rates.

After the passage of the 1940 Act, Divisions of the Commission continued to construe the Motor Carrier law to allow determinations of the reasonableness of past rates. In 1942, for example, the Commission did this in a case involving the same question presented by the Government in T. I. M. E., No. 68—the reasonableness of a joint through rate which exceeds the aggregate of intermediate rates between the same points. The Commission held that on the facts presented the rates "were unreasonable . . . to the extent that they exceeded the corresponding aggregate . . . ." *Kingan & Co.* v. *Olson Trans. Co.,* 32 M. C. C. 10, 12. Finally in *Bell Potato Chip Co.* v. *Aberdeen Truck Line,* 43 M. C. C. 337, the whole Commission reviewed the question to provide a "precedent for future guidance" and emphatically approved the *Barrows* line of cases. It established safeguards against frivolous or moot complaints but

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[14] The statute expressly declares unreasonable rates unlawful. See note 2, *supra. Barrows Porcelain Enam. Co.* v. *Cushman Motor Deliv. Co.,* 11 M. C. C. 365, confirmed this fact as to past unreasonable rates.

reaffirmed the existence of court remedies for unreasonable rates and the need for Commission determinations of the fact of unreasonableness before the courts could award damages.

Both the *Bell* case and the *Barrows* case have been cited to Congressional Committees time and again. In 1947 and 1948 extended hearings were held before Senate and House Committees on bills to establish uniform statutes of limitations for court actions arising out of violations of the Commerce Act and to subject motor carriers and freight forwarders to Commission reparations.[15] Members of the I. C. C. in written statements, briefs and testimony, stressed to the Committees considering the bills both the existence of the court remedies described in the *Bell* case and the fact that few common-law actions were in fact undertaken because of the expense involved in a split procedure.[16] Witnesses for and against the bills accepted the rule of the *Bell* case.[17] Thus the representative of the freight forwarders, whose status under the Act is the same as that of motor carriers, referring to the *Bell* case said "It is the law today," and then added "If the Commission finds that the rates have been unreasonable in the past, damages may be obtained under the law as it stands today." [18] He opposed the proposed change because he felt that it would make it easier for shippers to obtain reparations where no dam-

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[15] See Hearings, House Committee on Interstate and Foreign Commerce on H. R. 2324, H. R. 2295, 80th Cong., 1st Sess.; Hearings, Senate Subcommittee of the Committee on Interstate and Foreign Commerce on S. 571–H. R. 2759, S. 935, S. 1194, S. 290–2426, 80th Cong., 2d Sess.

[16] Hearings, House Committee, *supra,* n. 15, at 5–6; Hearings, Senate Subcommittee, *supra,* n. 15, at 8–16.

[17] See, *e. g.,* Hearings, House Committee, *supra,* n. 15, at 41–47, 52.

[18] *Id.,* at 41, 42.

ages were actually suffered.[19] When the bills were reported by the Committees the provisions for reparations before the Commission were excluded. The report of the House Committee explained that reparations before the Commission were not available under the law as it stood. After stating that the bills originally had included reparation provisions before the Commission similar to those applied to rail carriers and that these had been dropped, the report incorporated a letter from the I. C. C. explaining the existence of the court remedy and pointing out the weaknesses of this remedy. The Committee then stated that legislation making additional reparations provisions applicable to motor carriers and freight forwarders was not at that time deemed desirable. It concluded that the other provisions, including a uniform statute of limitations in cases arising from the charging of tariffs different from those on file, should be enacted.[20] While Congress did not enact these measures before adjournment,[21] they were passed in the following Congress after Committee Reports which referred to the hearings of the prior two years.[22]

Once more, as late as 1957, after this Court's decision in *Montana-Dakota Utilities Co.* v. *Northwestern Pub. Serv. Co.*, 341 U. S. 246, the I. C. C. sought to have reparations before the Commission established. Again hearings were held; in these the Chairman of the I. C. C., the Under Secretary of Commerce, a representative of the freight forwarders and others unequivocally testified that a rem-

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[19] *Id.*, at 42–47.

[20] H. R. Rep. No. 208, 80th Cong., 1st Sess. 3, 4.

[21] The bill passed the House of Representatives but the Senate did not debate it before adjournment. See H. R. Rep. No. 766, 81st Cong., 1st Sess. 1; S. Rep. No. 83, 81st Cong., 1st Sess. 2.

[22] 63 Stat. 280. See H. R. Rep. No. 766, 81st Cong., 1st Sess.; S. Rep. No. 83, 81st Cong., 1st Sess.

edy for unreasonable past rates was available through the courts.[23] This testimony by the representative of the freight forwarders caused the presiding member of the Subcommittee to ask "What does this bill propose that is different from what we now have? That is what I am trying to determine." To which the representative, opposing Commission reparations, replied: "It just adds some cumbersome machinery that we think will cause litigation." [24]

This Court has frequently had occasion to say that interpretations of statutes by agencies charged with their administration are entitled to very great weight.[25] Moreover, the legislative history of bills attempting to grant the I. C. C. power to award reparations goes far, in view of the arguments made against them, toward approving the original interpretation of the Motor Carrier Act made by Division 5 of the I. C. C. and Commissioner Eastman. Recently, the Commission has reaffirmed its interpretation which has stood for more than 20 years.[26] Against reaffirmance a dissent was written based on the belief that this Court's holding in *Montana-Dakota Utilities Co.* v. *Northwestern Pub. Serv. Co.*, 341 U. S. 246, required a new interpretation. The Court seems to stress the same contention here. Quite apart from the fact that the question actually up for decision in *Montana-Dakota* was whether the Federal Power Act *created* a *federal* cause of action and not whether it

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[23] Hearings, Senate Subcommittee of Committee on Interstate and Foreign Commerce on S. 377, S. 378, S. 937, S. 939, S. 943, 85th Cong., 1st Sess. 3, 12, 49, 116–117, 137.

[24] *Id.*, at 1, 117.

[25] See, *e. g.*, *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378; *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140; cf. *Cammarano* v. *United States*, 358 U. S. 498.

[26] *United States* v. *Davidson Transfer & Storage Co.*, 302 I. C. C. 87.

destroyed common-law rights, I believe that there are important differences between the Power Act and the Motor Carrier Act which make the *Montana-Dakota* case wholly inapplicable here.

Admittedly *Montana-Dakota* and the statute it interpreted have some similarities to these cases and this statute. But unlike the Carrier Act the provisions of the Power Act under consideration in *Montana-Dakota* regulated wholesale rates, that is rates charged purchasers for resale, not rates charged retail customers.[27] The purpose of that Act was, nevertheless, to benefit consumers by holding down wholesale prices. Wholesalers whose purchase price was reduced prospectively could pass the reduction on to their customers, the consumers. In *Montana-Dakota* the Court indicated that the consumers would not be helped by *ex post facto* determinations of unreasonableness resulting in a refund to wholesalers. 341 U. S., at 254. The facts of the case lent themselves to such a finding. Damages were asked for a back period of many years; consumers had long since paid their rates on the basis of the unreasonable prices charged the wholesalers; and there was no reason to believe that any consumers who benefited from whatever lower prices the refund might allow would be the same ones who had paid the excessive rates. The Federal Power Commission, in an *amicus* brief, stressed these facts and argued that any refund would likely be a windfall providing an unjust enrichment to the wholesaler. Citing this brief the Court accepted the F. P. C. argument, 341 U. S., at 254, n. 11, over a vigorous dissent which indicated that perhaps ways of refunding the excess to consumers might be found. 341 U. S., at 265, 266. No similar problem exists under the Motor Carrier Act. The relevant sections were in large

[27] 41 Stat. 1063, as amended, 16 U. S. C. §§ 791a–825r.

measure designed to protect shippers,[28] and in fact the shippers are, in many instances, the ultimate parties on whom the burden falls. Both these cases are, of course, such instances. And even when the shippers are not necessarily the ultimate parties, the economics of the industry is such that windfalls to them are unlikely.

Similarly, other reasons which induced this Court's holding in *Montana-Dakota* are inapplicable here. In refusing to include in the Power Act provisions authorizing wholesalers to seek reparations before the Federal Power Commission, the Senate Committee which reported the bill said, "They are appropriate sections for a State utility law, but the committee does not consider them applicable to one governing merely wholesale transactions." [29] This report, unlike any in the Motor Carrier Act, is easily understood when read in the light of evidence presented to the Committee considering the Power Act. The reparation provisions of that Act were opposed by the National Association of Railroad and Utilities Commissioners, whose General Solicitor told the Committee:

> "That is an entirely proper provision in a railroad statute. When a man goes to the railroad station with a load of goods to ship somewhere he has to ship at the rate that is fixed in the tariff. He must make the shipment then; and he ought to be able to come thereafter to the Commission and show that he was required to pay an unreasonable rate, if it was unreasonable, and to ask for a determination of a reasonable rate and get reparation that is due him for any overpayment. That is perfectly proper. But this bill relates only to service *between the wholesale gen-*

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[28] See testimony of Commissioner Eastman in Hearings, Senate Subcommittee on Interstate and Foreign Commerce on S. 1310, S. 2016, S. 1869, S. 2009, 76th Cong., 1st Sess. 792.

[29] S. Rep. No. 621, 74th Cong., 1st Sess. 20.

> *erating or producing company and the distributing utility.* We question whether the *public interest will be served by giving any company the right to go ahead receiving service at the established rate for 2 years, and then to bring a complaint before the Federal Commission that the rate has been unreasonable.*" [30]

The testimony was emphasized, as shown above, in the briefs in *Montana-Dakota.*[31] Doubtless this history led the minority as well as the majority in that case to the view that "Congress did not intend either court or Commission to have the power to award reparations on the ground that a properly filed rate or charge has in fact been unreasonably high or low." 341 U. S., at 258. Since the history of the Motor Carrier Act points in the opposite direction there is no reason to apply the *Montana-Dakota* case to the Motor Carrier Act.

Moreover, if motor carrier shippers are deprived of court actions to recover for unreasonable rates, they are placed in a much worse position than wholesale power purchasers. 16 U. S. C. § 824d (e) authorizes the Power Commission to suspend rates for five months and, if a hearing on those rates is not concluded by that time, to order the power company to keep an accurate account of the amount and source of all money received. Should the rates be found unreasonable, the Commission can order the excess refunded with interest. The Motor Carrier Act, on the other hand, while authorizing suspension of rates, has no provision for refunds if hearings are not completed when the suspension expires. § 216 (g), 49 U. S. C. § 316 (g). Had there been such a provision in

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[30] Hearings, House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st Sess. 1685.

[31] See Brief of Respondent Northwestern Pub. Serv. Co., pp. 26–27; Brief of the Federal Power Commission as *amicus curiae,* p. 13.

the Carrier Act the Government would have been fully protected from the rates charged in the *Davidson* case, No. 96.

The Power Act and the Motor Carrier Act are quite different in language, scope, purpose and meaning. The Court in *Montana-Dakota* carefully limited its holding to the Power Act, *e. g.*, 341 U. S., at 254. The arguments advanced in that context for the conclusive effect of power rates once filed are wholly inapplicable to rates under the Motor Carrier Act. In these Motor Carrier cases we have 20 years of Commission interpretation, in part by men who helped write the Act and who administered it from the time it first went into effect, to help us in deciding the question. Congress passed the 1940 revision of the Motor Carrier Act, apparently with full knowledge of the Commission rulings which indicated that shippers could challenge, in the courts, carrier-fixed rates so long as these rates had not been expressly held reasonable by the Commission. Cf. *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370. The changes made in 1949, and those not made in 1957, again indicate a reliance on the Commission's interpretation. I believe that interpretation should govern here, and therefore would affirm the judgments of the Courts of Appeals in both these cases.

PATTERSON, GENERAL ADMINISTRATOR, ET AL. *v.* UNITED STATES.

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

No. 429. Argued April 21, 1959.—Decided May 18, 1959.

Civilian employees of the United States who are entitled to the benefits of the Federal Employees' Compensation Act and who are injured in the performance of duty as seamen on vessels owned and operated by the Government and engaged in merchant service do not have a right of action against the Government under the Suits in Admiralty Act. Pp. 495–497.

258 F. 2d 702, affirmed.

Jacob Rassner argued the cause and filed a brief for petitioners.

Leavenworth Colby argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Seymour Farber.*

PER CURIAM.

Petitioners, Melvin A. Hays, Sterling E. Duncan, and Leonard L. Sullivan, were injured in the course of their employment with the United States while aboard vessels operated by the Government and engaged in merchant service. Petitioner Patterson is the administrator of the estate of Edgar A. Doody, Jr., who died as the result of injuries sustained by him while he was similarly employed. Each of the petitioners filed a libel *in personam* against the United States under the Suits in Admiralty Act, 41 Stat. 525 *et seq.*, 46 U. S. C. § 741 *et seq.* The Court of Appeals for the Second Circuit affirmed dismissal of the libels on the ground that petitioners' exclusive remedy was under the Federal Employees' Compensation Act,

39 Stat. 742 *et seq.*, 5 U. S. C. § 751 *et seq.*, 258 F. 2d 702. We granted certiorari, 358 U. S. 898, to resolve a conflict between the decision below and that of the Court of Appeals for the Eighth Circuit in *Inland Waterways Corp.* v. *Doyle,* 204 F. 2d 874.

In *Johansen* v. *United States,* 343 U. S. 427, 441, the Court held "that the Federal Employees Compensation Act is the exclusive remedy for civilian . . ." employees of the United States on government vessels engaged in public service and that the United States was therefore not liable to such employees under the Public Vessels Act. 43 Stat. 1112 *et seq.*, 46 U. S. C. § 781 *et seq.* The considerations which led to that conclusion are equally applicable to cases where the government vessel is engaged in merchant service. The United States "has established by the Compensation Act a method of redress for its employees. There is no reason to have two systems of redress." 343 U. S., at 439.[1]

The major portion of petitioners' argument, however, is addressed to the proposition that *Johansen* was incorrectly decided and that we should avail ourselves of this opportunity to reconsider it. We decline to do so. No arguments are presented by petitioners which were not fully considered in *Johansen* and rejected. "[W]hen the questions are of statutory construction, not of constitutional import, Congress can rectify our mistake, if such it was, or change its policy at any time, and in these circumstances reversal is not readily to be made." *United States* v. *South Buffalo R. Co.,* 333 U. S. 771, 774–775. If civilian seamen employed by the Government are to

[1] It is worthy of note that in *Johansen* the Court expressly disapproved the decision in *United States* v. *Marine,* 155 F. 2d 456, in which a civilian employee of the Government was awarded damages under the Suits in Admiralty Act for injuries sustained by him while aboard a vessel operated by the United States in the merchant service.

be accorded rights different from or greater than those which they enjoy under the Compensation Act, it is for Congress to provide them.[2]

Accordingly, the judgments of dismissal entered against petitioners Hays, Duncan, Sullivan, and Patterson are affirmed. We also affirm dismissal of the libel filed by petitioner Vallebuona, who has conceded that he could prevail only if *Johansen* were overruled.

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent.

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[2] The Clarification Act of 1943, 57 Stat. 45, 50 U. S. C. App. § 1291, indicates that Congress has chosen with care the remedies which it has made available to civilian seamen employed by the United States. That legislation provided that "officers and members of crews . . . employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration, . . . because of the temporary wartime character of their employment by the War Shipping Administration, shall not be considered as officers or employees of the United States for the purposes of the United States Employees Compensation Act, as amended . . . ."

DeVRIES ET AL. *v.* BAUMGARTNER'S ELECTRIC CONSTRUCTION CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA.

No. 551. Decided May 18, 1959.

Certiorari granted and judgment reversed.
Reported below: 77 S. D. —, 91 N. W. 2d 663.

Louis Sherman and *Joseph M. Stone* for petitioners.
Melvin T. Woods for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is reversed. *San Diego Building Trades Council* v. *Garmon, ante,* p. 236.

MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE WHITTAKER, and MR. JUSTICE STEWART dissent for the reasons set forth in the concurring opinion in *San Diego Building Trades Council* v. *Garmon, ante,* pp. 236, 249.

ANDERSON ET AL. *v.* CITY OF CEDAR RAPIDS.

APPEAL FROM THE SUPREME COURT OF IOWA.

No. 786. Decided May 18, 1959.

Appeal dismissed for want of a substantial federal question.
Reported below: 250 Iowa —, 93 N. W. 2d 216.

Ernest F. Pence and *Roy A. Golden* for appellants.
William M. Dallas for appellee.

PER CURIAM.

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

DYER ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL.

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

No. 67. Decided May 18, 1959.

Certiorari granted; judgment vacated; case remanded for further consideration.

Reported below: 251 F. 2d 512.

J. Raymond Dyer for petitioners.

Solicitor General Rankin, Thomas G. Meeker, Aaron Levy, Solomon Freedman and *Joseph S. Mitchell, Jr.* for the Securities and Exchange Commission, respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the United States Court of Appeals for the Eighth Circuit is vacated and the case is remanded to that court for further consideration in the light of its decision in *Dyer* v. *Securities & Exchange Comm'n,* No. 15989, decided April 10, 1959, 266 F. 2d 33.

CADY *v.* IOWA.

APPEAL FROM THE SUPREME COURT OF IOWA.

No. 718, Misc. Decided May 18, 1959.

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.

BEACON THEATRES, INC., *v.* WESTOVER, U. S. DISTRICT JUDGE, ET AL.

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

No. 45. Argued December 10, 1958.—Decided May 25, 1959.

In anticipation of a suit by petitioner for treble damages under the Sherman and Clayton Acts, the prospective defendant brought suit against petitioner in a Federal District Court for a declaratory judgment which would have settled some of the key issues in such an antitrust suit and prayed that the bringing of such a suit be enjoined pending outcome of the declaratory judgment litigation. Petitioner filed a counterclaim raising the issues which would have been raised in the antitrust suit for treble damages and demanded a jury trial. Purporting to act in the exercise of its discretion under Rules 42 (b) and 57 of the Federal Rules of Civil Procedure, the District Court ruled that it would try in equity without a jury the issues common to both proceedings before trying petitioner's counterclaim. The Court of Appeals held that the District Court had acted within the proper scope of its discretion, and it denied petitioner's application for a writ of mandamus requiring the District Court to set aside its ruling. *Held:* The judgment of the Court of Appeals is reversed. Pp. 501–511.

1. The District Court's finding that the complaint for declaratory relief presented basically equitable issues draws no support from the Declaratory Judgment Act, which specifically preserves the right to a jury trial for both parties. P. 504.

2. If petitioner would have been entitled to a jury trial in a treble damage suit, he cannot be deprived of that right merely because the prospective defendant took advantage of the availability of declaratory relief to sue petitioner first. P. 504.

3. Since the right to trial by jury applies to treble damage suits under the antitrust laws and is an essential part of the congressional plan for making competition rather than monopoly the rule of trade, the antitrust issues raised in the declaratory judgment suit were essentially jury questions. P. 504.

4. Assuming that the pleadings can be construed to support a request for an injunction against threats of lawsuits and as alleging the kind of harassment by a multiplicity of lawsuits which would traditionally have justified equity in taking jurisdiction and set-

tling the case in one suit, nevertheless, under the Declaratory Judgment Act and the Federal Rules of Civil Procedure, neither claim can justify denying petitioner a trial by jury of all the issues in the antitrust controversy. Pp. 506–511.

(a) Today the existence of irreparable harm and inadequacy of legal remedies as a basis of injunctive relief must be determined, not by precedents under discarded procedures, but in the light of the remedies now made available by the Declaratory Judgment Act and the Federal Rules of Civil Procedure. Pp. 506–510.

(b) Viewed in this manner, the use of discretion by the District Court under Rule 42 (b) to deprive petitioner of a full jury trial of the issues in the antitrust controversy cannot be justified. P. 508.

5. Mandamus is available under the All Writs Act, 28 U. S. C. § 1651, to require jury trial where it has been improperly denied. P. 511.

252 F. 2d 864, reversed.

Jack Corinblit argued the cause for petitioner. With him on the brief was *Elwood S. Kendrick.*

Frank R. Johnston argued the cause for respondents. With him on the brief was *Hudson B. Cox.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner, Beacon Theatres, Inc., sought by mandamus to require a district judge in the Southern District of California to vacate certain orders alleged to deprive it of a jury trial of issues arising in a suit brought against it by Fox West Coast Theatres, Inc. The Court of Appeals for the Ninth Circuit refused the writ, holding that the trial judge had acted within his proper discretion in denying petitioner's request for a jury. 252 F. 2d 864. We granted certiorari, 356 U. S. 956, because "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick* v. *Schiedt,* 293 U. S. 474, 486.

Fox had asked for declaratory relief against Beacon alleging a controversy arising under the Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2, and under the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, which authorizes suits for treble damages against Sherman Act violators. According to the complaint Fox operates a movie theatre in San Bernardino, California, and has long been exhibiting films under contracts with movie distributors. These contracts grant it the exclusive right to show "first run" pictures in the "San Bernardino competitive area" and provide for "clearance"—a period of time during which no other theatre can exhibit the same pictures. After building a drive-in theatre about 11 miles from San Bernardino, Beacon notified Fox that it considered contracts barring simultaneous exhibitions of first-run films in the two theatres to be overt acts in violation of the antitrust laws.[1] Fox's complaint alleged that this notification, together with threats of treble damage suits against Fox and its distributors, gave rise to "duress and coercion" which deprived Fox of a valuable property right, the right to negotiate for exclusive first-run contracts. Unless Beacon was restrained, the complaint continued, irreparable harm would result. Accordingly, while its pleading was styled a "Complaint for Declaratory Relief," Fox prayed both for a declaration that a grant of clearance between the Fox and Beacon theatres is reasonable and

[1] Beacon allegedly stated that the clearances granted violated both the antitrust laws and the decrees issued in *United States* v. *Paramount Pictures, Inc.*, 66 F. Supp. 323, 70 F. Supp. 53, affirmed in part and reversed in part, 334 U. S. 131, subsequent proceedings in the District Court, 85 F. Supp. 881. The decrees in that case set limits on what clearances could be given when theatres were in competition with each other and held that there should be no clearances between theatres not in substantial competition. Neither Beacon nor Fox, however, appears to have been a party to those decrees. Their relevance, therefore, seems to be only that of significant precedents.

not in violation of the antitrust laws, and for an injunction, pending final resolution of the litigation, to prevent Beacon from instituting any action under the antitrust laws against Fox and its distributors arising out of the controversy alleged in the complaint.[2] Beacon filed an answer, a counterclaim against Fox, and a cross-claim against an exhibitor who had intervened. These denied the threats and asserted that there was no substantial competition between the two theatres, that the clearances granted were therefore unreasonable, and that a conspiracy existed between Fox and its distributors to manipulate contracts and clearances so as to restrain trade and monopolize first-run pictures in violation of the antitrust laws. Treble damages were asked.

Beacon demanded a jury trial of the factual issues in the case as provided by Federal Rule of Civil Procedure 38 (b). The District Court, however, viewed the issues raised by the "Complaint for Declaratory Relief," including the question of competition between the two theatres, as essentially equitable. Acting under the purported authority of Rules 42 (b) and 57, it directed that these issues be tried to the court before jury determination of the validity of the charges of antitrust violations made in the counterclaim and cross-claim.[3] A common issue of the "Complaint for Declaratory Relief," the counterclaim, and the cross-claim was the reasonableness of the clearances granted to Fox, which depended, in part, on the

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[2] Other prayers aside from the general equitable plea for "such further relief as the court deems proper" added nothing material to those set out.

[3] Fed. Rules Civ. Proc., 42 (b) reads: "The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues." Rule 57 reads in part: "The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

existence of competition between the two theatres. Thus the effect of the action of the District Court could be, as the Court of Appeals believed, "to limit the petitioner's opportunity fully to try to a jury every issue which has a bearing upon its treble damage suit," for determination of the issue of clearances by the judge might "operate either by way of res judicata or collateral estoppel so as to conclude both parties with respect thereto at the subsequent trial of the treble damage claim." 252 F. 2d, at 874.

The District Court's finding that the Complaint for Declaratory Relief presented basically equitable issues draws no support from the Declaratory Judgment Act, 28 U. S. C. §§ 2201, 2202; Fed. Rules Civ. Proc., 57. See also 48 Stat. 955, 28 U. S. C. (1940 ed.) § 400. That statute, while allowing prospective defendants to sue to establish their nonliability, specifically preserves the right to jury trial for both parties.[4] It follows that if Beacon would have been entitled to a jury trial in a treble damage suit against Fox it cannot be deprived of that right merely because Fox took advantage of the availability of declaratory relief to sue Beacon first. Since the right to trial by jury applies to treble damage suits under the antitrust laws, and is, in fact, an essential part of the congressional plan for making competition rather than monopoly the rule of trade, see *Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U. S. 27, 29, the Sherman and Clayton Act issues on which Fox sought a declaration were essentially jury questions.

Nevertheless the Court of Appeals refused to upset the order of the district judge. It held that the question of whether a right to jury trial existed was to be judged

[4] See, *e. g.*, (*American*) *Lumbermens Mut. Cas. Co.* v. *Timms & Howard, Inc.*, 108 F. 2d 497; *Hargrove* v. *American Cent. Ins. Co.*, 125 F. 2d 225; *Johnson* v. *Fidelity & Casualty Co.*, 238 F. 2d 322. See Fed. Rules Civ. Proc., 57, 38, 39.

by Fox's complaint read as a whole. In addition to seeking a declaratory judgment, the court said, Fox's complaint can be read as making out a valid plea for injunctive relief, thus stating a claim traditionally cognizable in equity. A party who is entitled to maintain a suit in equity for an injunction, said the court, may have all the issues in his suit determined by the judge without a jury regardless of whether legal rights are involved. The court then rejected the argument that equitable relief, traditionally available only when legal remedies are inadequate, was rendered unnecessary in this case by the filing of the counterclaim and cross-claim which presented all the issues necessary to a determination of the right to injunctive relief. Relying on *American Life Ins. Co.* v. *Stewart,* 300 U. S. 203, 215, decided before the enactment of the Federal Rules of Civil Procedure, it invoked the principle that a court sitting in equity could retain jurisdiction even though later a legal remedy became available. In such instances the equity court had discretion to enjoin the later lawsuit in order to allow the whole dispute to be determined in one case in one court.[5] Reasoning by analogy, the Court of Appeals held it was not an abuse of discretion for the district judge, acting under Federal Rule of Civil Procedure 42 (b), to try the equitable cause first even though this might, through collateral estoppel, prevent a full jury trial of the counterclaim and cross-claim which were as effectively stopped as by an equity injunction.[6]

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[5] Compare *Enelow* v. *New York Life Ins. Co.,* 293 U. S. 379, with *American Life Ins. Co.* v. *Stewart,* 300 U. S. 203. See also *City of Morgantown* v. *Royal Ins. Co.,* 337 U. S. 254; *Peake* v. *Lincoln Nat. Life Ins. Co.,* 15 F. 2d 303.

[6] 252 F. 2d, at 874. In *Ettelson* v. *Metropolitan Life Ins. Co.,* 317 U. S. 188, 192, this Court recognized that orders enabling equitable causes to be tried before legal ones had the same effect as injunctions. In *City of Morgantown* v. *Royal Ins. Co.,* 337 U. S. 254, the Court denied at least some such orders the status of injunctions for the pur-

Beacon takes issue with the holding of the Court of Appeals that the complaint stated a claim upon which equitable relief could be granted. As initially filed the complaint alleged that threats of lawsuits by petitioner against Fox and its distributors were causing irreparable harm to Fox's business relationships. The prayer for relief, however, made no mention of the threats but asked only that pending litigation of the claim for declaratory judgment, Beacon be enjoined from beginning any lawsuits under the antitrust laws against Fox and its distributors arising out of the controversy alleged in the complaint. Evidently of the opinion that this prayer did not state a good claim for equitable relief, the Court of Appeals construed it to include a request for an injunction against threats of lawsuits. This liberal construction of a pleading is in line with Rule 8 of the Federal Rules of Civil Procedure. See *Conley* v. *Gibson,* 355 U. S. 41, 47–48. But this fact does not solve our problem. Assuming that the pleadings can be construed to support such a request and assuming additionally that the complaint can be read as alleging the kind of harassment by a multiplicity of lawsuits which would *traditionally* have justified equity to take jurisdiction and settle the case in one suit,[7] we are nevertheless of the opinion that, under the Declaratory Judgment Act and the Federal Rules of Civil Procedure, neither claim can justify denying Beacon a trial by jury of all the issues in the antitrust controversy.

The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal

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poses of appealability. It did not, of course, imply that when the orders came to be reviewed they would be examined any less strictly than injunctions. 337 U. S., at 258.

[7] See, *e. g., Smyth* v. *Ames,* 169 U. S. 466, 515; *Detroit* v. *Detroit Citizens' Street R. Co.,* 184 U. S. 368, 378–382; cf. *Matthews* v. *Rodgers,* 284 U. S. 521.

remedies.[8] At least as much is required to justify a trial court in using its discretion under the Federal Rules to allow claims of equitable origins to be tried ahead of legal ones, since this has the same effect as an equitable injunction of the legal claims. And it is immaterial, in judging if that discretion is properly employed, that before the Federal Rules and the Declaratory Judgment Act were passed, courts of equity, exercising a jurisdiction separate from courts of law, were, in some cases, allowed to enjoin subsequent legal actions between the same parties involving the same controversy. This was because the subsequent legal action, though providing an opportunity to try the case to a jury, might not protect the right of the equity plaintiff to a fair and orderly adjudication of the controversy. See, *e. g., New York Life Ins. Co.* v. *Seymour,* 45 F. 2d 47. Under such circumstances the legal remedy could quite naturally be deemed inadequate. Inadequacy of remedy and irreparable harm are practical terms, however. As such their existence today must be determined, not by precedents decided under discarded procedures, but in the light of the remedies now made available by the Declaratory Judgment Act and the Federal Rules.[9]

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[8] *E. g., Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 13 How. 518, 561; *Parker* v. *Winnipiseogee Lake Cotton & Woollen Co.,* 2 Black 545, 551; *Enelow* v. *New York Life Ins. Co.,* 293 U. S. 379.

[9] See, *e. g.,* Cook, Cases on Equity (4th ed.), 18; 4 Pomeroy, Equity Jurisprudence (5th ed.), § 1370; 5 Moore, Federal Practice, 154–158; Morris, Jury Trial Under the Federal Fusion of Law and Equity, 20 Tex. L. Rev. 427, 441–443. Cf. *Maryland Theater Corp.* v. *Brennan,* 180 Md. 377, 389, 24 A. 2d 911; *Hasselbring* v. *Koepke,* 263 Mich. 466, 248 N. W. 869. But cf. 1 Pomeroy, Equity Jurisprudence (5th ed.), §§ 182, 183. Significantly the Court of Appeals itself relied on the procedural changes brought about by the Federal Rules when it found the plea for equitable relief valid, for it did so by relying on *Conley* v. *Gibson,* 355 U. S. 41, which emphasized the liberal construction policies of the Rules.

495957 O–59–37

Viewed in this manner, the use of discretion by the trial court under Rule 42 (b) to deprive Beacon of a full jury trial on its counterclaim and cross-claim, as well as on Fox's plea for declaratory relief, cannot be justified. Under the Federal Rules the same court may try both legal and equitable causes in the same action. Fed. Rules Civ. Proc., 1, 2, 18. Thus any defenses, equitable or legal, Fox may have to charges of antitrust violations can be raised either in its suit for declaratory relief or in answer to Beacon's counterclaim. On proper showing, harassment by threats of other suits, or other suits actually brought, involving the issues being tried in this case, could be temporarily enjoined pending the outcome of this litigation. Whatever permanent injunctive relief Fox might be entitled to on the basis of the decision in this case could, of course, be given by the court after the jury renders its verdict. In this way the issues between these parties could be settled in one suit giving Beacon a full jury trial of every antitrust issue. Cf. *Ring* v. *Spina,* 166 F. 2d 546. By contrast, the holding of the court below while granting Fox no additional protection unless the avoidance of jury trial be considered as such, would compel Beacon to split his antitrust case, trying part to a judge and part to a jury.[10] Such a result, which involves the postponement and subordination of Fox's own legal claim for declaratory relief as well as of the counterclaim which Beacon was compelled by the Federal Rules to bring,[11] is not permissible.

Our decision is consistent with the plan of the Federal Rules and the Declaratory Judgment Act to effect

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[10] Since the issue of violation of the antitrust laws often turns on the reasonableness of a restraint on trade in the light of all the facts, see, *e. g., Standard Oil Co.* v. *United States,* 221 U. S. 1, 60, it is particularly undesirable to have some of the relevant considerations tried by one fact finder and some by another.

[11] Fed. Rules Civ. Proc., 13 (a).

substantial procedural reform while retaining a distinction between jury and nonjury issues and leaving substantive rights unchanged.[12] Since in the federal courts equity has always acted only when legal remedies were inadequate,[13] the expansion of adequate legal remedies provided by the Declaratory Judgment Act and the Federal Rules necessarily affects the scope of equity. Thus, the justification for equity's deciding legal issues once it obtains jurisdiction, and refusing to dismiss a case, merely because subsequently a legal remedy becomes available, must be re-evaluated in the light of the liberal joinder provisions of the Federal Rules which allow legal and equitable causes to be brought and resolved in one civil action.[14] Similarly the need for, and therefore, the availability of such equitable remedies as Bills of Peace, *Quia Timet* and Injunction must be reconsidered in view of the existence of the Declaratory Judgment Act as well as the liberal joinder provision of the Rules.[15] This is not only in accord with the spirit of the Rules and the Act

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[12] See 28 U. S. C. § 2072; Fed. Rules Civ. Proc., 39 (a), 57. See also *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368, 382, n. 26; *United States* v. *Yellow Cab Co.*, 340 U. S. 543, 555–556.

[13] See 36 Stat. 1163, derived from Act of Sept. 24, 1789, § 16, 1 Stat. 82. This provision, which antedates the Seventh Amendment, is discussed in 5 Moore, Federal Practice, 32. See, *e. g.*, *Hipp* v. *Babin*, 19 How. 271, 277–278; *Insurance Co.* v. *Bailey*, 13 Wall. 616, 620–621; *Grand Chute* v. *Winegar*, 15 Wall. 373; *Buzard* v. *Houston*, 119 U. S. 347, 351–352.

[14] See Fed. Rules Civ. Proc., 1, 2, 18. Cf. *Prudential Ins. Co.* v. *Saxe*, 134 F. 2d 16, 31–34; Morris, Jury Trial Under the Federal Fusion of Law and Equity, 20 Tex. L. Rev. 427, 441–443.

[15] See 1 Pomeroy, Equity Jurisprudence (5th ed.), §§ 251¾, 254, 264 (b); 5 Moore, Federal Practice, 32; but cf. *id.*, 209–211. See also, Note, The Joinder Rules and Equity Jurisdiction in the Avoidance of a Multiplicity of Suits, 12 Md. L. Rev. 88. Of course, unless there is an issue of a right to jury trial or of other rights which depend on whether the cause is a "legal" or "equitable" one, the question of adequacy of legal remedies is purely academic and need not arise.

but is required by the provision in the Rules that "[t]he right to trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved . . . inviolate." [16]

If there should be cases where the availability of declaratory judgment or joinder in one suit of legal and equitable causes would not in all respects protect the plaintiff seeking equitable relief from irreparable harm while affording a jury trial in the legal cause, the trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first. Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court,[17] that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial. As this Court said in *Scott* v. *Neely*, 140 U. S. 106, 109–110: "In the Federal courts this [jury] right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency." [18] This long-standing principle of equity dictates that only under the

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[16] Fed. Rules Civ. Proc., 38 (a). In delegating to the Supreme Court responsibility for drawing up rules, Congress declared that: "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." 28 U. S. C. § 2072. The Seventh Amendment reads: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

[17] See *Hurwitz* v. *Hurwitz*, 78 U. S. App. D. C. 66, 136 F. 2d 796, 798–799; cf. *The Genesee Chief* v. *Fitzhugh*, 12 How. 443, 459–460.

[18] This Court has long emphasized the importance of the jury trial. See *Parsons* v. *Bedford*, 3 Pet. 433, 446. See also *Galloway* v. *United States*, 319 U. S. 372. *Id.*, at 396 (dissenting opinion).

most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate,[19] can the right to a jury trial of legal issues be lost through prior determination of equitable claims. See *Leimer* v. *Woods,* 196 F. 2d 828, 833–836. As we have shown, this is far from being such a case.

Respondent claims mandamus is not available under the All Writs Act, 28 U. S. C. § 1651. Whatever differences of opinion there may be in other types of cases, we think the right to grant mandamus to require jury trial where it has been improperly denied is settled.[20]

The judgment of the Court of Appeals is

Reversed.

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

MR. JUSTICE STEWART, with whom MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER concur, dissenting.

There can be no doubt that a litigant is entitled to a writ of mandamus to protect a clear constitutional or statutory right to a jury trial. But there was no denial of such a right here. The district judge simply exercised his inherent discretion, now explicitly confirmed by the Federal Rules of Civil Procedure, to schedule the trial of an equitable claim in advance of an action at law. Even an abuse of such discretion could not, I think, be attacked

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[19] For an example of the flexible procedures available under the Federal Rules, see *Ring* v. *Spina,* 166 F. 2d 546, 550.

[20] *E. g., Ex parte Simons,* 247 U. S. 231, 239–240; *Ex parte Peterson,* 253 U. S. 300, 305–306; *Bereslavsky* v. *Caffey,* 161 F. 2d 499 (C. A. 2d Cir.); *Canister Co.* v. *Leahy,* 191 F. 2d 255 (C. A. 3d Cir.); *Black* v. *Boyd,* 248 F. 2d 156, 160–161 (C. A. 6th Cir.). Cf. *Bruckman* v. *Hollzer,* 152 F. 2d 730 (C. A. 9th Cir.). But cf. *In re Chappell & Co.,* 201 F. 2d 343 (C. A. 1st Cir.). See also *La Buy* v. *Howes Leather Co.,* 352 U. S. 249.

by the extraordinary writ of mandamus.[1] In any event no abuse of discretion is apparent in this case.

The complaint filed by Fox stated a claim traditionally cognizable in equity. That claim, in brief, was that Beacon had wrongfully interfered with the right of Fox to compete freely with Beacon and other distributors for the licensing of films for first-run exhibition in the San Bernardino area. The complaint alleged that the plaintiff was without an adequate remedy at law and would be irreparably harmed unless the defendant were restrained from continuing to interfere—by coercion and threats of litigation—with the plaintiff's lawful business relationships.

The Court of Appeals found that the complaint, although inartistically drawn, contained allegations entitling the petitioner to equitable relief.[2] That finding is accepted in the prevailing opinion today. If the complaint had been answered simply by a general denial, therefore, the issues would under traditional principles have been triable as a proceeding in equity. Instead of just putting in issue the allegations of the complaint, however, Beacon filed pleadings which affirmatively alleged the existence of a broad conspiracy among the plaintiff and other theatre owners to monopolize the first-run exhibition of films in the San Bernardino area, to refrain from competing among themselves, and to discriminate against Beacon in granting film licenses. Based upon these allegations, Beacon asked damages in the amount of $300,000. Clearly these conspiracy allegations stated a cause of action triable as of right by a

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[1] Compare *Black* v. *Boyd*, 248 F. 2d 156, with *Black* v. *Boyd*, 251 F. 2d 843.

[2] Cf. *De Groot* v. *Peters*, 124 Cal. 406; *California G. C. Bd.* v. *California P. Corp.*, 4 Cal. App. 2d 242, 244, 40 P. 2d 846. Compare *Kessler* v. *Eldred*, 206 U. S. 285; *International News Serv.* v. *Associated Press*, 248 U. S. 215, 236; *Truax* v. *Raich*, 239 U. S. 33, 38.

jury. What was demanded by Beacon, however, was a jury trial not only of this cause of action, but also of the issues presented by the original complaint.

Upon motion of Fox the trial judge ordered the original action for declaratory and equitable relief to be tried separately to the court and in advance of the trial of the defendant's counterclaim and cross-claim for damages. The court's order, which carefully preserved the right to trial by jury upon the conspiracy and damage issues raised by the counterclaim and cross-claim, was in conformity with the specific provisions of the Federal Rules of Civil Procedure.[3] Yet it is decided today that the Court of Appeals must compel the district judge to rescind it.

Assuming the existence of a factual issue common both to the plaintiff's original action and the defendant's counterclaim for damages, I cannot agree that the District Court must be compelled to try the counterclaim first.[4]

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[3] Rule 42 (b) provides: "(b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

The Note to Rule 39 of the Advisory Committee on Rules states that, "When certain of the issues are to be tried by jury and others by the court, the court may determine the sequence in which such issues shall be tried." This language was at one time contained in a draft of the Rules, but was deleted because "the power is adequately given by Rule 42 (b). . . ." Moore's Federal Practice (2d ed.) § 39.12, n. 8.

See also Rule 57, which provides, *inter alia*, that, "The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

[4] It is not altogether clear at this stage of the proceedings whether the existence of substantial competition between Fox and Beacon is actually a material issue of fact common to both the equitable claim and the counterclaim for damages. The respondent ingeniously argues that determination in the equitable suit of the issue

It is, of course, a matter of no great moment in what order the issues between the parties in the present litigation are tried. What is disturbing is the process by which the Court arrives at its decision—a process which appears to disregard the historic relationship between equity and law.

I.

The Court suggests that "the expansion of adequate legal remedies provided by the Declaratory Judgment Act . . . necessarily affects the scope of equity." Does the Court mean to say that the mere availability of an action for a declaratory judgment operates to furnish "an adequate remedy at law" so as to deprive a court of equity of the power to act? That novel line of reasoning is at least implied in the Court's opinion. But the Declaratory Judgment Act did not "expand" the substantive law.

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of competition between the theatres would be determinative of little or nothing in the counterclaim for damages. "The fact issue in the action for equitable and declaratory relief is whether the Fox West Coast California Theatre and the Petitioner's drive-in are substantially competitive with each other. The fact issue in the counterclaim is whether the cross-defendants and co-conspirators therein named conspired together in restraint of trade and to monopolize in the manner alleged in the counterclaim. Absent conspiracy, whether or not the distributors licensed a single first run picture to Petitioner's drive-in, be it in substantial competition or not in substantial competition with other first run theatres in the San Bernardino area, Petitioner will not have made out a case on its counterclaim. . . . If Petitioner on its counterclaim should fail to prove conspiracy the issue of competition between the theatres is meaningless. If Petitioner on the other hand succeeds in proving the allegations of its counterclaim, the conspiracy to monopolize first run and to discriminate against the new drive-in, the existence or non-existence of competition between the theatres would exculpate none of the alleged wrongdoers, although if there was an absence of competition between the drive-in and the other first run theatres, as Petitioner contended in its answer to the complaint, it might have some difficulty proving injury to its business."

That Act merely provided a new statutory remedy, neither legal nor equitable, but available in the areas of both equity and law. When declaratory relief is sought, the right to trial by jury depends upon the basic context in which the issues are presented. See Moore's Federal Practice (2d ed.) §§ 38.29, 57.30; Borchard, Declaratory Judgments (2d ed.), 399–404. If the basic issues in an action for declaratory relief are of a kind traditionally cognizable in equity, *e. g.*, a suit for cancellation of a written instrument, the declaratory judgment is not a "remedy at law." [5] If, on the other hand, the issues arise in a context traditionally cognizable at common law, the right to a jury trial of course remains unimpaired, even though the only relief demanded is a declaratory judgment.[6]

Thus, if in this case the complaint had asked merely for a judgment declaring that the plaintiff's specified manner of business dealings with distributors and other exhibitors did not render it liable to Beacon under the antitrust laws, this would have been simply a "juxtaposition of parties" case in which Beacon could have demanded a jury trial.[7] But the complaint in the present case, as the Court recognizes, presented issues of exclusively equitable cognizance, going well beyond a mere defense to any subsequent action at law. Fox sought from the court protection against Beacon's allegedly unlawful interference with its business relationships—protection which this

[5] *State Farm Mut. Auto. Ins. Co.* v. *Mossey,* 195 F. 2d 56; *Connecticut General Life Ins. Co.* v. *Candimat Co.,* 83 F. Supp. 1.

[6] *Dickinson* v. *General Accident F. & L. Assur. Corp.,* 147 F. 2d 396; *Hargrove* v. *American Cent. Ins. Co.,* 125 F. 2d 225; *Pacific Indemnity Co.* v. *McDonald,* 107 F. 2d 446.

[7] Moore's Federal Practice (2d ed.) § 57.31 [2]. "Transposition of parties" would perhaps be a more accurate description. A typical such case is one in which a plaintiff uses the declaratory judgment procedure to seek a determination of nonliability to a legal claim asserted by the defendant. The defendant in such a case is, of course, entitled to a jury trial.

Court seems to recognize might not have been afforded by a declaratory judgment, unsupplemented by equitable relief. The availability of a declaratory judgment did not, therefore, operate to confer upon Beacon the right to trial by jury with respect to the issues raised by the complaint.

II.

The Court's opinion does not, of course, hold or even suggest that a court of equity may never determine "legal rights." For indeed it is precisely such rights which the Chancellor, when his jurisdiction has been properly invoked, has often been called upon to decide. Issues of fact are rarely either "legal" or "equitable." All depends upon the context in which they arise. The examples cited by Chief Judge Pope in his thorough opinion in the Court of Appeals in this case are illustrative: ". . . [I]n a suit by one in possession of real property to quiet title, or to remove a cloud on title, the court of equity may determine the legal title. In a suit for specific performance of a contract, the court may determine the making, validity and the terms of the contract involved. In a suit for an injunction against trespass to real property the court may determine the legal right of the plaintiff to the possession of that property. Cf. Pomeroy, Equity Jurisprudence, 5th ed., §§ 138–221, 221a, 221b, 221d, 250." 252 F. 2d 864, 874.

Though apparently not disputing these principles, the Court holds, quite apart from its reliance upon the Declaratory Judgment Act, that Beacon by filing its counterclaim and cross-claim acquired a right to trial by jury of issues which otherwise would have been properly triable to the court. Support for this position is found in the principle that, "in the federal courts equity has always acted only when legal remedies were inadequate. . . ." Yet that principle is not employed in its traditional sense as a limitation upon the exercise of power by a court of

equity. This is apparent in the Court's recognition that the allegations of the complaint entitled Fox to equitable relief—relief to which Fox would not have been entitled if it had had an adequate remedy at law. Instead, the principle is employed today to mean that because it is possible under the counterclaim to have a jury trial of the factual issue of substantial competition, that issue must be tried by a jury, even though the issue was primarily presented in the original claim for equitable relief. This is a marked departure from long-settled principles.

It has been an established rule "that equitable jurisdiction existing at the filing of a bill is not destroyed because an adequate legal remedy may have become available thereafter." [8] *American Life Ins. Co.* v. *Stewart,* 300 U. S. 203, 215. See *Dawson* v. *Kentucky Distilleries Co.,* 255 U. S. 288, 296. It has also been long settled that the District Court in its discretion may order the trial of a suit in equity in advance of an action at law between the same parties, even if there is a factual issue common to both. In the words of Mr. Justice Cardozo, writing for a unanimous Court in *American Life Ins. Co.* v. *Stewart, supra:*

> "A court has control over its own docket. . . . In the exercise of a sound discretion it may hold one lawsuit in abeyance to abide the outcome of another, especially where the parties and the issues are the same. . . . If request had been made by the respondents to suspend the suits in equity till the other causes were disposed of, the District Court could have considered whether justice would not be

[8] The suggestion by the Court that "This was because the subsequent legal action, though providing an opportunity to try the case to a jury, might not protect the right of the equity plaintiff to a fair and orderly adjudication of the controversy" is plainly inconsistent with many of the cases in which the rule has been applied. See, *e. g., Beedle* v. *Bennett,* 122 U. S. 71; *Clark* v. *Wooster,* 119 U. S. 322.

done by pursuing such a course, the remedy in equity being exceptional and the outcome of necessity. . . . There would be many circumstances to be weighed, as, for instance, the condition of the court calendar, whether the insurer had been precipitate or its adversaries dilatory, as well as other factors. In the end, benefit and hardship would have to be set off, the one against the other, and a balance ascertained." 300 U. S. 203, 215–216.[9]

III.

The Court today sweeps away these basic principles as "precedents decided under discarded procedures." It suggests that the Federal Rules of Civil Procedure have somehow worked an "expansion of adequate legal remedies" so as to oust the District Courts of equitable jurisdiction, as well as to deprive them of their traditional power to control their own dockets. But obviously the Federal Rules could not and did not "expand" the substantive law one whit.[10]

Like the Declaratory Judgment Act, the Federal Rules preserve inviolate the right to trial by jury in actions historically cognizable at common law, as under the Constitution they must.[11] They do not create a right of trial

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[9] It is arguable that if a case factually similar to *American Life Ins. Co.* v. *Stewart* were to arise under the Declaratory Judgment Act, the defendant would be entitled to a jury trial. See footnote 7. But cf. 5 Moore's Federal Practice (2d ed.), p. 158.

[10] Congressional authorization of the Rules expressly provided that "Said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant." 48 Stat. 1064. See 28 U. S. C. § 2072.

[11] "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U. S. Const., Amend. VII. See Rules 38, 39, Fed. Rules Civ. Proc.

by jury where that right "does not exist under the Constitution or statutes of the United States." Rule 39 (a). Since Beacon's counterclaim was compulsory under the Rules, see Rule 13 (a), it is apparent that by filing it Beacon could not be held to have waived its jury rights.[12] Compare *American Mills Co.* v. *American Surety Co.*, 260 U. S. 360. But neither can the counterclaim be held to have transformed Fox's original complaint into an action at law.[13] See *Bendix Aviation Corp.* v. *Glass*, 81 F. Supp. 645.

The Rules make possible the trial of legal and equitable claims in the same proceeding, but they expressly affirm the power of a trial judge to determine the order in which claims shall be heard. Rule 42 (b). Certainly the Federal Rules were not intended to undermine the basic structure of equity jurisprudence, developed over the centuries and explicitly recognized in the United States Constitution.[14]

For these reasons I think the petition for a writ of mandamus should have been dismissed.

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[12] This is not, of course, to suggest that the filing of a permissive "legal" counterclaim to an "equitable" complaint would amount to a waiver of jury rights on the issues raised by the counterclaim.

[13] Determination of whether a claim stated by the complaint is triable by the court or by a jury will normally not be dependent upon the "legal" or "equitable" character of the counterclaim. See Borchard, Declaratory Judgments (2d ed.), p. 404. There are situations, however, such as a case in which the plaintiff seeks a declaration of invalidity or noninfringement of a patent, in which the relief sought by the counterclaim will determine the nature of the entire case. See Moore's Federal Practice (2d ed.) § 38.29.

[14] "The judicial Power shall extend to all Cases, in Law and Equity . . . ." Art. III, § 2.

BIBB, DIRECTOR, DEPARTMENT OF PUBLIC SAFETY OF ILLINOIS, ET AL. *v.* NAVAJO FREIGHT LINES, INC., ET AL.

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

No. 94. Argued March 30–31, 1959.—Decided May 25, 1959.

As applied to interstate motor carriers operating under certificates of public convenience and necessity issued by the Interstate Commerce Commission, the Illinois statute here involved, which requires trucks and trailers operating on that State's highways to be equipped with a specified type of rear fender mudguard which would be illegal in Arkansas, which is different from those permitted in at least 45 other States, and which would seriously interfere with the "interline" operations of motor carriers, is invalid because it unduly and unreasonably burdens interstate commerce in violation of Art. I, § 8 of the Constitution. Pp. 521–530.

(a) Even state safety regulations must yield when they run afoul of the policy of free trade reflected in the Commerce Clause. Pp. 523–524, 528–529.

(b) Interchanging mudguards on trucks and trailers at the border of Illinois is a time-consuming task; and the necessity to use welding might mean that some trucks or trailers would have to be unloaded and loaded again—all of which adds up to a serious burden on interstate commerce not justified by a compelling need for this new safety measure. Pp. 527–528.

(c) The record in this case shows that this is one of those exceptional cases where a state safety regulation in the exercise of the police power places such a heavy burden on interstate commerce, uncompensated by compelling advantages of safety, that it violates the Commerce Clause. Pp. 529–530.

159 F. Supp. 385, affirmed.

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

and *Raymond S. Sarnow* and *A. Zola Groves,* Assistant Attorneys General.

David Axelrod argued the cause for appellees. With him on the brief were *Jack Goodman* and *Carl L. Steiner.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

We are asked in this case to hold that an Illinois statute [1] requiring the use of a certain type of rear fender

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[1] The state statute (effective July 8, 1957) in relevant part provides:

"It is unlawful for any person to operate any motor vehicle of the second division upon the highways of this state outside the corporate limits of a city, village or incorporated town unless such vehicle is equipped with rear fender splash guards which shall comply with the specifications hereinafter provided in this Section; except that any motor vehicle of the second division which is or has been purchased, new or used, prior to August 1, 1957 shall be equipped with rear fender splash guards which are so attached as to prevent the splashing of mud or water upon the windshield of other motor vehicles and such splash guards on such vehicle shall not be required to comply with the specifications hereinafter provided in this Section until January 1, 1958.

"The rear fender splash guards shall contour the wheel in such a manner that the relationship of the inside surface of any such splash guard to the tread surface of the tire or wheel shall be relatively parallel, both laterally and across the wheel, at least throughout the top 90 degrees of the rear 180 degrees of the wheel surface; provided however, on vehicles which have a clearance of less than 5 inches between the top of the tire or wheel and that part of the body of the vehicle directly above the tire or wheel when the vehicle is loaded to maximum legal capacity, the curved portion of the splash guard need only extend from a point directly behind the center of the rear axle and to the rear of the wheel surface upwards to within at least 2 inches of the bottom line of the body when the vehicle is loaded to maximum legal capacity. On all vehicles to which this Section applies, there shall be a downward extension of the curved surface which shall end not more than 10 inches from the ground

mudguard on trucks and trailers operated on the highways of that State conflicts with the Commerce Clause of the Constitution. The statutory specification for this type of mudguard provides that the guard shall contour the rear wheel, with the inside surface being relatively parallel to the top 90 degrees of the rear 180 degrees of the whole surface.[2] The surface of the guard must extend downward to within 10 inches from the ground when the truck is loaded to its maximum legal capacity. The guards must be wide enough to cover the width of the protected tire, must be installed not more than 6 inches from the tire surface when the vehicle is loaded

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when the vehicle is loaded to maximum legal capacity. This downward extension shall be part of the curved surface or attached directly to said curved surface, but it need not contour the wheel.

"The splash guards shall be wide enough to cover the full tread or treads of the tires being protected and shall be installed not more than 6 inches from the tread surface of the tire or wheel when the vehicle is loaded to maximum legal capacity. The splash guard shall have a lip or flange on its outside edge to minimize side throw and splash. The lip or flange shall extend toward the center of the wheel, and shall be perpendicular to and extend not less than 2 inches below the inside or bottom surface line or plane of the guard.

"The splash guards may be constructed of a rigid or flexible material, but shall be attached in such a manner that, regardless of movement, either by the splash guards or the vehicle, the splash guards will retain their general parallel relationship to the tread surface of the tire or wheel under all ordinary operating conditions." Ill. Rev. Stat., 1957, c. 95½, § 218b.

Motor vehicles of the second division are defined as "Those vehicles which are designed and used for pulling or carrying freight and also those vehicles or motor cars which are designed and used for the carrying of more than seven persons." Ill. Rev. Stat., 1957, c. 95½, § 99 (b).

[2] The specifications are somewhat modified if the clearance between the top of the tire and the body of the vehicle directly above it is less than 5 inches when the vehicle is loaded to its maximum legal capacity.

to maximum capacity, and must have a lip or flange on its outer edge of not less than 2 inches.[3]

Appellees, interstate motor carriers holding certificates from the Interstate Commerce Commission, challenged the constitutionality of the Illinois Act. A specially constituted three-judge District Court concluded that it unduly and unreasonably burdened and obstructed interstate commerce, because it made the conventional or straight mudflap, which is legal in at least 45 States, illegal in Illinois, and because the statute, taken together with a Rule of the Arkansas Commerce Commission [4] requiring straight mudflaps, rendered the use of the same motor vehicle equipment in both States impossible. The statute was declared to be violative of the Commerce Clause and appellants were enjoined from enforcing it. 159 F. Supp. 385. An appeal was taken and we noted probable jurisdiction. 358 U. S. 808.

The power of the State to regulate the use of its highways is broad and pervasive. We have recognized the peculiarly local nature of this subject of safety, and have upheld state statutes applicable alike to interstate and intrastate commerce, despite the fact that they may have an impact on interstate commerce. *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177; *Maurer* v. *Hamilton*, 309 U. S. 598; *Sproles* v. *Binford*, 286 U. S. 374. The regulation of highways "is akin to quarantine

[3] There are certain exemptions from the statute, but their validity or the validity of the statute in light of them is not questioned here. But see *Rudolph Express Co.* v. *Bibb*, 15 Ill. 2d 76, 153 N. E. 2d 820. No contention is here made that the statute discriminates against interstate commerce, and it is clear that its provisions apply alike to vehicles in intrastate as well as in interstate commerce. Nor is it contended that the statute violates the Due Process Clause of the Fourteenth Amendment. Cf. *People* v. *Warren*, 11 Ill. 2d 420, 143 N. E. 2d 28.

[4] Arkansas Commerce Commission Rule 100, December 13, 1957.

495957 O-59-38

measures, game laws, and like local regulations of rivers, harbors, piers, and docks, with respect to which the state has exceptional scope for the exercise of its regulatory power, and which, Congress not acting, have been sustained even though they materially interfere with interstate commerce." *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 783.

These safety measures carry a strong presumption of validity when challenged in court. If there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid state objective. Policy decisions are for the state legislature, absent federal entry into the field.[5] Unless we can conclude on the whole record that "the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it" (*Southern Pacific Co.* v. *Arizona, supra,* pp. 775–776) we must uphold the statute.

The District Court found that "since it is impossible for a carrier operating in interstate commerce to determine which of its equipment will be used in a particular area, or on a particular day, or days, carriers operating into or through Illinois . . . will be required to equip all their trailers in accordance with the requirements of the Illinois Splash Guard statute." With two possible exceptions

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[5] It is not argued that there has been a pre-emption of the field by federal regulation. While the Interstate Commerce Commission has, pursuant to § 204 (a) of the Interstate Commerce Act (49 Stat. 546, 49 U. S. C. § 304 (a)), promulgated its Motor Carrier Safety Regulations to govern vehicles operating in interstate or foreign commerce (see 49 CFR, Pts. 190–197), it has expressly declined to establish any requirements concerning wheel flaps, and has disclaimed any intention to occupy the field or abrogate state regulations not inconsistent with its standards. 54 M. C. C. 337, 354, 358.

the mudflaps required in those States which have mudguard regulations would not meet the standards required by the Illinois statute. The cost of installing the contour mudguards is $30 or more per vehicle. The District Court found that the initial cost of installing those mudguards on all the trucks owned by the appellees ranged from $4,500 to $45,840. There was also evidence in the record to indicate that the cost of maintenance and replacement of these guards is substantial.

Illinois introduced evidence seeking to establish that contour mudguards had a decided safety factor in that they prevented the throwing of debris into the faces of drivers of passing cars and into the windshields of a following vehicle. But the District Court in its opinion stated that it was "conclusively shown that the contour mud flap possesses no advantages over the conventional or straight mud flap previously required in Illinois and presently required in most of the states" (159 F. Supp., at 388) and that "there is rather convincing testimony that use of the contour flap creates hazards previously unknown to those using the highways." *Id.*, at 390. These hazards were found to be occasioned by the fact that this new type of mudguard tended to cause an accumulation of heat in the brake drum, thus decreasing the effectiveness of brakes, and by the fact that they were susceptible of being hit and bumped when the trucks were backed up and of falling off on the highway.

These findings on cost and on safety are not the end of our problem. Local regulation of the weight of trucks using the highways upheld in *Sproles* v. *Binford, supra,* also involved increased financial burdens for interstate carriers. State control of the width and weight of motor trucks and trailers sustained in *South Carolina Highway Dept.* v. *Barnwell Bros., supra,* involved nice questions of judgment concerning the need of those regulations so far as the issue of safety was concerned. That case also pre-

sented the problem whether interstate motor carriers, who were required to replace all equipment or keep out of the State, suffered an unconstitutional restraint on interstate commerce. The matter of safety was said to be one essentially for the legislative judgment; and the burden of redesigning or replacing equipment was said to be a proper price to exact from interstate and intrastate motor carriers alike. And the same conclusion was reached in *Maurer* v. *Hamilton, supra,* where a state law prohibited any motor carrier from carrying any other vehicle above the cab of the carrier vehicle or over the head of the operator of that vehicle. Cost taken into consideration with other factors might be relevant in some cases to the issue of burden on commerce. But it has assumed no such proportions here. If we had here only a question whether the cost of adjusting an interstate operation to these new local safety regulations prescribed by Illinois unduly burdened interstate commerce, we would have to sustain the law under the authority of the *Sproles, Barnwell,* and *Maurer* cases. The same result would obtain if we had to resolve the much discussed issues of safety presented in this case.

This case presents a different issue. The equipment in the *Sproles, Barnwell,* and *Maurer* cases could pass muster in any State, so far as the records in those cases reveal. We were not faced there with the question whether one State could prescribe standards for interstate carriers that would conflict with the standards of another State, making it necessary, say, for an interstate carrier to shift its cargo to differently designed vehicles once another state line was reached. We had a related problem in *Southern Pacific Co.* v. *Arizona, supra,* where the Court invalidated a statute of Arizona prescribing a maximum length of 70 cars for freight trains moving through that State. More closely in point is *Morgan* v. *Virginia,* 328 U. S. 373, where a local law required a reseating of passengers on interstate

busses entering Virginia in order to comply with a local segregation law. Diverse seating arrangements for people of different races imposed by several States interfered, we concluded, with "the need for national uniformity in the regulations for interstate travel." *Id.*, at 386. Those cases indicate the dimensions of our present problem.

An order of the Arkansas Commerce Commission, already mentioned,[6] requires that trailers operating in that State be equipped with straight or conventional mudflaps. Vehicles equipped to meet the standards of the Illinois statute would not comply with Arkansas standards, and vice versa. Thus if a trailer is to be operated in both States, mudguards would have to be interchanged, causing a significant delay in an operation where prompt movement may be of the essence. It was found that from two to four hours of labor are required to install or remove a contour mudguard. Moreover, the contour guard is attached to the trailer by welding and if the trailer is conveying a cargo of explosives (*e. g.*, for the United States Government) it would be exceedingly dangerous to attempt to weld on a contour mudguard without unloading the trailer.

It was also found that the Illinois statute seriously interferes with the "interline" operations of motor carriers—that is to say, with the interchanging of trailers between an originating carrier and another carrier when the latter serves an area not served by the former. These "interline" operations provide a speedy through-service for the shipper. Interlining contemplates the physical transfer of the entire trailer; there is no unloading and reloading of the cargo. The interlining process is particularly vital in connection with shipment of perishables, which would spoil if unloaded before reaching their destination, or with the movement of explosives carried

[6] Note 4, *supra*.

under seal. Of course, if the originating carrier never operated in Illinois, it would not be expected to equip its trailers with contour mudguards. Yet if an interchanged trailer of that carrier were hauled to or through Illinois, the statute would require that it contain contour guards. Since carriers which operate in and through Illinois cannot compel the originating carriers to equip their trailers with contour guards, they may be forced to cease interlining with those who do not meet the Illinois requirements. Over 60 percent of the business of 5 of the 6 plaintiffs is interline traffic. For the other it constitutes 30 percent. All of the plaintiffs operate extensively in interstate commerce, and the annual mileage in Illinois of none of them exceeds 7 percent of total mileage.

This in summary is the rather massive showing of burden on interstate commerce which appellees made at the hearing.

Appellants did not attempt to rebut the appellees' showing that the statute in question severely burdens interstate commerce. Appellants' showing was aimed at establishing that contour mudguards prevented the throwing of debris into the faces of drivers of passing cars and into the windshields of a following vehicle. They concluded that, because the Illinois statute is a reasonable exercise of the police power, a federal court is precluded from weighing the relative merits of the contour mudguard against any other kind of mudguard and must sustain the validity of the statute notwithstanding the extent of the burden it imposes on interstate commerce. They rely in the main on *South Carolina Highway Dept.* v. *Barnwell Bros., supra.* There is language in that opinion which, read in isolation from such later decisions as *Southern Pacific Co.* v. *Arizona, supra,* and *Morgan* v. *Virginia, supra,* would suggest that no showing of burden on interstate commerce is sufficient to invalidate local

safety regulations in absence of some element of discrimination against interstate commerce.

The various exercises by the States of their police power stand, however, on an equal footing. All are entitled to the same presumption of validity when challenged under the Due Process Clause of the Fourteenth Amendment. *Lincoln Union* v. *Northwestern Co.,* 335 U. S. 525; *Day-Brite Lighting, Inc.,* v. *Missouri,* 342 U. S. 421; *Williamson* v. *Lee Optical Co.,* 348 U. S. 483. Similarly the various state regulatory statutes are of equal dignity when measured against the Commerce Clause. Local regulations which would pass muster under the Due Process Clause might nonetheless fail to survive other challenges to constitutionality that bring the Supremacy Clause into play. Like any local law that conflicts with federal regulatory measures (*California Comm'n* v. *United States,* 355 U. S. 534; *Service Storage & Transfer Co.* v. *Virginia,* 359 U. S. 171), state regulations that run afoul of the policy of free trade reflected in the Commerce Clause must also bow.

This is one of those cases—few in number—where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce. This conclusion is especially underlined by the deleterious effect which the Illinois law will have on the "interline" operation of interstate motor carriers. The conflict between the Arkansas regulation and the Illinois regulation also suggests that this regulation of mudguards is not one of those matters "admitting of diversity of treatment, according to the special requirements of local conditions," to use the words of Chief Justice Hughes in *Sproles* v. *Binford, supra,* at 390. A State which insists on a design out of line with the requirements of almost all the other States may sometimes place a great burden of delay and inconvenience on those interstate motor carriers

entering or crossing its territory. Such a new safety device—out of line with the requirements of the other States—may be so compelling that the innovating State need not be the one to give way. But the present showing—balanced against the clear burden on commerce—is far too inconclusive to make this mudguard meet that test.

We deal not with absolutes but with questions of degree. The state legislatures plainly have great leeway in providing safety regulations for all vehicles—interstate as well as local. Our decisions so hold. Yet the heavy burden which the Illinois mudguard law places on the interstate movement of trucks and trailers seems to us to pass the permissible limits even for safety regulations.

Affirmed.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring.

The opinion of the Court clearly demonstrates the heavy burden, in terms of cost and interference with "interlining," which the Illinois statute here involved imposes on interstate commerce. In view of the findings of the District Court, summarized on page 525 of the Court's opinion and fully justified by the record, to the effect that the contour mudflap "possesses no advantages" in terms of safety over the conventional flap permitted in all other States, and indeed creates certain safety hazards, this heavy burden cannot be justified on the theory that the Illinois statute is a necessary, appropriate, or helpful local safety measure. Accordingly, I concur in the judgment of the Court.

CROWN ZELLERBACH CORP. *v.* WASHINGTON.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 805. Decided May 25, 1959.

Appeal dismissed and certiorari denied.
Reported below: 53 Wash. 2d 813, 328 P. 2d 884.

Burroughs B. Anderson for appellant.

John J. O'Connell, Attorney General of Washington, and *John W. Riley,* Assistant Attorney General, 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.

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

SOUTHERN PACIFIC CO. *v.* CORPORATION COMMISSION OF ARIZONA ET AL.

APPEAL FROM THE SUPREME COURT OF ARIZONA.

No. 763. Decided May 25, 1959.

Appeal dismissed for want of a substantial federal question.
Reported below: 84 Ariz. 365, 329 P. 2d 883.

George L. Buland, Burton Mason and *Randolph Karr* for appellant.

Wade Church, Attorney General of Arizona, *Wm. S. Andrews,* Assistant Attorney General, and *Stanley W. Trachta* for appellees.

PER CURIAM.

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

RODGERS *v.* UTAH.

APPEAL FROM THE SUPREME COURT OF UTAH.

No. 695, Misc. Decided May 25, 1959.

Appeal dismissed for want of a substantial federal question.
Reported below: 8 Utah 2d 156, 329 P. 2d 1075.

Lewis J. Wallace for appellant.

E. R. Callister, Attorney General of Utah, and *Raymond W. Gee,* Assistant Attorney General, for appellee.

PER CURIAM.

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

STATE ATHLETIC COMMISSION *v.* DORSEY.

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

No. 787. Decided May 25, 1959.

168 F. Supp. 149, affirmed.

Jack P. F. Gremillion, Attorney General of Louisiana, *George Ponder,* First Assistant Attorney General, and *William P. Schuler,* Assistant Attorney General, for appellant.

Prudhomme F. Dejoie, Thurgood Marshall, Jack Greenberg and *James M. Nabrit III* for appellee.

PER CURIAM.

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

IN RE SARNER.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 803. Decided May 25, 1959.

Appeal dismissed and certiorari denied.
Reported below: 28 N. J. 519, 147 A. 2d 244.

Aaron W. Nussman for appellant.

David D. Furman, Attorney General of New Jersey, and *David M. Satz, Jr.* and *Morton I. Greenberg,* Deputy Attorneys General, 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.

LAMAR BATH HOUSE CO. ET AL. *v.* CITY OF HOT SPRINGS ET AL.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 791. Decided May 25, 1959.

Appeal dismissed for want of a substantial federal question.
Reported below: —— Ark. ——, 315 S. W. 2d 884.

William M. Clark and *Richard C. Butler* for appellants.

James W. Chesnutt for appellees.

PER CURIAM.

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

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. *v.* ILLINOIS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 793. Decided May 25, 1959.

168 F. Supp. 706, affirmed.

Edwin R. Eckersall and *R. K. Merrill* for appellant.

Latham Castle, Attorney General of Illinois, and *Harry R. Begley,* Special Assistant Attorney General, for the State of Illinois and the Illinois Commerce Commission, and *S. Ashley Guthrie* and *Francis D. Fisher* for the Milwaukee Road Commuters' Association, appellees.

PER CURIAM.

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

VITARELLI *v.* SEATON, SECRETARY OF THE INTERIOR, ET AL.

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

No. 101. Argued April 1–2, 1959.—Decided June 1, 1959.

Petitioner was an employee of the Department of the Interior in a position not designated as "sensitive." He was not a veteran, had no protected Civil Service status, and could have been discharged summarily without cause. Purporting to proceed under the Act of August 26, 1950, Executive Order No. 10450 and departmental regulations prescribing the procedure to be followed in "security risk" cases, the Secretary suspended him and served him with written charges that his "sympathetic association" with Communists or Communist sympathizers, and other similar alleged activities, tended to show that his continued employment might be "contrary to the best interests of national security." At a subsequent hearing before a security hearing board, no evidence was adduced in support of these charges and no witness testified against petitioner; but he and four witnesses who testified for him were subjected to an extensive cross-examination which went far beyond the activities specified in the charges. Subsequently, he was sent a notice of dismissal, effective September 10, 1954, "in the interest of national security" and for the reasons set forth in the charges. In 1956, he sued for a declaratory judgment that his discharge was illegal and an injunction directing his reinstatement. While the case was pending, a copy of a "notification of personnel action," dated September 21, 1954, and reciting that it was "a revision of and replaces the original bearing the same date," was filed in the court and a copy was delivered to petitioner. This notification was identical with one issued September 21, 1954, except that it omitted any reference to the reason for petitioner's discharge and to the authority under which it was carried out. *Held:* Petitioner's dismissal was illegal and he is entitled to reinstatement. Pp. 536–546.

(a) Having chosen to proceed against petitioner on security grounds, the Secretary was bound by the regulations which he had promulgated for dealing with such cases, even though petitioner could have been discharged summarily and without cause independently of those regulations. Pp. 539–540.

(b) The record shows that the proceedings leading to petitioner's dismissal from Government service on grounds of national security violated petitioner's procedural rights under the applicable departmental regulations. Therefore, his dismissal was illegal and of no effect. Pp. 540–545.

(c) Delivery to petitioner in 1956 of the revised "notification of personnel action" dated September 21, 1954, which was plainly intended only as a grant of relief to petitioner by expunging the grounds of the 1954 discharge, cannot be treated as an exercise of the Secretary's summary dismissal power as of the date of its delivery to petitioner. Pp. 545–546.

(d) Petitioner is entitled to reinstatement, subject to any lawful exercise of the Secretary's authority hereafter to dismiss him from employment. P. 546.

102 U. S. App. D. C. 316, 253 F. 2d 338, reversed.

Clifford J. Hynning argued the cause for petitioner. With him on the brief was *Harry E. Sprogell.*

John G. Laughlin, Jr. argued the cause for respondents. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case concerns the legality of petitioner's discharge as an employee of the Department of the Interior. Vitarelli, an educator holding a doctor's degree from Columbia University, was appointed in 1952 by the Department of the Interior as an Education and Training Specialist in the Education Department of the Trust Territory of the Pacific Islands, at Koror in the Palau District, a mandated area for which this country has responsibility.

By a letter dated March 30, 1954, respondent Secretary's predecessor in office notified petitioner of his suspension from duty without pay, effective April 2, 1954, assigning as ground therefor various charges. Essentially, the charges were that petitioner from 1941 to 1945

had been in "sympathetic association" with three named persons alleged to have been members of or in sympathetic association with the Communist Party, and had concealed from the Government the true extent of these associations at the time of a previous inquiry into them; that he had registered as a supporter of the American Labor Party in New York City in 1945, had subscribed to the USSR Information Bulletin, and had purchased copies of the Daily Worker and New Masses; and that because such associations and activities tended to show that petitioner was "not reliable or trustworthy" his continued employment might be "contrary to the best interests of national security."

Petitioner filed a written answer to the statement of charges, and appeared before a security hearing board on June 22 and July 1, 1954. At this hearing no evidence was adduced by the Department in support of the charges, nor did any witness testify against petitioner. Petitioner testified at length, and presented four witnesses, and he and the witnesses were extensively cross-examined by the security officer and the members of the hearing board. On September 2, 1954, a notice of dismissal effective September 10, 1954, was sent petitioner over the signature of the Secretary, reciting that the dismissal was "in the interest of national security for the reasons specifically set forth in the letter of charges dated March 30, 1954." This was followed on September 21, 1954, with the filing of a "Notification of Personnel Action" setting forth the Secretary's action. The record does not show that a copy of this document was ever sent to petitioner.

After having failed to obtain reinstatement by a demand upon the Secretary, petitioner filed suit in the United States District Court for the District of Columbia seeking a declaration that his dismissal had been illegal and ineffective and an injunction requiring his reinstatement. On October 10, 1956, while the case was pending in the

District Court, a copy of a new "Notification of Personnel Action," dated September 21, 1954, and reciting that it was "a revision of and replaces the original bearing the same date," was filed in the District Court, and another copy of this document was delivered to petitioner shortly thereafter. This notification was identical with the one already mentioned, except that it omitted any reference to the reason for petitioner's discharge and to the authority under which it was carried out.[1] Thereafter the District Court granted summary judgment for the respondent. That judgment was affirmed by the Court of Appeals, one judge dissenting. 102 U. S. App. D. C. 316, 253 F. 2d 338. We granted certiorari to consider the validity of petitioner's discharge. 358 U. S. 871.

The Secretary's letter of March 30, 1954, and notice of dismissal of September 2, 1954, both relied upon Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953), the Act of August 26, 1950, 64 Stat. 476, 5 U. S. C. § 22–1 *et seq.*, and Department of the Interior Order No. 2738, all relating to discharges of government employees on security or loyalty grounds, as the authority for petitioner's dismissal. In *Cole* v. *Young,* 351 U. S. 536, this Court held that the statute referred to did not apply to government employees in positions not designated as "sensitive." Respondent takes the position that since petitioner's position in government service has at no time been designated as sensitive the effect of *Cole,* which was decided after the 1954 dismissal of petitioner, was to render also inapplicable to petitioner Department of the Interior Order No. 2738, under which the proceedings relating to petitioner's dismissal were had. It is urged

[1] An affidavit of the custodian of records of the Civil Service Commission, filed in the District Court together with this revised notification, states "That all records of the said Commission have been expunged of all adverse findings made with respect to Mr. William Vincent Vitarelli under Executive Order 10450."

that in this state of affairs petitioner, who concededly was at no time within the protection of the Civil Service Act, Veterans' Preference Act, or any other statute relating to employment rights of government employees, and who, as a "Schedule A" employee, could have been summarily discharged by the Secretary at any time without the giving of a reason, under no circumstances could be entitled to more than that which he has already received—namely, an "expunging" from the record of his 1954 discharge of any reference to the authority or reasons therefor.

Respondent misconceives the effect of our decision in *Cole*. It is true that the Act of August 26, 1950, and the Executive Order did not alter the power of the Secretary to discharge summarily an employee in petitioner's status, without the giving of any reason. Nor did the Department's own regulations preclude such a course. Since, however, the Secretary gratuitously decided to give a reason, and that reason was national security, he was obligated to conform to the procedural standards he had formulated in Order No. 2738 for the dismissal of employees on security grounds. *Service* v. *Dulles*, 354 U. S. 363. That Order on its face applies to *all* security discharges in the Department of the Interior, including such discharges of Schedule A employees. *Cole* v. *Young* established that the Act of August 26, 1950, did not permit the discharge of nonsensitive employees pursuant to procedures authorized by that Act if those procedures were more summary than those to which the employee would have been entitled by virtue of any pre-existing statute or regulation. That decision cannot, however, justify noncompliance by the Secretary with regulations promulgated by him in the departmental Order, which as to petitioner afford greater procedural protections in the case of a dismissal stated to be for security reasons than in the case of dismissal without any statement of reasons. Having chosen to proceed against petitioner on security

495957 O-59-39

grounds, the Secretary here, as in *Service,* was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulations he could have discharged petitioner summarily.

Petitioner makes various contentions as to the constitutional invalidity of the procedures provided by Order No. 2738. He further urges that even assuming the validity of the governing procedures, his dismissal cannot stand because the notice of suspension and hearing given him did not comply with the Order. We find it unnecessary to reach the constitutional issues, for we think that petitioner's second position is well taken and must be sustained.

Preliminarily, it should be said that departures from departmental regulations in matters of this kind involve more than mere consideration of procedural irregularities. For in proceedings of this nature, in which the ordinary rules of evidence do not apply, in which matters involving the disclosure of confidential information are withheld, and where it must be recognized that counsel is under practical constraints in the making of objections and in the tactical handling of his case which would not obtain in a cause being tried in a court of law before trained judges, scrupulous observance of departmental procedural safeguards is clearly of particular importance.[2] In this instance an examination of the record, and of the transcript of the hearing before the departmental security board, discloses that petitioner's procedural rights under the applicable regulations were violated in at least three material respects in the proceedings which terminated in the final notice of his dismissal.

First, § 15 (a) of Order No. 2738 requires that the statement of charges served upon an employee at the time

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[2] As already noted, we do not reach the question of the constitutional permissibility of an administrative adjudication based on "confidential information" not disclosed to the employee.

of his suspension on security grounds "shall be as specific and detailed as security considerations, including the need for protection of confidential sources of information, permit . . . and shall be subject to amendment within 30 days of issuance." Although the statement of charges furnished petitioner appears on its face to be reasonably specific,[3] the transcript of hearing establishes that the statement, which was never amended, cannot conceivably be said in fact to be as specific and detailed as "security considerations . . . permit." For petitioner was questioned by the security officer and by the hearing board in great detail concerning his association with and knowledge of various persons and organizations nowhere mentioned in the statement of charges,[4] and at length concerning his activities in Bucks County, Pennsylvania, and elsewhere after 1945, activities as to which the charges are also completely silent. These questions were presumably asked because they were deemed relevant to the inquiry before the board, and the very fact that they were asked and thus spread on the record is conclusive

[3] The substance of the charges has been stated on pp. 536–537, *supra*.

[4] The statement of charges referred to petitioner's alleged associations with only three named persons, "F———, W———, and W———." During the course of the hearing the security officer, however, asked "How well did you know L——— B———? . . . Did you ever meet H——— B——— C———? . . . Did you ever remember meeting a J——— L———?" Further, petitioner was questioned as to his knowledge of and relationships with a wide variety of organizations not mentioned in the statement of charges. Thus he was asked: "Do you know what Black Mountain Transcendentalism is? . . . Do you recall an organization by the name of National Council for Soviet-American Friendship? . . . How about the Southern Conference for Human Welfare? . . . What is the organization called the Joint Antifascist Refugee Committee? . . . Have you ever had any contact with the Negro Youth Congress? . . . How about Abraham Lincoln Brigade? . . . Have you ever heard of a magazine called 'Cooperative Union'? . . . I was wondering whether you had ever heard of Consumers Union?"

indication that "security considerations" could not have justified the omission of any statement concerning them in the charges furnished petitioner.

Second, §§ 21 (a) and (e) require that hearings before security hearing boards shall be "orderly" and that "reasonable restrictions shall be imposed as to relevancy, competency, and materiality of matters considered." The material set forth in the margin, taken from the transcript, and illustrative rather than exhaustive, shows that these indispensable indicia of a meaningful hearing were not observed.[5] It is not an overcharacterization to say

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[5] "Mr. ARMSTRONG [the departmental security officer, inquiring about petitioner's activities as a teacher in a Georgia college]: Were these activities designed to be put into effect by both the white and the colored races? . . . What were your feelings at that time concerning race equality? . . . How about civil rights? Did that enter into a discussion in your seminar groups?"

"Mr. ARMSTRONG: Do I interpret your statement correctly that maybe Negroes and Jews are denied some of their constitutional rights at present?

"Mr. VITARELLI: Yes.

"Mr. ARMSTRONG: In what way?

"Mr. VITARELLI: I saw it in the South where certain jobs were open to white people and not open to Negroes because they were Negroes. . . . In our own university, there was a quota at Columbia College for the medical students. Because they were Jewish, they would permit only so many. I thought that was wrong.

"Chairman TOWSON: Doctor, isn't it also true that Columbia College had quotas by states and other classifications as well?

"Mr. VITARELLI: I don't remember that. It may be true.

"Mr. ARMSTRONG: In other words, wasn't there a quota on Gentiles as well as Jews?

"Mr. VITARELLI: . . . I had remembered that some Jews seemed to feel, and I felt, too, at the time, that they were being persecuted somewhat.

"Chairman TOWSON: Did you ever take the trouble to investigate whether or not they were or did you just accept their word?

[*Footnote 5 continued on p. 543.*]

that as the hearing proceeded it developed into a wide-ranging inquisition into this man's educational, social, and political beliefs, encompassing even a question as to whether he was "a religious man."

"Mr. VITARELLI: No, I didn't investigate it.

"Chairman TOWSON: You accepted their word for it.

"Mr. VITARELLI: I accepted the general opinion of the group of professors with whom I associated and was taught. . . .

"Chairman TOWSON: I am simply asking you to verify the vague impression I have that Columbia College puts a severe quota on residents of New York City, whatever their race, creed or color may be.

"Mr. VITARELLI: I think that is true. . . .

"Chairman TOWSON: Otherwise there would be no students at Columbia College except residents of New York City.

"Mr. VITARELLI: There may be a few others, but mostly New York City.

"Chairman TOWSON: Isn't it true that the quota system is designed by the college in order to make it available to persons other than live in New York City?

"Mr. VITARELLI: I believe that is the reason.

"Chairman TOWSON: And any exclusion of a resident of New York City would be for that reason, rather than the race, creed or color?

"Mr. VITARELLI: I think that is the way the policy is stated.

"Chairman TOWSON: Is it not a fact?

"Mr. VITARELLI: I don't think so. . . .

"Chairman TOWSON: Excuse me, Mr. Armstrong.

"Mr. ARMSTRONG: I went to Columbia Law School for two years and certainly there was not any quota system there at that time, and that is a long time ago. All right, we are getting afield."

Petitioner was also asked the following questions by the security officer during the course of the hearing:

"Mr. ARMSTRONG: I think you indicated in an answer or a reply to an interrogatory that you at times voted for and sponsored the principles of Franklin Delano Roosevelt, Norman A. Thomas, and Henry Wallace? . . . How many times did you vote for . . . [Thomas] if you care to say? . . . How about Henry Wallace? . . . How about Norman Thomas? Did his platform coincide more nearly with your ideas of democracy? . . . At one time, or two, you were a strong advocate of the United Nations. Are you

Third, § 21 (c)(4) gives the employee the right "to cross-examine any witness offered in support of the charges." It is apparent from an over-all reading of the regulations that it was not contemplated that this provision should require the Department to call witnesses to testify in support of any or all of the charges, because it was expected that charges might rest on information gathered from or by "confidential informants." We think, however, that § 21 (c)(4) did contemplate the calling by the Department of any informant not properly classifiable as "confidential," if information furnished by that informant was to be used by the board in assessing an employee's status.[6] The transcript shows that this

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still? . . . The file indicates, too, that you were quite hepped up over the one world idea at one time; is that right?"

Witnesses presented by petitioner were asked by the security officer and board members such questions as:

"The Doctor indicated that he was acquainted with and talked to Norman Thomas on occasions. Did you know about that? . . . How about Dr. Vitarelli? Is he scholarly? . . . A good administrator? . . . Was he careless with his language around the students or careful? . . . Did you consider Dr. Vitarelli as a religious man? . . . Was he an extremist on equality of races? . . . In connection with the activities that Dr. Vitarelli worked on that you know about, either in the form of projects or in connection with the educational activities that you have mentioned, did they extend to the Negro population of the country? In other words, were they contacts with Negro groups, with Negro instructors, with Negro students, and so on?"

It is not apparent how any of the above matters could be material to a consideration of the question whether petitioner's retention in government service would be consistent with national security.

[6] This reading of the provision is supported by § 21 (e) of the Order, which provides in part that "if the employee is or may be handicapped by the nondisclosure to him of confidential information or by lack of opportunity to cross-examine confidential informants, the hearing board shall take that fact into consideration," thus implying that the employee is to have the right to cross-examine nonconfidential informants who provide material taken into consideration by the board.

provision was violated on at least one occasion at petitioner's hearing, for the security officer identified by name a person who had given information apparently considered detrimental to petitioner, thus negating any possible inference that that person was considered a "confidential informant" whose identity it was necessary to keep secret, and questioned petitioner at some length concerning the information supplied from this source without calling the informant and affording petitioner the right to cross-examine.[7]

Because the proceedings attendant upon petitioner's dismissal from government service on grounds of national security fell substantially short of the requirements of the applicable departmental regulations, we hold that such dismissal was illegal and of no effect.

Respondent urges that even if the dismissal of September 10, 1954, was invalid, petitioner is not entitled to reinstatement by reason of the fact that he was at all events validly dismissed in October 1956, when a copy of the second "Notification of Personnel Action," omitting all reference to any statute, order, or regulation relating to security discharges, was delivered to him. Granting that the Secretary could at any time after September 10, 1954, have validly dismissed petitioner without any statement of reasons, and independently of the proceedings taken against him under Order No. 2738, we cannot view the delivery of the new notification to petitioner as an exercise of that summary dismissal power. Rather, the fact that it was dated "9–21–54," contained a termination of employment date of "9–10–54," was designated as "a revision" of the 1954 notification, and was evidently filed in

[7] The information was to the effect that petitioner had criticized as "bourgeois" the purchase of a house by a woman associate in Georgia. Petitioner flatly denied that he had made the remark attributed to him, and said that he could never have made such a statement except in a spirit of levity.

the District Court before its delivery to petitioner indicates that its sole purpose was an attempt to moot petitioner's suit in the District Court by an "expunging" of the grounds for the dismissal which brought Order No. 2738 into play.[8] In these circumstances, we would not be justified in now treating the 1956 action, plainly intended by the Secretary as a grant of relief to petitioner in connection with the form of the 1954 discharge, as an exercise of the Secretary's summary removal power as of the date of its delivery to petitioner.[9]

It follows from what we have said that petitioner is entitled to the reinstatement which he seeks, subject, of course to any lawful exercise of the Secretary's authority hereafter to dismiss him from employment in the Department of the Interior.

Reversed.

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

An executive agency must be rigorously held to the standards by which it professes its action to be judged. See *Securities & Exchange Comm'n* v. *Chenery Corp.*, 318 U. S. 80, 87–88. Accordingly, if dismissal from

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[8] The Secretary successfully took the position in the courts below that the only possible defect in the 1954 discharge was the articulation of the "national security" grounds therefor, and that since that defect did not void the dismissal as such, an "expunging" of these grounds gave petitioner the maximum relief to which he could possibly be entitled.

[9] Respondent's brief in this Court refers to the 1956 notice as part of "corrective administrative action which has been taken," and as "relief voluntarily accorded [petitioner]." The premise upon which the dissenting opinion essentially rests—that the 1956 action was an attempt "to discharge Vitarelli retroactively"—thus is contrary to the Secretary's own position as to the reason for that action.

employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. See *Service* v. *Dulles,* 354 U. S. 363. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword. Therefore, I unreservedly join in the Court's main conclusion, that the attempted dismissal of Vitarelli in September 1954 was abortive and of no validity because the procedure under Department of the Interior Order No. 2738 was invoked but not observed.

But when an executive agency draws on the freedom that the law vests in it, the judiciary cannot deny or curtail such freedom. The Secretary of the Interior concededly had untrammelled right to dismiss Vitarelli out of hand, since he had no protected employment rights. He could do so as freely as a private employer who is not bound by procedural restrictions of a collective bargaining contract. The Secretary was under no law-imposed or self-imposed restriction in discharging an employee in Vitarelli's position without statement of reasons and without a hearing. And so the question is, did the Secretary take action, after the abortive discharge in 1954, dismissing Vitarelli?

In October 1956 there was served upon Vitarelli a copy of a new notice of dismissal which had been inserted in the Department's personnel records in place of the first notice. Another copy was filed with the District Court in this proceeding. This second notice contained no mention of grounds of discharge. If, instead of sending this second notice to Vitarelli, the Secretary had telephoned Vitarelli to convey the contents of the second notice, he would have said: "I note that you are contesting the validity of the dismissal. I want to make this very clear to you. If I did not succeed in dismissing you before,

I now dismiss you, and I dismiss you retroactively, effective September 1954."

The Court disallows this significance to the second notice of discharge because it finds controlling meaning in the suggestion of the Government that the expunging from the record of any adverse comment, and the second notice of discharge, signified a reassertion of the effectiveness of the first attempt at dismissal. And so, the Court concludes, no intention of severance from service in 1956 could legally be found since the Secretary expressed no doubt that the first dismissal had been effective. But this document of 1956 was not a mere piece of paper in a dialectic. The paper was a record of a process, a manifestation of purpose and action. The intendment of the second notice, to be sure, was to discharge Vitarelli retroactively, resting this attempted dismissal on valid authority—the summary power to dismiss without reason. Though the second notice could not pre-date the summary discharge because the Secretary rested his 1954 discharge on an unsustainable ground, and Vitarelli could not be deprived of rights accrued during two years of unlawful discharge, the prior wrongful action did not deprive the Secretary of the power in him to fire Vitarelli prospectively. And if the intent of the Secretary be manifested in fact by what he did, however that intent be expressed—here, the intent to be rid of Vitarelli—the Court should not frustrate the Secretary's rightful exercise of this power as of October 1956. The fact that he wished to accomplish more does not mean he accomplished nothing.

To construe the second notice to mean administratively nothing is to attribute to the Secretary the purpose of a mere diarist, the corrector of entries in the Department's archives. This wholly disregards the actualities in the conduct of a Department concerned with terminating the services of an undesired employee as completely and by

whatever means that may legally be accomplished. If an employer summons before him an employee over whom he has unfettered power of dismissal and says to him: "You are no longer employed here because I fired you last week," can one reasonably escape the conclusion that though the employer was in error and had not effectively carried out his purpose to fire the employee last week, the employer's statement clearly manifests a present belief that the employee is dismissed and an intention that he be foreverafter dismissed? Certainly the employee would have no doubt his employment was now at an end. Of course if some special formal document were required to bring about a severance of a relationship, cf. *Felter* v. *Southern Pacific Co.*, 359 U. S. 326, because of non-compliance with the formality the severance would not come into being. But no such formality was requisite to Vitarelli's dismissal.

This is the common sense of it: In 1956 the Secretary said to Vitarelli: "This document tells you without any ifs, ands, or buts, you have been fired right along and of course that means you are not presently employed by this Department." Since he had not been fired successfully in 1954, the Court concludes he must still be employed. I cannot join in an unreal interpretation which attributes to governmental action the empty meaning of confetti throwing.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* WILLIAMS, REVENUE COMMISSIONER.

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

No. 783. Decided June 1, 1959.

Since the State represents that no fine against petitioner has been finally determined and assessed, certiorari to review the contempt judgment against petitioner is denied, leaving petitioner free to take further proceedings here when the judgment below becomes final or the jurisdiction of this Court may otherwise be appropriately invoked.

Robert L. Carter, Frank D. Reeves and *A. T. Walden* for petitioners.

Eugene Cook, Attorney General of Georgia, *Robert H. Hall,* Assistant Attorney General, and *E. Freeman Leverett,* Deputy Assistant Attorney General, for respondent.

PER CURIAM.

The motion to substitute Dixon Oxford in the place of T. V. Williams as the party respondent is granted. The State represents to us that no fine against petitioner has been finally determined and assessed. Accordingly, the petition for a writ of certiorari is denied, leaving petitioner free to take further proceedings here when the judgment below becomes final or the jurisdiction of this Court may otherwise be appropriately invoked.

MR. JUSTICE DOUGLAS.

With some doubts I bow to the conclusion that this judgment is not final within the meaning of the jurisdictional statute, 28 U. S. C. § 1257. It ordered the petitioner to "produce all its books, records and other data

bearing on said corporation's income, disbursements and expenses prepared or used by said corporation in the conduct of its business during said taxable years wherever said business was transacted, whether within or without this state (except such as may be otherwise theretofore produced hereunder) . . . within thirty-five days . . . [and] that said corporation forthwith pay into the registry of the Clerk of this Court a fine of twenty-five thousand dollars, to be hereafter assessed and apportioned remedially and punitively, as shall appear just and appropriate to the Court, the Court reserving jurisdiction, after the production of the books, records and data hereby ordered, to reduce the amount of said fine if such should be just under the circumstances then existing."

By the terms of this judgment, the Georgia court reserves the power to reduce the amount of the fine. One question tendered by the petitioner would turn on the amount of the fine. It is the issue of "cruel and unusual punishments" which is outlawed by the Eighth Amendment that is in turn made applicable to the States by the Fourteenth, *Francis* v. *Resweber,* 329 U. S. 459, 463. That is a subsidiary question and one that the State contends is not properly here because, it is said, no such assignment of error was included in the bill of exceptions.

The central issue in the case has nothing to do with the amount of the fine. It seems that the order to produce the records and the citation for contempt followed each other in a matter of a few hours. The basic question is whether holding petitioner in contempt and imposing any fine comported with that due process required of every government under our Bill of Rights. Were that question here alone, I would think the judgment was final. But since the issue of "cruel and unusual punishment" is also tendered and since a reduction of the fine may eliminate it from the case, I acquiesce in the denial of certiorari at this stage of the proceedings.

SIEGEL ET AL. *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 773. Decided June 1, 1959.

Appeal dismissed for want of a substantial federal question.
Reported below: 5 N. Y. 2d 707, 708.

William G. Mulligan for appellants.

Frank H. Gordon for appellee.

PER CURIAM.

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

OHIO EX REL. KLAPP, PROSECUTING ATTORNEY, *v.* DAYTON POWER & LIGHT CO. ET AL.

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

No. 851. Decided June 1, 1959.

Certiorari granted and judgment reversed.
Reported below: 263 F. 2d 909.

Robert Houston French, Haveth E. Mau and *R. K. Wilson* for petitioner.

Julian de Bruyn Kops for respondents.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the United States Court of Appeals for the Sixth Circuit is reversed. *Strawbridge* v. *Curtiss,* 3 Cranch 267; *Removal Cases,* 100 U. S. 457; *Indianapolis* v. *Chase National Bank,* 314 U. S. 63.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 552 and 901 were purposely omitted, in order to make it possible to publish the 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 FEBRUARY 24 THROUGH JUNE 1, 1959.

FEBRUARY 24, 1959.

Miscellaneous Orders.

No. 10, Original. UNITED STATES *v.* LOUISIANA ET AL. This case is set for argument on Monday, October 12, 1959, on the motion of the United States for judgment, the answers thereto, and on the motion to dismiss the cross-bill of the State of Alabama. THE CHIEF JUSTICE and MR. JUSTICE CLARK took no part in the consideration or entry of this order.

For previous order and counsel in this case, see 358 U. S. 902.

No. 504. TAYLOR *v.* MCELROY ET AL. Certiorari, 358 U. S. 918, to the United States Court of Appeals for the District of Columbia Circuit. Further consideration of the respondents' suggestion of mootness is postponed to the hearing of the case on the merits. *Solicitor General Rankin* for respondents. *Joseph L. Rauh, Jr., John Silard, Harold A. Cranefield* and *Richard Lipsitz* for petitioner.

No. 339. SPEVACK *v.* STRAUSS ET AL. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. The motion of petitioner for leave to add John A. McCone as a party respondent is granted. *Carleton U. Edwards, II, Joseph Y. Houghton* and *Bernard Margolius* for petitioner.

No. 372. GINSBURG *v.* SULLIVAN, U. S. DISTRICT JUDGE, ET AL., 358 U. S. 882, 923. The motion to remand and for other relief is denied. *Paul Ginsburg, pro se.*

No. 2, Original. WISCONSIN ET AL. *v.* ILLINOIS ET AL.;

No. 3, Original. MICHIGAN *v.* ILLINOIS ET AL.; and

No. 4, Original. NEW YORK *v.* ILLINOIS ET AL. The motion to allow and fix time for filing plaintiffs' reply brief is granted and the time is extended to and including March 31, 1959. The defendants are allowed to and including March 31, 1959, to reply to the brief of the Solicitor General, if so advised. *John W. Reynolds,* Attorney General, and *Roy Tulane,* Assistant Attorney General, for the State of Wisconsin; *Miles Lord,* Attorney General, and *Raymond A. Haik,* Special Assistant Attorney General, for the State of Minnesota; *Mark McElroy,* Attorney General, *Robert E. Boyd,* Assistant Attorney General, and *Herbert H. Naujoks,* Special Assistant to the Attorneys General, for the State of Ohio; *Anne X. Alpern,* Attorney General, and *Lois G. Forer,* Deputy Attorney General, for the State of Pennsylvania; *Paul L. Adams,* Attorney General, *Samuel J. Torina,* Solicitor General, and *Nicholas V. Olds,* Assistant Attorney General, for the State of Michigan; and *Louis J. Lefkowitz,* Attorney General, and *Richard H. Shepp* and *Dunton F. Tynan,* Assistant Attorneys General, for the State of New York, complainants. *Latham Castle,* Attorney General of Illinois, *William C. Wines,* Assistant Attorney General, *George A. Lane, Lawrence J. Fenlon, Joseph B. Fleming, Joseph H. Pleck* and *Thomas M. Thomas* for the defendants.

No. 420, Misc. LEIGH *v.* REESE, SHERIFF;

No. 449, Misc. MORSE *v.* UNITED STATES ATTORNEY GENERAL;

No. 471, Misc. SAVAGE *v.* PEPERSACK, WARDEN; and

No. 539, Misc. JACKSON *v.* STEINER, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied. Movants *pro se. Solicitor General Rankin* for respondent in No. 449, Misc.

No. 405, Misc. CARPENTER *v.* LEDERLE, CHIEF JUDGE, U. S. DISTRICT COURT, ET AL. Motion for leave to file petition for writ of mandamus and for other relief denied.

No. 392, Misc. HOUSE *v.* GRIMES, SHERIFF. Motion for leave to file petition for writ of habeas corpus and for other relief denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

No. ——. GIBSON ET AL. *v.* FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE. The application for a stay of the judgment of the Supreme Court of Florida and proceedings pursuant thereto, presented to MR. JUSTICE BLACK, and by him referred to the Court, is granted and the execution of such judgment and proceedings pursuant thereto is stayed pending the timely filing and disposition of a petition for certiorari. *Robert L. Carter* and *G. E. Graves, Jr.* for petitioners. *Mark R. Hawes* for the Florida Legislative Investigation Committee.

Probable Jurisdiction Noted.

No. 567. UNITED STATES *v.* PARKE, DAVIS & CO. Appeal from the United States District Court for the District of Columbia. Probable jurisdiction noted. *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman* and *W. Louise Florencourt* for the United States. *Gerhard A. Gesell* and *Edward S. Reid, Jr.* for appellee. Reported below: 164 F. Supp. 827.

No. 571. KINSELLA, WARDEN, *v.* UNITED STATES EX REL. SINGLETON. Appeal from the United States District Court for the Southern District of West Virginia. Motion of the appellee for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. *Solicitor General Rankin, Assistant Attorney General White,*

Harold H. Greene and *William A. Kehoe, Jr.* for the United States. *Frederick Bernays Wiener* for appellee. Reported below: 164 F. Supp. 707.

Certiorari Granted. (See also No. 234, Misc., 358 U. S. 645.)

No. 597. HOFFMAN, U. S. DISTRICT JUDGE, *v.* BLASKI ET AL. C. A. 7th Cir. Certiorari granted. *Charles J. Merriam* and *Samuel B. Smith* for petitioner. *Lloyd C. Root, Daniel V. O'Keeffe* and *John O'C. FitzGerald* for respondents. Reported below: 260 F. 2d 317.

No. 132. AQUILINO ET AL., DOING BUSINESS AS HOME MAINTENANCE CO., ET AL. *v.* UNITED STATES ET AL. Court of Appeals of New York. Certiorari granted. *Charles S. Friedman* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott* for the United States. Reported below: 3 N. Y. 2d 511, 146 N. E. 2d 774.

No. 559. HENRY *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted. *Edward J. Calihan, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 259 F. 2d 725.

No. 570. MCELROY, SECRETARY OF DEFENSE, ET AL. *v.* UNITED STATES EX REL. GUAGLIARDO. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General White, Harold H. Greene* and *William A. Kehoe, Jr.* for petitioners. *Michael A. Schuchat* for respondent. Reported below: 104 U. S. App. D. C. 112, 259 F. 2d 927.

No. 579. UNITED STATES *v.* DURHAM LUMBER CO. ET AL. C. A. 4th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *George F. Lynch* for the United States. *C. V. Jones* for Carter, respondent. Reported below: 257 F. 2d 570.

No. 562. LEWIS ET AL. *v.* BENEDICT COAL CORP. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit granted; and

No. 563. UNITED MINE WORKERS OF AMERICA ET AL. *v.* BENEDICT COAL CORP. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit granted limited to question 1 presented by the petition for the writ which reads as follows:

"1. Where (1) the settlement of disputes section of collective bargaining agreements antedating 1950 provided that Mine Workers shall not engage in a work stoppage pending settlement of disputes under grievance machinery procedures and such agreements contained other 'no strike' clauses, and (2) under the Labor Management Relations Act, 1947,[4a] the right to strike became a bargainable subject, and (3) in 1950 UMW and coal operators signatories to the National Bituminous Coal Wage Agreement of 1950, deleted such clauses therefrom and expressly covenanted that the 'no strike' clauses in prior agreements were rescinded and made null and void, and (4) signatories to such 1950 Agreement covenanted that stoppages, as well as disputes, shall be settled exclusively under grievance machinery procedures set forth in such contract, is a stoppage of work pending settlement of a dispute cognizable under the grievance machinery

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[4a] The Labor Management Relations Act, 1947, is herein called the "Act."

procedures proscribed thereby and a violation of the 1950 Agreement so as to subject UMW and District 28 to damage actions under the Act's Section 301?"

MR. JUSTICE STEWART took no part in the consideration or decision of these applications.

Val J. Mitch, Harold H. Bacon, E. H. Rayson, Charles E. McNabb and *R. R. Kramer* for petitioners in No. 562. *Welly K. Hopkins, Harrison Combs, Willard P. Owens* and *M. E. Boiarsky* for petitioners in No. 563. *Fred B. Greear* for respondent. Reported below: 259 F. 2d 346.

No. 499, Misc. WILSON *v.* BOHLANDER, COMMANDER, FITZSIMONS ARMY HOSPITAL. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit granted. *Frederick Bernays Wiener* for petitioner. *Solicitor General Rankin* for respondent. Reported below: See 167 F. Supp. 791.

Certiorari Denied. (See also No. 549, 358 U. S. 642; No. 363, Misc., 358 U. S. 645; No. 427, Misc., 358 U. S. 643; No. 428, Misc., 358 U. S. 646; and No. 392, Misc., ante, p. 903.)

No. 531. ALKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Raymond J. Bradley, Frank F. Truscott* and *Jacob Kossman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Joseph F. Goetten* and *Lawrence K. Bailey* for the United States. Reported below: 260 F. 2d 135.

No. 535. KEYES ET AL. *v.* GLADEVIEW DRAINAGE DISTRICT, PALM BEACH COUNTY, FLORIDA. C. A. 5th Cir. Certiorari denied. *J. Tweed McMullen* for petitioners. *Francis W. Sams* for respondent. Reported below: 258 F. 2d 273.

No. 591. GRIECO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Henry A. Lowenberg* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 261 F. 2d 414.

No. 593. MILLER ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. *Lee A. Freeman, Brainerd Currie* and *Philip B. Kurland* for petitioners. *Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston, R. L. Farrington, Neil Brooks* and *Donald A. Campbell* for respondents. Reported below: 260 F. 2d 286.

No. 594. LEWIS ET AL. *v.* STAMPOLIS. Supreme Court of Pennsylvania, Western District. Certiorari denied. *John J. Wilson, A. E. Kountz* and *Val J. Mitch* for petitioners. *D. B. Tobe* and *Charles E. McKissock* for respondent. Reported below: See 186 Pa. Super. 285, 142 A. 2d 348.

No. 595. DONOVAN *v.* ESSO SHIPPING CO. C. A. 3d Cir. Certiorari denied. *T. James Tumulty* for petitioner. *Walter X. Connor* for respondent. Reported below: 259 F. 2d 65.

No. 598. SOUTHERN CALIFORNIA GAS CO. *v.* CITY OF LOS ANGELES. Supreme Court of California. Certiorari denied. *T. J. Reynolds, L. T. Rice* and *Bates Booth* for petitioner. *Roger Arnebergh* and *Bourke Jones* for respondent. Reported below: 50 Cal. 2d 713, 329 P. 2d 289.

No. 599. PROHOROFF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *J. B. Tietz* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 259 F. 2d 694.

No. 590. CONSOLIDATED ELECTRIC LAMP CO. ET AL. *v.* MITCHELL, SECRETARY OF LABOR, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Gerard D. Reilly* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, Stuart Rothman* and *Bessie Margolin* for the Secretary of Labor, respondent. Reported below: 104 U. S. App. D. C. 32, 259 F. 2d 189.

No. 603. BUCHNER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John R. Fitzpatrick* and *Edward J. Lynch* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 106 U. S. App. D. C. —, 268 F. 2d 891.

No. 627. HANNAHVILLE INDIAN COMMUNITY ET AL. *v.* PRAIRIE BAND OF POTAWATOMI INDIANS ET AL. Court of Claims. Certiorari denied. *Walter H. Maloney, James N. Beery* and *Paul M. Niebell* for petitioners. *O. R. McGuire, Howard D. Moses* and *Ivy Lee Buchanan* for the respondent Bands of Indians. *Solicitor General Rankin* for the United States. Reported below: 143 Ct. Cl. —, 165 F. Supp. 139.

No. 601. OROZ *v.* AMERICAN PRESIDENT LINES, LTD. C. A. 2d Cir. Certiorari denied. *Philip F. DiCostanzo* for petitioner. *William Garth Symmers* and *Frederick Fish* for respondent. Reported below: 259 F. 2d 636.

No. 602. PENNSYLVANIA RAILROAD CO. ET AL. *v.* MCARDLE ET AL. C. A. 3d Cir. Certiorari denied. *Mahlon E. Lewis* and *Philip W. Amram* for petitioners. *Abraham E. Freedman* for respondents. Reported below: 258 F. 2d 945.

No. 605. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Myer H. Gladstone* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 260 F. 2d 508.

No. 606. DAVENPORT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Reuben G. Lenske* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 260 F. 2d 591.

No. 607. BRADFORD MACHINE TOOL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Philip J. Schneider* and *Morison R. Waite* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Lee A. Jackson* and *Harry Marselli* for respondent. Reported below: 260 F. 2d 950.

No. 608. RANDOLPH *v.* STOKES ET AL. C. A. 8th Cir. Certiorari denied. *Sherman Landau* for petitioner. *John S. Marsalek* for garnishee-respondent. Reported below: 260 F. 2d 461.

No. 609. STANDARD AMERICAN LIFE *v.* SHEEHAN, COMMISSIONER OF INSURANCE. Supreme Court of Minnesota. Certiorari denied. *Daniel S. Feidt* for petitioner. *Miles Lord,* Attorney General of Minnesota, for respondent. Reported below: 253 Minn. 462, 93 N. W. 2d 1.

No. 615. MEREDITH *v.* JOHN DEERE PLOW CO. C. A. 8th Cir. Certiorari denied. *Merritt M. Meredith, pro se. Raymond A. Smith* for respondent. Reported below: 261 F. 2d 121.

No. 610. McDonald *v.* O'Meara et al. C. A. 5th Cir. Certiorari denied. *Robert Weinstein* for petitioner. *John L. Toler* for the First City National Bank of Houston et al., and *M. Truman Woodward, Jr.* for the Louisiana Land & Exploration Co., respondents. Reported below: 259 F. 2d 425.

No. 613. St. Regis Tribe of Mohawk Indians *v.* New York. Court of Appeals of New York. Certiorari denied. *James Craig Peacock, Paul F. Myers* and *Edward J. Gosier* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Julius L. Sackman* for respondent. Reported below: 5 N. Y. 2d 24, 152 N. E. 2d 411.

No. 614. O'Connor et al. *v.* Commissioner of Internal Revenue. C. A. 6th Cir. Certiorari denied. *John C. O'Connor* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *Joseph Kovner* for respondent. Reported below: 260 F. 2d 358.

No. 617. Peter Paul, Inc., et al. *v.* Rederi A/B Pulp et al. C. A. 2d Cir. Certiorari denied. *Henry N. Longley* and *John W. R. Zisgen* for petitioners. *James McKown, Jr.* and *Charles S. Haight* for respondents. Reported below: 258 F. 2d 901.

No. 618. United States Lines Co. *v.* St. Paul Fire & Marine Insurance Co. C. A. 2d Cir. Certiorari denied. *Michael F. Whalen* and *James McGarry* for petitioner. *Martin P. Detels* for respondent. Reported below: 258 F. 2d 374.

No. 669. Thomas et al. *v.* Broadway Baptist Church. Court of Appeals of Kentucky. Certiorari denied. *J. W. Jones* for petitioners. *James W. Stites* for respondent. Reported below: 316 S. W. 2d 698.

No. 623. SWIFT & Co. *v.* JOHN DOE ET AL. St. Louis Court of Appeals of Missouri. Certiorari denied. *Walter R. Mayne* and *Earl G. Spiker* for petitioner. *Harry H. Craig* and *J. T. Wiley, Jr.* for respondents. Reported below: 315 S. W. 2d 465.

No. 626. DANNING, TRUSTEE IN BANKRUPTCY, *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Martin Gendel* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 259 F. 2d 305.

No. 632. SOUTHERN BLEACHERY & PRINT WORKS, INC., *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. *Frank A. Constangy, M. A. Prowell* and *Fred W. Elarbee, Jr.* for petitioner. *Solicitor General Rankin, Jerome D. Fenton, Thomas J. McDermott* and *Dominick L. Manoli* for respondent. Reported below: 257 F. 2d 235.

No. 635. LADUE & Co. *v.* ROGERS, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN. C. A. 7th Cir. Certiorari denied. *Nathan Shefner* for petitioner. *Solicitor General Rankin, Assistant Attorney General Townsend, George B. Searls* and *Irwin A. Seibel* for respondent. Reported below: 259 F. 2d 905.

No. 636. PACIFIC EMPLOYERS INSURANCE Co. *v.* INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. *W. N. Mullen* for petitioner. *Everett A. Corten* for the Industrial Accident Commission of California, and *Solicitor General Rankin, Assistant Attorney General Doub, Morton Hollander* and *Herbert E. Morris* for the Veterans Administration, respondents.

No. 628. PEWEE COAL CO., INC., *v.* UNITED STATES. Court of Claims. Certiorari denied. *Martin Emilius Carlson* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 142 Ct. Cl. 796, 161 F. Supp. 952.

No. 639. SEABOARD & WESTERN AIRLINES, INC., *v.* CIVIL AERONAUTICS BOARD ET AL.; and

No. 645. CIVIL AERONAUTICS BOARD *v.* PAN AMERICAN WORLD AIRWAYS, INC., ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Hardy K. Maclay* and *Walter D. Hansen* for petitioner in No. 639. *Solicitor General Rankin, Assistant Attorney General Hansen, Franklin M. Stone* and *O. D. Ozment* for petitioner in No. 645. *Henry J. Friendly* for Pan American World Airways, Inc., and *Charles Pickett* and *William Caverly* for Trans World Airlines, Inc., respondents. Reported below: 104 U. S. App. D. C. 288, 261 F. 2d 754.

No. 647. GICHNER IRON WORKS, INC., *v.* HANNA ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Richard W. Galiher* and *William E. Stewart, Jr.* for petitioner. *Paul R. Connolly* and *Hugh Lynch, Jr.* for respondents. Reported below: 104 U. S. App. D. C. 246, 261 F. 2d 75.

No. 378, Misc. LLOYD *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* and *Beatrice Rosenberg* for the United States. Reported below: 104 U. S. App. D. C. 48, 259 F. 2d 334.

No. 631. JULES S. SOTTNEK CO., INC., ET AL. *v.* CENTRAL RAILROAD CO. OF NEW JERSEY. C. A. 2d Cir. Certiorari denied. *Raymond E. Stefferson* for petitioners. *Vincent E. McGowan* and *Theodore A. Kelly* for respondent. Reported below: 258 F. 2d 85.

No. 637. MERCHANTS WAREHOUSE CO., INC., *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *William Waller* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Melva M. Graney* and *Grant W. Wiprud* for respondent. Reported below: 261 F. 2d 277.

No. 638. HYMAN *v.* CONTINENTAL ILLINOIS NATIONAL BANK ET AL. C. A. 5th Cir. Certiorari denied. *Samuel H. Horne* for petitioner. *Floyd E. Thompson* and *Walter Humkey* for respondents. Reported below: 258 F. 2d 502.

No. 641. CHASE MANHATTAN BANK *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *C. W. Wellen* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Robert N. Anderson* and *L. W. Post* for respondent. Reported below: 259 F. 2d 231.

No. 642. LOEB *v.* LOEB. Court of Appeals of New York and/or Supreme Court of New York, New York County. Certiorari denied. *Benjamin H. Sullivan* for petitioner. *Alexis C. Coudert* for respondent. Reported below: 4 N. Y. 2d 542, 152 N. E. 2d 36.

No. 651. BEVIL ET AL. *v.* O'BOYLE ET AL. C. A. 5th Cir. Certiorari denied. *William Hamlet Blades* for petitioners. *Hugh G. Freeland* for respondents. Reported below: 259 F. 2d 506.

No. 501. DREIS, EXECUTOR, *v.* BISHOP, ADMINISTRATRIX. C. A. 3d Cir. Motion to dispense with printing response to petition granted. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied. *Osmond K. Fraenkel* for petitioner. *Croxton Williams* for respondent. Reported below: 257 F. 2d 495.

No. 596. STELLA *v.* GRAHAM-PAIGE MOTORS CORP. ET AL. Motion to use the certified record in case No. 164, October Term, 1956, as a part of the record granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Lewis M. Dabney, Jr.* and *Murray C. Bernays* for petitioner. *Ambrose V. McCall* for Graham-Paige Motors Corp., respondent. Reported below: 259 F. 2d 476.

No. 600. HART ET AL. *v.* SELECTED INVESTMENTS TRUST FUND, LINWOOD O. NEAL, TRUSTEE, ET AL. Motion to substitute W. M. Harrison as a party respondent in the place of Paul C. Duncan, resigned, granted. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied. *George Zolotar* for petitioners. *George E. Soule, James D. Fellers* and *Luther Bohanon* for Harrison, respondent. *Solicitor General Rankin, Thomas G. Meeker, David Ferber* and *Arthur Blasberg, Jr.* for the Securities and Exchange Commission in opposition. Reported below: 260 F. 2d 918.

No. 630. GEUDER, PAESCHKE & FREY CO. *v.* J. R. CLARK CO. ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Maxwell H. Herriott* for petitioner. *Andrew E. Carlsen* for respondents. Reported below: 259 F. 2d 737.

No. 604. SKIBS, "A/S MARIE BAKKE," *v.* OTIS MCALLISTER & Co. Motions of American President Lines, Ltd., Grace Line Inc., et al., and Lykes Bros. Steamship Co., Inc., et al. for leave to file briefs, as *amici curiae*, granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. *Ira S. Lillick* and *Tom Killefer* for petitioner. *Lloyd M. Tweedt* for respondent. *William Garth Symmers, Frederick Fish* and *William Warner* for American President Lines, Ltd., *L. deGrove Potter* and *James McGarry* for Grace Line Inc., et al., and *Joseph M. Rault* for Lykes Bros. Steamship Co., Inc., et al., as *amici curiae*, in support of the petition. Reported below: 260 F. 2d 181.

No. 640. MISSOURI PACIFIC RAILROAD Co. *v.* JOHN DOE ET AL. St. Louis Court of Appeals of Missouri. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *George W. Holmes* for petitioner. *Harry H. Craig* and *J. T. Wiley, Jr.* for respondents. Reported below: 315 S. W. 2d 465.

No. 225, Misc. DEFILLO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 257 F. 2d 835.

No. 304, Misc. MCGUINN *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 *Carl H. Imlay* for the United States.

No. 306, Misc. NERWINSKI *v.* CAVELL, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 310, Misc. GOSTOVICH *v.* VALORE, ADJUDICATION OFFICER, VETERANS ADMINISTRATION. C. A. 3d Cir. Certiorari denied. *Louis C. Glasso* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Herbert E. Morris* for respondent. Reported below: 257 F. 2d 144.

No. 338, Misc. TENORIO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Richard L. Walsh* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 258 F. 2d 816.

No. 361, Misc. HAMER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 259 F. 2d 274.

No. 364, Misc. HARRIS *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 365, Misc. UNITED STATES EX REL. COBB *v.* CAVELL, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 258 F. 2d 946.

No. 374, Misc. BOGGS *v.* MCLEOD, WARDEN. Criminal Court of Appeals of Oklahoma. Certiorari denied.

No. 381, Misc. LANDMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 386, Misc. LUTTRELL *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied. Petitioner *pro se. John J. O'Connell,* Attorney General of Washington, for respondent.

No. 379, Misc. GREEN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Jean F. Dwyer* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 104 U. S. App. D. C. 23, 259 F. 2d 180.

No. 387, Misc. KETCHUM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 259 F. 2d 434.

No. 388, Misc. HICKS *v.* OREGON. Supreme Court of Oregon. Certiorari denied. Reported below: 213 Ore. 619, 325 P. 2d 794.

No. 389, Misc. HOWARD *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.

No. 390, Misc. WATKINS *v.* CAVELL, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 391, Misc. YOUNG ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioners *pro se. Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 259 F. 2d 641.

No. 431, Misc. JACKSON *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. Court of Appeals of Maryland. Certiorari denied. Reported below: 218 Md. 652, 658, 146 A. 2d 438, 442.

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No. 399, Misc. HART *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 259 F. 2d 646.

No. 402, Misc. WILLIAMS *v.* UNITED STATES. C. A. 8th 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: 260 F. 2d 125.

No. 403, Misc. TRICE *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 406, Misc. STEVENS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 411, Misc. CANFORA, ALIAS PENZY, ALIAS RAYMONDI, *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 417, Misc. AMBROSINI *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.

No. 418, Misc. GROVE *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 419, Misc. GORSI *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States.

No. 422, Misc. CHAPMAN *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 430, Misc. JACKSON, ALIAS WILLIAMS, *v.* CULVER, STATE PRISON CUSTODIAN. Supreme Court of Florida. Certiorari denied.

No. 434, Misc. DASHOSH *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 439, Misc. PETERSON *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 441, Misc. BOONE *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 443, Misc. ROBERTS *v.* ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 444, Misc. JACKSON *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 448, Misc. HENSLEY *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

No. 452, Misc. AARON *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 456, Misc. CRONIN *v.* CONBOY, SUPERINTENDENT OF GREAT MEADOW CORRECTIONAL INSTITUTION, ET AL. Court of Appeals of New York. Certiorari denied.

No. 464, Misc. JACKSON *v.* STEINER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 261 F. 2d 447.

No. 475, Misc. SEWELL *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.

No. 480, Misc. PITTS *v.* KEENAN, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 481, Misc. MAJEWSKI *v.* ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 484, Misc. JEFFERSON *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 485, Misc. SUIT *v.* ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 134, Misc. DEESE *v.* CULVER, DIRECTOR OF CORRECTIONS. Petition for writ of certiorari to the Supreme Court of Florida denied without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court. Petitioner *pro se*. *Richard W. Ervin*, Attorney General of Florida, for respondent.

No. 206, Misc. FLOWERS *v.* TRAVELERS INSURANCE CO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Joe H. Tonahill* for petitioner. *Bryan F. Williams, Jr.* for respondent. Reported below: 258 F. 2d 220.

No. 349, Misc. DAVIS *v.* OHIO ET AL. Supreme Court of Ohio. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application.

Rehearing Denied.

No. 5. HOTEL EMPLOYEES UNION, LOCAL NO. 255, ET AL. *v.* SAX ENTERPRISES, INC., ET AL., 358 U. S. 270;

No. 6. HOTEL EMPLOYEES UNION, LOCAL NO. 255, ET AL. *v.* LEVY ET AL., DOING BUSINESS AS SHERRY FRONTENAC HOTEL, ET AL., 358 U. S. 270;

No. 443. G & G FISHING MAGNETS, INC., ET AL. *v.* K & G OIL TOOL & SERVICE CO., INC., ET AL., 358 U. S. 898; and

No. 543. HARMSEN *v.* FIZZELL ET AL., 358 U. S. 940. Petitions for rehearing denied.

No. 52. HAHN *v.* ROSS ISLAND SAND & GRAVEL CO., 358 U. S. 272. Rehearing denied. THE CHIEF JUSTICE and MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this application.

No. 494. PURITAN CHURCH BUILDING FUND ET AL. *v.* UNITED STATES ET AL., 358 U. S. 927;

No. 511. DEEP SEA TANKERS, LTD., ET AL. *v.* THE LONG BRANCH ET AL., 358 U. S. 933;

No. 514. STATES STEAMSHIP CO. *v.* UNITED STATES ET AL., 358 U. S. 933;

No. 522. UNITED STATES EX REL. THOMPSON *v.* LENNOX, SHERIFF, 358 U. S. 931;

No. 375, Misc. SHEPHERD *v.* UNITED STATES, 358 U. S. 936; and

No. 459, Misc. BRUNER *v.* ADAMS, WARDEN, 358 U. S. 937. Petitions for rehearing denied. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of these applications.

No. 88, Misc. HAMPTON *v.* DEBLAAY ET AL., 358 U. S. 850. Motion for leave to file petition for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application.

MARCH 2, 1959.

Miscellaneous Orders.

No. 41. NEW YORK CENTRAL RAILROAD CO. *v.* BOARD OF PUBLIC UTILITY COMMISSIONERS OF NEW JERSEY ET AL. Appeal from the United States District Court for the District of New Jersey. (Probable jurisdiction noted, 357 U. S. 917.) The motion to continue and for other relief is denied. *Thomas E. Dewey* and *Gerald E. Dwyer* for appellant-movant. *William A. Roberts* and *Milton T. Lasher* for appellees in opposition. Reported below: 158 F. Supp. 98.

No. 178. THE MONROSA ET AL. *v.* CARBON BLACK EXPORT, INC. Certiorari, 358 U. S. 809, to the United States Court of Appeals for the Fifth Circuit. The motion of American Institute of Marine Underwriters for leave to file brief, as *amicus curiae,* is granted. *Henry N. Longley* for movant. Reported below: 254 F. 2d 297.

No. 157. STEVENS, SUCCESSOR TO LAWLER, SECRETARY OF HIGHWAYS OF PENNSYLVANIA, ET AL. *v.* CREASY ET AL. Appeal from the United States District Court for the Western District of Pennsylvania. (Probable jurisdiction noted, 358 U. S. 807.) The motion to substitute David L. Lawrence and Park H. Martin in the place of George M. Leader and Lewis M. Stevens as parties appellant is granted. *Anne X. Alpern,* Attorney General of Pennsylvania, for movant. Reported below: 160 F. Supp. 404.

No. 378. ANONYMOUS NOS. 6 AND 7 *v.* ARKWRIGHT, JUSTICE OF THE SUPREME COURT OF NEW YORK. Appeal from the Court of Appeals of New York. The motion to substitute Edward G. Baker in the place of George A. Arkwright, retired, as the party appellee is granted. *Raphael H. Weissman* for movant. Reported below: 4 N. Y. 2d 1034, 152 N. E. 2d 651.

No. 415, Misc. MOORE *v.* MCNEILL, SUPERINTENDENT, MATTEAWAN STATE HOSPITAL; and

No. 436, Misc. MORRISON *v.* CAVELL, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 490, Misc. KURTH *v.* BENNETT, 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.

Certiorari Granted. (*See also No. 36, ante, p. 25, and No. 424, ante, p. 26.*)

No. 307. GOETT, ADMINISTRATRIX, *v.* UNION CARBIDE CORP. ET AL. C. A. 4th Cir. Certiorari granted. *Ernest Franklin Pauley* for petitioner. Reported below: 256 F. 2d 449.

No. 438. HESS, ADMINISTRATOR, *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *Cleveland C. Cory* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for the United States. Reported below: 259 F. 2d 285.

No. 448. SENTILLES *v.* INTER-CARIBBEAN SHIPPING CORP. C. A. 5th Cir. Certiorari granted. *Milton Kelner* for petitioner. *George F. Gilleland* for respondent. Reported below: 256 F. 2d 156.

No. 541. WEST *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari granted. *Abraham E. Freedman* and *Joseph Weiner* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. *Thomson F. Edwards* for Atlantic Port Contractors, Inc., respondent-impleaded. Reported below: 256 F. 2d 671.

No. 350, Misc. PARKER *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted.

Certiorari Denied. (*See also No. 490, Misc., supra, and No. 142, ante, p. 28.*)

No. 48. CITY OF TALLAHASSEE *v.* OLAN MILLS INCORPORATED. Supreme Court of Florida. Certiorari denied. *James Messer, Jr.* for petitioner. *Robert C. Hunt* for respondent. Reported below: 100 So. 2d 164.

No. 643. NOE ET AL., DOING BUSINESS AS JAMES A. NOE & CO., *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Warren Woods* for petitioner. *Solicitor General Rankin, Assistant Attorney General Hansen, John L. Fitzgerald* and *Richard A. Solomon* for the Federal Communications Commission, and *Paul M. Segal* and *Robert A. Marmet* for Loyola University, respondents. Reported below: 104 U. S. App. D. C. 221, 260 F. 2d 739.

No. 644. CHAPIN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Louis R. Baker* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for the United States. Reported below: 258 F. 2d 465.

No. 588. AMERICAN GILSONITE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. *Allan E. Mecham* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Heffron, Harry Baum* and *Marvin W. Weinstein* for respondent. Reported below: 259 F. 2d 654.

No. 646. FIREMAN'S FUND INSURANCE CO. *v.* WILBURN BOAT CO. ET AL. C. A. 5th Cir. Certiorari denied. *Edward B. Hayes* and *Joe A. Keith* for petitioner. *Hobert Price* and *T. G. Schirmeyer* for respondents. Reported below: 259 F. 2d 662.

No. 648. TAMARKIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Leonard Edward Abel* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 260 F. 2d 436.

No. 650. HANKINSON *v.* VAN DUSEN ET AL. C. A. 3d Cir. Certiorari denied. *Seymour I. Toll* for petitioner. *Bernard G. Segal* and *Edward W. Mullinix* for respondents. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Lionel Kestenbaum* for the United States in opposition.

No. 652. GEORGE SOLLITT CONSTRUCTION CO. *v.* GATEWAY ERECTORS, INC. C. A. 7th Cir. Certiorari denied. *Robert B. Johnstone* for petitioner. Reported below: 260 F. 2d 165.

No. 654. FARACO *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *David R. Shelton* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Melva M. Graney* for respondent. Reported below: 261 F. 2d 387.

No. 653. BYRD ET AL. *v.* STEIN ET AL. C. A. 5th Cir. Certiorari denied. *Frank E. Everett, Jr.* for petitioners. Reported below: 258 F. 2d 168.

No. 658. BALDWIN ET AL. *v.* BOARD OF TAX ROLL CORRECTIONS OF OKLAHOMA COUNTY ET AL. Supreme Court of Oklahoma. Certiorari denied. *Luther Bohanon* and *Leon S. Hirsh* for petitioners. *M. M. Thomas* for respondents. Reported below: 331 P. 2d 412.

No. 662. CALIFORNIA TANKER CO. *v.* REARDON. C. A. 2d Cir. Certiorari denied. *C. Dickerman Williams* for petitioner. *Louis R. Harolds* for respondent. Reported below: 260 F. 2d 369.

No. 666. BUTLER ET AL. *v.* WATTS. District Court of Appeal of Florida, Third Appellate District. Certiorari denied. *George F. Gilleland* for petitioners. *William S. Frates* for respondent. Reported below: 103 So. 2d 123.

No. 667. CITY AND COUNTY OF DENVER ET AL. *v.* DAVIDSON CHEVROLET, INC., ET AL. Supreme Court of Colorado. Certiorari denied. *John C. Banks* for petitioners. *Abe Krash* for respondents. Reported below: 137 Colo. 575, 328 P. 2d 377.

No. 695. APPALACHIAN ELECTRIC POWER CO. *v.* MCKINNEY. C. A. 4th Cir. Certiorari denied. *George Richardson, Jr.* for petitioner. Reported below: 261 F. 2d 292.

No. 267, Misc. SMITH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 257 F. 2d 432.

No. 147. HILL, ADMINISTRATRIX, *v.* WATERMAN STEAMSHIP CORP. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Abraham E. Freedman, Milton M. Borowsky* and *Martin J. Vigderman* for petitioner. *Thomas F. Mount* and *J. Welles Henderson, Jr.* for respondent. Reported below: 251 F. 2d 655.

No. 487. FILIPEK *v.* MOORE-McCORMACK LINES, INC., ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *James W. Forsyth* for petitioner. *Walter X. Connor, Thomas F. Feeney* and *Charles N. Fiddler* for Moore-McCormack Lines, Inc., respondent. Reported below: 258 F. 2d 734.

No. 585. FERRAIOLO *v.* NEWMAN. C. A. 6th Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application. *Ralph Rudd* and *Morris J. Levy* for petitioner. *Louis Loss* for respondent. *Solicitor General Rankin, Thomas G. Meeker* and *David Ferber* filed a brief for the Securities and Exchange Commission, as *amicus curiae,* in support of petitioner. Reported below: 259 F. 2d 342.

No. 612. KAPLAN TRUCKING CO. *v.* BOWERS, TAX COMMISSIONER OF OHIO. Supreme Court of Ohio. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application. *John P. McMahon* for petitioner. *Mark McElroy,* Attorney General of Ohio, and *John M. Tobin,* Assistant Attorney General, for respondent. Reported below: 168 Ohio St. 141, 151 N. E. 2d 654.

No. 328, Misc. CRAIN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 351, Misc. HAYES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States. Reported below: 258 F. 2d 400.

No. 393, Misc. LOOMIS *v.* ROGERS, ATTORNEY GENERAL, ET AL., GARNISHEES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Townsend, George B. Searls* and *Irwin A. Seibel* for respondents. Reported below: 103 U. S. App. D. C. 84, 254 F. 2d 941.

No. 409, Misc. LEMASTER *v.* ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 414, Misc. BOYKIN *v.* ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 421, Misc. HAMM *v.* MANSFIELD, COMMONWEALTH'S ATTORNEY, ET AL. Court of Appeals of Kentucky. Certiorari denied. Reported below: 317 S. W. 2d 172.

No. 423, Misc. UNITED STATES EX REL. WILLIAMS *v.* MCMANN, ACTING WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 424, Misc. ORTEGA *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 425, Misc. CARNEY *v.* JACKSON, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 432, Misc. LAMPE *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.

No. 435, Misc. DI SILVESTRO *v.* UNITED STATES VETERANS ADMINISTRATION. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for respondent.

No. 440, Misc. FRECCIA *v.* MARTIN, WARDEN. 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, and *Paxton Blair,* Solicitor General, for respondent. Reported below: 6 App. Div. 2d 770, 174 N. Y. S. 2d 464.

No. 445, Misc. WELLS *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 447, Misc. ST. LAWRENCE *v.* CLEMMER, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General White, Harold H. Greene* and *William A. Kehoe, Jr.* for respondent. Reported below: 260 F. 2d 470.

No. 450, Misc. COURTNEY *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 451, Misc. CROMWELL *v.* DULLES, SECRETARY OF STATE, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for respondents.

No. 438, Misc. SHIVERS *v.* PEPERSACK, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 218 Md. 635, 145 A. 2d 240.

No. 442, Misc. JAMES *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 *Felicia Dubrovsky* for the United States. Reported below: 104 U. S. App. D. C. 263, 261 F. 2d 381.

No. 453, Misc. JOHNSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 15 Ill. 2d 244, 154 N. E. 2d 274.

No. 473, Misc. COVINGTON *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.

No. 478, Misc. WILLIAMS *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Clyde W. Woody* for petitioner. Reported below: 164 Tex. Cr. R. 347, 321 S. W. 2d 72.

No. 486, Misc. BEGHTEL *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. Reported below: 164 Cal. App. 2d 294, 330 P. 2d 444.

No. 530, Misc. LEE *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. *Leon B. Catlett* for petitioner. Reported below: —— Ark. ——, 315 S. W. 2d 916.

No. 454, Misc. SHANE *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 474, Misc. SCOTT *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.

No. 487, Misc. MORGAN *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 488, Misc. DECKHART *v.* CAVELL, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 489, Misc. EDWARDS *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 492, Misc. DEFOE *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 493, Misc. CONERLY *v.* NEWELL, JUDGE, SUPERIOR COURT, LOS ANGELES COUNTY. District Court of Appeal of California, Second Appellate District. Certiorari denied.

No. 321, Misc. SAMPEDRO *v.* PUERTO RICO. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Gerardo Ortiz del Rivero* for petitioner. *J. B. Fernandez Badillo*, Attorney General of Puerto Rico, and *Arturo Estrella*, Assistant Attorney General, for respondent.

No. 426, Misc. OWENS *v.* CALIFORNIA ET AL. Petition for writ of certiorari to the Supreme Court of California and for other relief denied.

Rehearing Denied.

No. 532. LANZA *v.* NEW JERSEY, 358 U. S. 333; and

No. 537. SECOND FEDERAL SAVINGS & LOAN ASSOCIATION OF CLEVELAND *v.* BOWERS, TAX COMMISSIONER OF OHIO, 358 U. S. 305. Petitions for rehearing denied.

No. 283, Misc. MCDANIEL *v.* CALIFORNIA, 358 U. S. 282. Petition for rehearing denied. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this application.

No. 509. H. ROUW CO. *v.* MISSOURI PACIFIC RAILROAD CO., 358 U. S. 929. The motion to join or substitute parties plaintiff is denied. Petition for rehearing denied. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this motion and application.

MARCH 9, 1959.

Miscellaneous Orders.

No. 2, Original. WISCONSIN ET AL. *v.* ILLINOIS ET AL.;

No. 3, Original. MICHIGAN *v.* ILLINOIS ET AL.; and

No. 4, Original. NEW YORK *v.* ILLINOIS ET AL. The motion of the Solicitor General for an extension of time to file a brief in these cases is granted and the time is extended to and including April 15, 1959. The plaintiffs are allowed to and including April 30, 1959, to file their reply brief to the answer of the defendants and to reply to the brief of the Solicitor General, if so advised. Defendants are allowed to and including April 30, 1959, to reply to the brief of the Solicitor General, if so advised.

Solicitor General Rankin on the motion.

No. 461, Misc. FORSYTHE *v.* NEW JERSEY; and

No. 519, Misc. JOHNSON *v.* KEARNEY, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

Probable Jurisdiction Noted.

No. 649. MACKEY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL. *v.* MENDOZA-MARTINEZ. Appeal from the United States District Court for the Southern District of California. Probable jurisdiction noted. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Jerome M. Feit* for appellants.

No. 552. MINNEAPOLIS & ST. LOUIS RAILWAY CO. *v.* UNITED STATES ET AL.;

No. 620. SOUTH DAKOTA ET AL. *v.* UNITED STATES ET AL.; and

No. 633. MINNESOTA ET AL. *v.* UNITED STATES ET AL. Appeals from the United States District Court for the District of Minnesota. Probable jurisdiction noted. *Max Swiren* and *Richard Musenbrock* for appellant in No. 552. *Phil Saunders,* Attorney General of South Dakota, *Herman L. Bode,* Assistant Attorney General, and *Ernest W. Stephens* for appellants in No. 620. *Miles Lord,* Attorney General of Minnesota, and *Harold J. Soderberg,* Assistant Attorney General, for appellants in No. 633. *Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston, Robert W. Ginnane* and *B. Franklin Taylor, Jr.* for the United States and the Interstate Commerce Commission, appellees. *Latham Castle,* Attorney General of Illinois, and *Harry R. Begley,* Special Assistant Attorney General, for the State of Illinois, appellee. *Starr Thomas* and *Edwin A. Lucas* for the Atchison, Topeka & Santa Fe Railway Co. et al., appellees. *Robert H. Walker* and *Max J. Lipkin* for Intervening Appellees. Reported below: 165 F. Supp. 893.

Certiorari Granted. (*See No. 552, Misc., ante, p. 64.*)

Certiorari Denied.

No. 657. ADAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *M. R. Nachman, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for the United States. Reported below: 260 F. 2d 467.

No. 659. BARY ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. *William A. Bryans III* and *Austin W. Scott, Jr.* for petitioners. *Solicitor General Rankin* and *Acting Assistant Attorney General Yeagley* for the United States.

No. 660. DOHERTY *v.* BRESS. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Cornelius H. Doherty* for petitioner. Reported below: 104 U. S. App. D. C. 308, 262 F. 2d 20.

No. 663. ZIPP ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Fred H. Mandel* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Robert N. Anderson* and *George F. Lynch* for respondent. Reported below: 259 F. 2d 119.

No. 664. UNITED STATES *v.* KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS; and

No. 665. KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS *v.* UNITED STATES. Court of Claims. Certiorari denied. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for the United States. *J. Roy Thompson, Jr.* and *W. C. Lewis* for the Tribes of Indians. Reported below: 143 Ct. Cl. ——, 166 F. Supp. 939.

No. 674. DAWLEY *v.* CITY OF NORFOLK ET AL. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Leonard S. Davis* and *Virgil S. Gore, Jr.* for respondents. Reported below: 260 F. 2d 647.

No. 676. MERCHANT'S FAST MOTOR LINES, INC., *v.* LANE ET AL. C. A. 5th Cir. Certiorari denied. *Reagan Sayers* for petitioner. *Dorsey B. Hardeman* for respondents. Reported below: 259 F. 2d 336.

No. 560. OLIPHANT ET AL. *v.* BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN ET AL. In view of the abstract context in which the questions sought to be raised are presented by this record, the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit is denied. *Joseph L. Rauh, Jr.* and *John Silard* for petitioners. *Harold C. Heiss, Russell B. Day* and *Milton Kramer* for respondents. Reported below: 262 F. 2d 359.

No. 668. LEIGHTON *v.* ROGERS, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL. The motion to use the record in No. 348, October Term, 1957, is granted. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Townsend, George B. Searls, Irving Jaffe* and *Paul E. McGraw* for the Attorney General, respondent.

No. 672. ZACARIAS *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied. *Carroll* v. *United States*, 354 U. S. 394. *Daniel Y. Garbern* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 261 F. 2d 416.

No. 655. BEACHVIEW BROADCASTING CORP. *v.* FEDERAL COMMUNICATIONS COMMISSION. The motion for leave to add Tidewater Teleradio, Inc., as a party respondent is granted. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. *Edward P. Morgan* and *Herbert E. Forrest* for petitioner. *Solicitor General Rankin, Assistant Attorney General Hansen, John L. FitzGerald, Richard A. Solomon* and *Jerry M. Hamovit* for respondent. *Paul Porter* and *Harry M. Plotkin* for Tidewater Teleradio, Inc. Reported below: 104 U. S. App. D. C. 377, 262 F. 2d 688.

No. 266, Misc. LEYVAS *v.* UNITED STATES. C. A. 9th 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: 264 F. 2d 272.

No. 491, Misc. GREEN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John J. Dwyer* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 105 U. S. App. D. C. 342, 267 F. 2d 619.

No. 397, Misc. STARR *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Edward T. Cheyfitz* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 105 U. S. App. D. C. 91, 264 F. 2d 377.

No. 457, Misc. BOHME *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 49, Misc. KELLEY *v.* RANDOLPH, WARDEN. Circuit Court of Macon County, Illinois. Certiorari denied. Petitioner *pro se*. *Latham Castle*, Attorney General of Illinois, and *William C. Wines*, Assistant Attorney General, for respondent.

No. 261, Misc. GARNES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 258 F. 2d 530.

No. 302, Misc. NOBLE *v.* PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA. Supreme Court of Alabama. Certiorari denied. *J. Edmund Odum* for petitioner. *J. Reese Johnston, Jr.* for respondent. Reported below: 267 Ala. 488, 102 So. 2d 902.

No. 337, Misc. WHITT *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Nathan M. Brown* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States.

No. 462, Misc. HAWKS *v.* RANDOLPH, WARDEN. Circuit Court of Winnebago County, Illinois. Certiorari denied.

No. 472, Misc. LYONS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 494, Misc. DAILEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Chester E. Wallace* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 259 F. 2d 433.

No. 503, Misc. SPACK *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 505, Misc. YOUNG *v.* ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 508, Misc. POWELL *v.* CAVELL, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 509, Misc. BERRY *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 510, Misc. GALLARELLI *v.* UNITED STATES. C. A. 1st 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: 260 F. 2d 259.

No. 516, Misc. KIRBY *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 518, Misc. WILLIAMS *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.

No. 522, Misc. DIXON *v.* BARTLEY, JUDGE OF THE CIRCUIT COURT OF WILL COUNTY. Supreme Court of Illinois. Certiorari denied.

No. 526, Misc. MURDAUGH *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 325, Misc. JUZWIAK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *William E. Willis* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 258 F. 2d 844.

No. 366, Misc. KING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 258 F. 2d 754.

No. 369, Misc. DEVENY *v.* UNITED STATES. The motion to add American Casualty Company of Reading, Pennsylvania, as a party respondent is granted. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied. Petitioner *pro se. Solicitor General Rankin* for the United States. *Harry P. Thomson, Jr.* for the Casualty Company. Reported below: 257 F. 2d 814.

MARCH 23, 1959.

Miscellaneous Orders.

No. 467, Misc. STEWART *v.* GREEN, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION, ET AL.; and

No. 541, Misc. COSTELLO *v.* KLINGER, SUPERINTENDENT, CALIFORNIA MEN'S COLONY. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied.

No. 263. ABEL, ALIAS "MARK," ALIAS COLLINS, ALIAS GOLDFUS, *v.* UNITED STATES. Certiorari, 358 U. S. 813, to the United States Court of Appeals for the Second Circuit. Argued February 24–25, 1959.

It is ordered that this case be set for reargument on October 12, 1959, at the head of the calendar for that date. Upon reargument counsel are requested to discuss in their further briefs and oral arguments, in addition to other issues, the following questions:

1. Whether under the laws and Constitution of the United States (a) the administrative warrant of the New York Acting District Director of the Immigration and Naturalization Service was validly issued, (b) such administrative warrant constituted a valid basis for arresting petitioner or taking him into custody, and (c) such warrant furnished a valid basis for the searches and seizures affecting his person, luggage, and the room occupied by him at the Hotel Latham.

2. Whether, independently of such administrative warrant, petitioner's arrest, and the searches and seizures affecting his person, luggage, and the room occupied by him at the Hotel Latham, were valid under the laws and Constitution of the United States.

3. Whether on the record before us the issues involved in Questions "1 (a)," "1 (b)," and "2" are properly before the Court.

James B. Donovan argued the cause for petitioner. With him on the brief was *Thomas M. Debevoise, II. Solicitor General Rankin* argued the cause for the United States. With him on the brief were *Acting Assistant Attorney General Yeagley, William F. Tompkins* and *Kevin T. Maroney.* Reported below: 258 F. 2d 485.

No. 520, Misc. STEFANICH *v.* CIRCUIT COURT OF RANDOLPH COUNTY, ILLINOIS, ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 15, Original. ILLINOIS *v.* MICHIGAN ET AL. The motion of the States of Michigan, Ohio and Pennsylvania for an extension of time to answer the motion for leave to file the complaint is granted and the time is extended to and including March 31, 1959. *Paul L. Adams,* Attorney General, *Samuel J. Torina,* Solicitor General, and *Nicholas V. Olds,* Assistant Attorney General, for the State of Michigan; *Mark McElroy,* Attorney General, and *Harold Read,* First Assistant Attorney General, for the State of Ohio; and *Anne X. Alpern,* Attorney General, and *Lois G. Forer,* Deputy Attorney General, for the State of Pennsylvania, movants. *Latham Castle,* Attorney General of Illinois, *William C. Wines,* Assistant Attorney General, and *George E. Billett, Charles A. Bane* and *Calvin D. Trowbridge,* Special Assistant Attorneys General, for complainant.

No. 532, Misc. BYERS *v.* KANSAS;

No. 540, Misc. ORTEGA *v.* RAGEN, WARDEN;

No. 554, Misc. ALLEN *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY; and

No. 585, Misc. MOORE *v.* UNITED STATES. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted. (*See also No. 578, ante, p. 120, and No. 155, Misc., ante, p. 116.*)

No. 64, Misc. YANCY *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit granted. MR. JUSTICE STEWART took no part in the consideration or decision of these applications. *Seymour B. Goldman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Robert S. Erdahl* and *J. F. Bishop* for the United States. Reported below: 252 F. 2d 554.

Certiorari Denied. (*See also No. 336, Misc., ante, p. 120, and Misc. Nos. 467 and 541, supra.*)

No. 555. NEZ PERCE TRIBE OF INDIANS ET AL. *v.* SEATON, SECRETARY OF THE INTERIOR. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Richard Schifter* and *Eugene Gressman* for petitioners. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *Harold S. Harrison* for respondent. Reported below: 103 U. S. App. D. C. 202, 257 F. 2d 206.

No. 661. UNITED STATES *v.* WIGGINS. C. A. 5th Cir. Certiorari denied. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. *Victor V. Blackwell* and *Hayden C. Covington* for respondent. Reported below: 261 F. 2d 113.

No. 670. PADELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Osmond K. Fraenkel* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 262 F. 2d 357.

No. 671. A. D. JUILLIARD & CO., INC., *v.* JOHNSON, COLLECTOR OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Stephen Ailes, Paul F. Mickey* and *William C. Hill* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Robert N. Anderson* and *L. W. Post* for respondent. Reported below: 259 F. 2d 837.

No. 679. WEIN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Russell E. Parsons* and *Richard Gladstein* for petitioner.

No. 624. ARNFELD ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *J. Marvin Haynes, N. Barr Miller, Joseph H. Sheppard* and *Arthur H. Adams* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, I. Henry Kutz* and *Myron C. Baum* for the United States. Reported below: 143 Ct. Cl. ——, 163 F. Supp. 865.

No. 673. WINTERS ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *James R. Ryan* and *Samuel Hess Crossland* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *Meyer Rothwacks* for the United States. Reported below: 261 F. 2d 675.

No. 680. SEERY *v.* UNITED STATES. Court of Claims. Certiorari denied. *Gustave I. Jahr* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 142 Ct. Cl. 234, 161 F. Supp. 395.

No. 694. ORBO THEATRE CORP. *v.* LOEW'S, INC., ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Joseph G. Dooley* for petitioner. *John F. Caskey, William R. Glendon* and *Joseph T. Childs* for respondents. Reported below: 104 U. S. App. D. C. 262, 261 F. 2d 380.

No. 702. HINTON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Bryce Rea, Jr.* and *Edgar Watkins* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 104 U. S. App. D. C. 324, 262 F. 2d 36.

No. 677. REAVES *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. *Jack Holt* and *Jack Holt, Jr.* for petitioner. Reported below: —— Ark. ——, 316 S. W. 2d 824.

No. 682. COOPER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. *R. L. Letton* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Robert N. Anderson* for respondent. Reported below: 262 F. 2d 530.

No. 683. SIMPSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *John E. Skilling, Paul F. Myers, James Craig Peacock, Robert Holt Myers, John Holt Myers* and *James W. Quiggle* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Melva M. Graney* for the United States. Reported below: 261 F. 2d 497.

No. 686. TAITEL ET AL., DOING BUSINESS AS I. TAITEL & SON, *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Thomas M. Quinn* for petitioner. *Solicitor General Rankin, Jerome D. Fenton, Thomas J. McDermott* and *Dominick L. Manoli* for respondent. Reported below: 261 F. 2d 1.

No. 689. GROGAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Wesley R. Asinof* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 261 F. 2d 86.

No. 681. MOORE *v.* OHIO. Supreme Court of Ohio. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application. *C. C. Lipps* for petitioner.

No. 701. CLUCK ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Arthur Glover* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *Carolyn R. Just* for respondent. Reported below: 261 F. 2d 267.

No. 625. GANS ET AL. *v.* OHIO. Supreme Court of Ohio. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application. *Curtis F. McClane* and *Donald J. Lett* for petitioners. *John D. Sears, Jr.* for respondent. Reported below: 168 Ohio St. 174, 151 N. E. 2d 709.

No. 685. ROYCE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Louis Eisenstein* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *Helen A. Buckley* for respondent.

No. 698. DEEN *v.* GULF, COLORADO & SANTA FE RAILWAY CO. Supreme Court of Texas. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *David C. McCord* and *Robert Lee Guthrie* for petitioner. *Luther Hudson* for respondent.

No. 410, Misc. WARD *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se. Stanley Mosk,* Attorney General of California, and *William E. James,* Assistant Attorney General, for respondent. Reported below: 50 Cal. 2d 702, 328 P. 2d 777.

No. 455, Misc. MYERS *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 218 Md. 49, 145 A. 2d 228.

No. 458, Misc. CRANSTON *v.* BALTIMORE & OHIO RAILROAD CO. C. A. 3d Cir. Certiorari denied. *Louis C. Glasso* for petitioner. *Vincent M. Casey* for respondent. Reported below: 258 F. 2d 630.

No. 460, Misc. RICH *v.* UNITED STATES. C. A. 4th 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: 261 F. 2d 536.

No. 463, Misc. COLEMAN *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 260 F. 2d 518.

No. 465, Misc. DIXON *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 468, Misc. BARNES *v.* AMERICAN BROADCASTING CO. ET AL. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Perry S. Patterson* and *Don H. Reuben* for the Mutual Broadcasting System, Inc., respondent. Reported below: 259 F. 2d 858.

No. 477, Misc. WILLIAMS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 495, Misc. FRANICH, BY HIS GUARDIAN AD LITEM, *v.* GREAT NORTHERN RAILWAY CO. C. A. 9th Cir. Certiorari denied. *Joseph P. Monaghan* for petitioner. *Edwin S. Booth* and *John J. Burke, Jr.* for respondent. Reported below: 260 F. 2d 599.

No. 500, Misc. PURCILLA *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 501, Misc. LEE *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 262 F. 2d 53.

No. 502, Misc. UNITED STATES EX REL. KING *v.* MCNEILL, DIRECTOR, MATTEAWAN STATE HOSPITAL, ET AL. C. A. 2d Cir. Certiorari denied.

No. 506, Misc. FLOYD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 260 F. 2d 910.

No. 507, Misc. HALL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 259 F. 2d 430.

No. 511, Misc. GILLIAM *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 *Felicia Dubrovsky* for the United States. Reported below: 103 U. S. App. D. C. 181, 257 F. 2d 185.

No. 513, Misc. LA BOSTRIE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 14 Ill. 2d 617, 153 N. E. 2d 570.

No. 514, Misc. DELGADO DE JESUS *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 515, Misc. NIENDORF *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Edward T. Mancuso* for petitioner.

No. 523, Misc. VERCELES *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 524, Misc. CHILDS *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* and *Beatrice Rosenberg* for the United States. Reported below: 105 U. S. App. D. C. 342, 267 F. 2d 619.

No. 525, Misc. CLINTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 260 F. 2d 824.

No. 527, Misc. WILLIAMS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 531, Misc. LOVE *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 533, Misc. BARBER *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied. Reported below: 210 Ore. 46, 309 P. 2d 192.

No. 534, Misc. LAUGHTON *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 535, Misc. WILLIAMS *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 536, Misc. VRANIAK *v.* RANDOLPH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 261 F. 2d 234.

No. 544, Misc. GALLAWAY *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 545, Misc. BARNES *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.

No. 550, Misc. RODDY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 262 F. 2d 308.

No. 551, Misc. PETHOUD *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied. Reported below: 153 Wash. 2d 262, 332 P. 2d 1092.

No. 553, Misc. JOHNSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 15 Ill. 2d 239, 154 N. E. 2d 274.

No. 555, Misc. FATA *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 557, Misc. LANGLEY *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 559, Misc. BOLLING *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 561, Misc. MARSHALL *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* and *Beatrice Rosenberg* for the United States. Reported below: 104 U. S. App. D. C. 359, 262 F. 2d 456.

No. 562, Misc. MESSER *v.* PENNSYLVANIA THRESHERMEN & FARMERS' MUTUAL CASUALTY INSURANCE CO. C. A. 4th Cir. Certiorari denied. *Archie Elledge* and *Clyde C. Randolph, Jr.*, for petitioner. *Welch Jordan* for respondent. Reported below: 259 F. 2d 389.

No. 563, Misc. CRAWFORD *v.* KING ET AL. C. A. 6th Cir. Certiorari denied.

No. 566, Misc. ARMSTRONG *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 571, Misc. BUNDY ET AL. *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 575, Misc. KISSINGER *v.* E. I. DU PONT DE NEMOURS & CO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *Robert S. Vance* for petitioner. *Frank M. Dixon* for respondent. Reported below: 259 F. 2d 411.

Rehearing Denied.

No. 531. ALKER *v.* UNITED STATES, 358 U. S. 817;

No. 622. COUNTY OF BERGEN ET AL. *v.* UNITED STATES ET AL., *ante*, p. 27; and

No. 435, Misc. DI SILVESTRO *v.* UNITED STATES VETERANS ADMINISTRATION, *ante*, p. 929. Petitions for rehearing denied.

Dismissal Under Rule 60.

No. 479, Misc. LAWLOR ET AL., TRADING AS INDEPENDENT POSTER EXCHANGE, *v.* NATIONAL SCREEN SERVICE CORP. ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Francis T. Anderson* for petitioners. *Louis Nizer, Abraham L. Freedman, Louis J. Goffman, W. Bradley Ward* and *Edward W. Mullinix* for respondents.

MARCH 30, 1959.

Miscellaneous Orders.

No. 466. COOKE ET AL. *v.* NORTH CAROLINA. Appeal from the Supreme Court of North Carolina. Upon consideration of the suggestion of death the appeal of Phillip Cooke is dismissed as abated. Reported below: 248 N. C. 485, 103 S. E. 2d 846.

No. 743. PARKER *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The motion for the appointment of counsel is granted and it is ordered that *Frank M. Wozencraft, Esquire,* of Houston, Texas, a member of the Bar of this Court be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 700. UNITED STATES *v.* MERSKY ET AL. Appeal from the United States District Court for the Southern District of New York. Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States. *Julius L. Schapira* for appellees. Reported below: 261 F. 2d 40.

No. 210. UNITED STATES *v.* ATLANTIC REFINING CO. ET AL. The motion to remand is granted and the cause is remanded to the United States District Court for the District of Columbia insofar as it pertains to the orders of said court of March 26, 1958, involving the Tidal Pipe Line Company, Tidewater Oil Company, Service Pipe Line Company, and Standard Oil Company (Indiana). MR. JUSTICE CLARK and MR. JUSTICE HARLAN took no part in the consideration or decision of this motion. *Solicitor General Rankin* on the motion.

Certiorari Granted.

No. 706. BRAEN *v.* PFEIFFER OIL TRANSPORT CO., INC. C. A. 2d Cir. Certiorari granted. *Arthur N. Seiff* for petitioner. *Edmund F. Lamb* for respondent. Reported below: 263 F. 2d 147.

Certiorari Denied. (*See also No. 678, ante, p. 206.*)

No. 687. RUSHLIGHT ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Dwight L. Schwab* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Morton Hollander* and *Herbert E. Morris* for the United States. Reported below: 259 F. 2d 658.

No. 690. BALTIMORE BUILDING AND CONSTRUCTION TRADES COUNCIL *v.* SELBY-BATTERSBY & CO. ET AL. C. A. 4th Cir. Certiorari denied. *Claude L. Callegary* for petitioner. *Earle K. Shawe* and *Wilson K. Barnes* for respondents. *Solicitor General Rankin* filed a memorandum of the National Labor Relations Board. Reported below: 259 F. 2d 151.

No. 691. BLUM *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *William F. Walsh* for petitioner. Reported below: 317 S. W. 2d 931.

No. 693. BERCUT-VANDERVOORT & CO., INC., *v.* UNITED STATES. United States Court of Customs and Patent Appeals. Certiorari denied. *John R. Benney* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for the United States.

No. 696. ANONYMOUS (No. 1) *v.* HART, JUSTICE OF THE SUPREME COURT OF NEW YORK, ET AL. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied. *David F. Price* for petitioner. *Denis M. Hurley* and *Michael A. Castaldi* for respondents.

No. 697. D'AGOSTINO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 261 F. 2d 154.

No. 703. ENZOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Wesley R. Asinof* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 262 F. 2d 172.

No. 707. BEITER *v.* ERB ET AL. C. A. 7th Cir. Certiorari denied. *George S. Geffs* for petitioner. *Hector A. Brouillet* for respondents. Reported below: 259 F. 2d 911.

No. 708. KRAFT ET AL. *v.* CITY OF LOUISVILLE. Court of Appeals of Kentucky. Certiorari denied. *Wilbur O. Fields* for petitioners. *William E. Berry* and *Herman E. Frick* for respondent. Reported below: 317 S. W. 2d 161.

No. 347, Misc. DUNCAN *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.

No. 476, Misc. BLACK *v.* MINNESOTA. Supreme Court of Minnesota. Certiorari denied. Petitioner *pro se. Miles Lord,* Attorney General of Minnesota, and *Charles E. Houston,* Solicitor General, for respondent.

No. 521, Misc. NEALEY *v.* FLORIDA. Supreme Court of Florida. Certiorari denied.

No. 538, Misc. COLLINS *v.* ILLINOIS. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 546, Misc. HESS *v.* PETRILLO ET AL. C. A. 7th Cir. Certiorari denied. *Thomas M. Quinn* for petitioner. *Henry Kaiser* for New et al., respondents. Reported below: 259 F. 2d 735.

No. 547, Misc. VISCONTI *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: 261 F. 2d 215.

No. 560, Misc. DEAN, ALIAS LEE, *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 567, Misc. PIASCIK *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 568, Misc. CURRIE *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 574, Misc. BOWEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Chester E. Wallace* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 260 F. 2d 266.

No. 576, Misc. CARROLL *v.* NEW YORK. Supreme Court of New York, Appellate Division, First Judicial Department. Certiorari denied.

No. 577, Misc. SMITH *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 580, Misc. MINTON *v.* ELLIS, GENERAL MANAGER, TEXAS DEPARTMENT OF CORRECTIONS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 588, Misc. GRANT *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.

No. 589, Misc. WORLEY, ADMINISTRATRIX, ET AL. *v.* DUNN, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 6th Cir. Certiorari denied. Petitioners *pro se*. *Charles C. Trabue, Jr.* for the Trustee in Bankruptcy, and *F. A. Berry* for the First American National Bank of Nashville, respondents. Reported below: 260 F. 2d 355.

No. 591, Misc. TURNER *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 595, Misc. SLAUGHTER *v.* GEORGIA. Court of Appeals of Georgia. Certiorari denied.

No. 597, Misc. BAKER *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 598, Misc. JUDKINS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 611, Misc. EDDE *v.* COLUMBIA UNIVERSITY ET AL. Supreme Court of New York, New York County. Certiorari denied. Petitioner *pro se*. *Edward D. Burns, John A. Kiser* and *Martin Fogelman* for Columbia University, and *Charles A. Brind, Jr.* for the Commissioner of Education of New York, respondents. Reported below: See 8 Misc. 2d 795, 168 N. Y. Supp. 2d 643.

Rehearing Denied.

No. 124. WILLIAMS *v.* OKLAHOMA, 358 U. S. 576;

No. 528. BASS *v.* UNITED STATES ET AL., 358 U. S. 333;

No. 206, Misc. FLOWERS *v.* TRAVELERS INSURANCE CO., *ante*, p. 920;

No. 365, Misc. UNITED STATES EX REL. COBB *v.* CAVELL, WARDEN, *ante*, p. 916;

No. 387, Misc. KETCHUM *v.* UNITED STATES, *ante*, p. 917;

No. 417, Misc. AMBROSINI *v.* UNITED STATES, *ante*, p. 918; and

No. 423, Misc. UNITED STATES EX REL. WILLIAMS *v.* MCMANN, ACTING WARDEN, ET AL., *ante*, p. 928. Petitions for rehearing denied.

No. 494. PURITAN CHURCH BUILDING FUND ET AL. *v.* UNITED STATES ET AL., 358 U. S. 927. Motion for leave to file second petition for rehearing denied. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this application.

APRIL 6, 1959.

Miscellaneous Orders.

No. 47. ERIE RAILROAD CO. *v.* BOARD OF PUBLIC UTILITY COMMISSIONERS OF NEW JERSEY ET AL.; and

No. 55. NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO. *v.* BOARD OF PUBLIC UTILITY COMMISSIONERS OF NEW JERSEY ET AL. Appeals from the United States District Court for the District of New Jersey. (Probable jurisdiction noted, 357 U. S. 917.) The motion to vacate the decree is granted and the cases are remanded to the United States District Court for the District of New Jersey with directions to dismiss the complaint as moot. On the motion were *Charles W. Hutchinson* and *Raymond J. Lamb* for the Erie Railroad Co., appellant in No. 47, and *Leon Leighton* for the New York, Susquehanna & Western Railroad Co., appellant in No. 55. Reported below: 158 F. Supp. 104.

No. 553. COMMISSIONER OF INTERNAL REVENUE *v.* ACKER. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. The motion of *George Olshausen* for leave to file brief, as *amicus curiae,* is denied.

No. 569, Misc. SEARS *v.* KLINGER, SUPERINTENDENT, CALIFORNIA MEN'S COLONY. Motion for leave to file petition for writ of habeas corpus denied.

No. 385, Misc. CHESSMAN *v.* DICKSON, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

Certiorari Granted.

No. 711. MITCHELL, SECRETARY OF LABOR, *v.* OREGON FROZEN FOODS CO. ET AL. C. A. 9th Cir. Certiorari granted. *Solicitor General Rankin, Stuart Rothman, Bessie Margolin* and *Sylvia S. Ellison* for petitioner. Reported below: 254 F. 2d 116.

No. 724. INMAN *v.* BALTIMORE & OHIO RAILROAD CO. Supreme Court of Ohio. Certiorari granted. *Raymond J. McGowan* for petitioner. *C. G. Roetzel* and *John L. Rogers, Jr.* for respondent. Reported below: 168 Ohio St. 335, 154 N. E. 2d 442.

Certiorari Denied. (*See also No. 704 and No. 581, Misc., ante, p. 230.*)

No. 684. EASTERN COAL CORP. *v.* RELIFORD ET AL. C. A. 6th Cir. Certiorari denied. *George Richardson, Jr.* for petitioner. *Dan Jack Combs* for respondents. Reported below: 260 F. 2d 447.

No. 709. ROGERS ET AL. *v.* HOLLOWAY ET AL. Court of Appeals of Kentucky. Certiorari denied. *Richard C. Oldham* for petitioners. Reported below: 316 S. W. 2d 352.

No. 714. MADISON FUND, INC., ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *William R. Spofford* and *Charles I. Thompson, Jr.* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott* for respondent. Reported below: 261 F. 2d 325.

No. 716. PECKHAM *v.* CASALDUC, TRUSTEE OF RONRICO CORPORATION, ET AL. C. A. 1st Cir. Certiorari denied. *Jay E. Darlington* for petitioner. *Harold A. Segall* for respondents. Reported below: 261 F. 2d 120.

No. 715. HICKS *v.* SUMMERFIELD, POSTMASTER GENERAL, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Richard A. Mehler* and *George J. Goldsborough, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for respondents. Reported below: 104 U. S. App. D. C. 286, 261 F. 2d 752.

No. 720. LEWIS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Curtis P. Mitchell* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 105 U. S. App. D. C. 15, 263 F. 2d 265.

No. 758. SCHMIDT *v.* SHELL ET AL. The motion to use the record in No. 456, October Term, 1954, is granted. The petition for writ of certiorari to the District Court of Appeal of California, First Appellate District, is denied. *George Olshausen* and *James W. Harvey* for petitioner. *Ingemar E. Hoberg* for respondents. Reported below: 164 Cal. App. 2d 350, 330 P. 2d 817.

No. 543, Misc. MOORE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Paul F. Mickey* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 104 U. S. App. D. C. 327, 262 F. 2d 216.

No. 549, Misc. HEIDEMAN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Walter E. Gillcrist* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States. Reported below: 104 U. S. App. D. C. 128, 259 F. 2d 943.

No. 729. PENNSYLVANIA RAILROAD CO. *v.* BYRNE, ADMINISTRATRIX. C. A. 3d Cir. Certiorari denied. *Philip Price* and *Theodore Voorhees* for petitioner. *B. Nathaniel Richter* and *Seymour I. Toll* for respondent. Reported below: 262 F. 2d 906.

No. 736. BRIGHT LEAF INDUSTRIES, INC., *v.* STABLER ET AL. C. A. 5th Cir. Certiorari denied. *Paul B. Eaton* for petitioner. *Edwin Pearce* for respondents. Reported below: 261 F. 2d 383.

No. 377, Misc. GREEN *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se.* *A. S. Harrison, Jr.,* Attorney General of Virginia, for respondent.

No. 429, Misc. TABLE *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se.* *A. S. Harrison, Jr.,* Attorney General of Virginia, for respondent.

No. 483, Misc. BROWN *v.* DRAVO CORPORATION. C. A. 3d Cir. Certiorari denied. *Louis C. Glasso* for petitioner. Reported below: 258 F. 2d 704.

No. 542, Misc. JUDE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 262 F. 2d 117.

No. 565, Misc. CHAPMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Rankin* for the United States.

No. 573, Misc. FREDERICKS *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 578, Misc. JONES ET AL. *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 605, Misc. BAKER *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 609, Misc. IN RE WILLIAMS. C. A. 5th Cir. Certiorari denied.

No. 616, Misc. FISHER *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 617, Misc. COOK *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.

No. 618, Misc. RAPACKI *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 620, Misc. MITCHELL *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 654. STEWART *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 655, Misc. CRAWFORD *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

Rehearing Denied.

No. 3. ROMERO *v.* INTERNATIONAL TERMINAL OPERATING CO. ET AL., 358 U. S. 354;

No. 147. HILL, ADMINISTRATRIX, *v.* WATERMAN STEAMSHIP CORP., *ante*, p. 927;

No. 267. KELLY *v.* KOSUGA, 358 U. S. 516;

No. 560. OLIPHANT ET AL. *v.* BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN ET AL., *ante*, p. 935;

No. 599. PROHOROFF *v.* UNITED STATES, *ante*, p. 907;

No. 234, Misc. KLEIN *v.* MCDONALD, ADJUDICATION OFFICER, ET AL., 358 U. S. 645; and

No. 361, Misc. HAMER *v.* UNITED STATES, *ante*, p. 916. Petitions for rehearing denied.

APRIL 10, 1959.

Dismissal Under Rule 60.

No. 760. LOCAL 259, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, ET AL. *v.* LEE, CHAIRMAN OF THE SUBVERSIVE ACTIVITIES CONTROL BOARD, ET AL. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Petition for writ of certiorari dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Allan R. Rosenberg* for petitioners. *Solicitor General Rankin* for respondents. Reported below: 104 U. S. App. D. C. 339, 262 F. 2d 228.

APRIL 20, 1959.

Miscellaneous Orders.

No. 625, Misc. GARRISON *v.* WOODRUFF, WARDEN;

No. 631, Misc. THOMPSON *v.* CAVELL, WARDEN; and

No. 641, Misc. WYERS *v.* BANNAN, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 15, Original. ILLINOIS *v.* MICHIGAN ET AL. The motion to advance and for summary judgment is denied. The case is set for argument on the motion for leave to file the complaint for declaratory judgment and assigned for hearing at the end of the calendar for the week of May 18th. Two hours are allowed for oral argument. The Solicitor General is invited to file a brief and participate in the oral argument if he is so advised and 30 additional minutes are allowed for that purpose. *Latham Castle,* Attorney General of Illinois, *William C. Wines,* Assistant Attorney General, and *George E. Billett* for complainant.

No. 101. VITARELLI *v.* SEATON, SECRETARY OF THE INTERIOR, ET AL. Certiorari, 358 U. S. 871, to the United States Court of Appeals for the District of Columbia Circuit. The motion to substitute Roger W. Jones in the place of Harris Ellsworth, resigned, as a party respondent is granted. *Henry E. Sprogell* for appellant. *Solicitor General Rankin* for respondents. Reported below: 102 U. S. App. D. C. 316, 253 F. 2d 338.

No. 398. LOUISIANA POWER & LIGHT CO. *v.* CITY OF THIBODAUX. Certiorari, 358 U. S. 893, to the United States Court of Appeals for the Fifth Circuit. The motion of the respondent for leave to file supplemental brief is granted. *Louis Fenner Claiborne* for respondent. Reported below: 255 F. 2d 774.

No. 454. TERRITO ET AL. *v.* UNITED STATES ET AL. The motion to recall the judgment and to reinstate the appeal is denied. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this motion. *Francis J. Ortman* for appellants. For previous decision, see 358 U. S. 279.

No. 597. HOFFMAN, U. S. DISTRICT JUDGE, *v.* BLASKI ET AL. Certiorari, 359 U. S. 904, to the United States Court of Appeals for the Seventh Circuit. The motion to require certification of an additional part of the record is denied. *Charles J. Merriam* and *Samuel B. Smith* for petitioner-movant. Reported below: 260 F. 2d 317.

No. 652, Misc. HOUSE *v.* MAYO, STATE PRISON CUSTODIAN. Motion for leave to file petition for writ of habeas corpus and for other relief denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

No. 517, Misc. POWELL *v.* OHIO. The motion for leave to file petition for writ of certiorari is denied. Treating the motion as a petition for writ of certiorari to the Supreme Court of Ohio, certiorari is denied without prejudice to an application for a writ of habeas corpus in the appropriate United States District Court. MR. JUSTICE STEWART took no part in the consideration or decision of this motion. Petitioner *pro se*. *C. Watson Hover* for respondent.

Certiorari Granted.

No. 746. MITCHELL, SECRETARY OF LABOR, *v.* ROBERT DEMARIO JEWELRY, INC., ET AL. C. A. 5th Cir. Certiorari granted. *Solicitor General Rankin, Stuart Rothman, Bessie Margolin* and *Jacob I. Karro* for petitioner. Reported below: 260 F. 2d 929.

No. 512, Misc. DAVIS *v.* VIRGINIAN RAILWAY CO. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Appeals of Virginia granted. *R. Arthur Jett* for petitioner. *W. R. C. Cocke* for respondent.

No. 717. NATIONAL LABOR RELATIONS BOARD *v.* DRIVERS, CHAUFFEURS, HELPERS, LOCAL UNION NO. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Rankin, Jerome D. Fenton, Thomas J. McDermott, Dominick L. Manoli* and *Norton J. Come* for petitioner. *Herbert S. Thatcher* for respondent. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

No. 40, Misc. RIOS *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted limited to the following questions:

1. Independently of the state court's determination, was the evidence used against petitioner in the federal prosecution obtained in violation of his rights under the Constitution of the United States?

2. If the evidence was unlawfully obtained, was such evidence admissible in the federal prosecution of petitioner because it was obtained by state officers without federal participation?

Clore Warne for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States. Reported below: 256 F. 2d 173.

Certiorari Denied. (*See also Nos. 712, ante, p. 310; 726, ante, p. 312; 740, ante, p. 313; 747, ante, p. 310; and Misc. Nos. 623, ante, p. 311; 636, ante, p. 312; 517, ante, p. 964; 652, ante, p. 964; and 659, ante, p. 313.*)

No. 727. WASHBURN *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *William F. Walsh* for petitioner. Reported below: 166 Tex. Cr. R. ——, 318 S. W. 2d 627.

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No. 705. KEA STEAMSHIP CORP. *v.* MESLE ET AL. C. A. 3d Cir. Certiorari denied. *Thomas F. Mount* and *J. Welles Henderson* for petitioner. *T. E. Byrne, Jr.* for Haenn Ship Ceiling & Refitting Corp., respondent. Reported below: 260 F. 2d 747.

No. 728. CORPSTEIN ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner Joseph Corpstein *pro se*. *Solicitor General Rankin, Assistant Attorney General Hansen, Richard A. Solomon, Robert L. Farrington, Neil Brooks* and *Donald A. Campbell* for the United States. Reported below: 262 F. 2d 200.

No. 730. CAMPBELL, ADMINISTRATRIX, ET AL. *v.* MATTEUCCI, ADMINISTRATOR. C. A. 10th Cir. Certiorari denied. *Edgar Allyn Buttle* and *Edmund H. H. Caddy* for petitioners. *William A. Sloan* for respondent. Reported below: 261 F. 2d 225.

No. 731. KLAMATH MEDICAL SERVICE BUREAU *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Robert T. Mautz* and *James R. Moore* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Robert N. Anderson* for respondent. Reported below: 261 F. 2d 842.

No. 734. CORY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Watson Washburn* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Joseph F. Goetten* and *George F. Lynch* for respondent. Reported below: 261 F. 2d 702.

No. 738. SEVEN-UP CO. *v.* BLUE NOTE, INC. C. A. 7th Cir. Certiorari denied. *Beverly W. Pattishall* for petitioner. *Sidney R. Zatz* and *Jack H. Oppenheim* for respondent. Reported below: 260 F. 2d 584.

No. 735. ROGERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Hayden C. Covington* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 263 F. 2d 283.

No. 739. THOMPSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Mary M. Kaufman* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Yeagley* and *Philip R. Monahan* for the United States. Reported below: 261 F. 2d 809.

No. 748. PALERMO *v.* STOCKTON THEATRES, INC. Supreme Court of California. Certiorari denied. *Forrest E. Macomber* for petitioner. Reported below: 51 Cal. 2d 346, 333 P. 2d 10.

No. 750. DAVID *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *James C. Herndon, Sam D. Bartlo* and *Alan Y. Cole* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph F. Goetten* for the United States.

No. 754. TAFT HOTEL CORP. *v.* HOUSING AND HOME FINANCE AGENCY ET AL. C. A. 2d Cir. Certiorari denied. *Leo E. Sherman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the Housing and Home Finance Agency et al., and *William R. Murphy* for O'Brion et al., respondents. Reported below: 262 F. 2d 307.

No. 755. HAGANS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *J. Sewell Elliott* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 261 F. 2d 924.

No. 713. SMOOT SAND & GRAVEL CORP. *v.* DISTRICT OF COLUMBIA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *David R. Shelton* for petitioner. *Chester H. Gray, Milton D. Korman* and *Henry E. Wixon* for respondent. Reported below: 104 U. S. App. D. C. 292, 261 F. 2d 758.

No. 741. UNION TRANSFER CO. ET AL. *v.* UNITED STATES;

No. 742. HUGHES TRANSPORTATION, INC., *v.* UNITED STATES; and

No. 744. KENTUCKY *v.* UNITED STATES. Petitions for writs of certiorari to the Court of Claims denied. *Robert A. Nelson* for petitioners in No. 741. *Daryal A. Myse* for petitioner in No. 742. *Jo M. Ferguson,* Attorney General of Kentucky, and *George M. Catlett,* Special Assistant Attorney General, for the Commonwealth of Kentucky, petitioner in No. 744. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for the United States. Reported below: No. 741, — Ct. Cl. —, 168 F. Supp. 217; Nos. 742 and 744, — Ct. Cl. —, 168 F. Supp. 219.

No. 752. MCDERMOTT *v.* JAMULA ET AL. Superior Court of Massachusetts. Certiorari denied. *Frederick M. Myers,* for petitioner. *Louis Sherman* and *Joseph M. Stone* for respondents. Reported below: 338 Mass. —, 154 N. E. 2d 595.

No. 777. JIMENEZ ET AL. *v.* FLORES. Supreme Court of Texas. Certiorari denied. *Gerald Weatherly* for petitioners. *Will Wilson,* Attorney General of Texas, *W. V. Geppert* and *Riley Eugene Fletcher,* Assistant Attorneys General, for respondent. Reported below: 317 S. W. 2d 189.

No. 759. STERN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Eberhard P. Deutsch* and *René H. Himel, Jr.* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Baum* for the United States. Reported below: 262 F. 2d 957.

No. 762. WILLIAMS ET AL. *v.* BABCOCK & WILCOX CO. ET AL. C. A. 3d Cir. Certiorari denied. *Loyal H. Gregg* and *William H. Parmelee* for petitioners. *Inzer B. Wyatt, Marvin Schwartz* and *Robert L. Kirkpatrick* for respondents. Reported below: 262 F. 2d 253.

No. 751. DAILEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Walter B. Fincher* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 261 F. 2d 870.

No. 352, Misc. WAHRHAFTIG *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied. Petitioner *pro se. John J. O'Connell,* Attorney General of Washington, and *Lawrence Ross,* Assistant Attorney General, for respondent.

No. 404, Misc. BASS *v.* GEORGIA. Supreme Court of Georgia. Certiorari denied. Petitioner *pro se. Eugene Cook,* Attorney General of Georgia, *E. Freeman Leverett,* Assistant Attorney General, *Paul Webb,* Solicitor General, and *Eugene L. Tiller,* Assistant Solicitor General, for respondent.

No. 572, Misc. NEWSOM *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 261 F. 2d 452.

No. 446, Misc. LESTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States.

No. 528, Misc. TURNER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Frank D. O'Connor* and *Benj. J. Jacobson* for respondent. Reported below: 5 N. Y. 2d 787, 180 N. Y. S. 2d 314.

No. 529, Misc. DAWKINS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Frank D. O'Connor* and *Benj. J. Jacobson* for respondent. Reported below: 4 N. Y. 2d 967, 177 N. Y. S. 2d 495.

No. 548, Misc. FAVORS *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 584, Misc. VLCKO *v.* BENNETT, WARDEN. Supreme Court of Iowa. Certiorari denied. Petitioner *pro se*. *Norman A. Erbe,* Attorney General of Iowa, for respondent.

No. 586, Misc. KNOX *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *Horace R. Alexius, Jr.* for petitioner. Reported below: 236 La. 461, 107 So. 2d 719.

No. 590, Misc. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 261 F. 2d 128.

No. 582, Misc. HOLLIS *v.* ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 261 F. 2d 230.

No. 592, Misc. WILLIAMSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Howard R. Lonergan* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States. Reported below: 262 F. 2d 476.

No. 593, Misc. SPEARS *v.* HUMBLE OIL & REFINING CO. C. A. 5th Cir. Certiorari denied. Reported below: 261 F. 2d 231.

No. 596, Misc. VAN SLYKE *v.* WALLACK, WARDEN. Court of Appeals of New York. Certiorari denied.

No. 599, Misc. JOHNSON *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 606, Misc. PRINCELER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Sutherland G. Taylor* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States.

No. 612, Misc. PEDEN *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.

No. 613, Misc. MULLEN ET AL. *v.* DISTRICT OF COLUMBIA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioners *pro se*. *Chester H. Gray, Milton D. Korman* and *Hubert B. Pair* for respondent.

No. 610, Misc. HORNBECK *v.* JACKSON, WARDEN. Appellate Division of the Supreme Court of New York, Third Judicial Department. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, and *Paxton Blair*, Solicitor General, for respondent.

No. 614, Misc. POLLACK *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ET AL. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Frank H. Gordon* for the Association of the Bar of the City of New York, *Jacob Burns* for the New York County Lawyers Association, and *David M. Potts* for the Bronx County Bar Association, respondents.

No. 619, Misc. WORKMAN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 621, Misc. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 624, Misc. CHAMBERS *v.* ILLINOIS. Criminal Court of Cook County, Illinois. Certiorari denied. Reported below: See 9 Ill. 2d 83, 136 N. E. 2d 812.

No. 626, Misc. YATES *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.

No. 629, Misc. UPSHAW *v.* PEGELOW ET AL. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States.

No. 630, Misc. MULHOLLEN *v.* JOHNSTON, SUPERINTENDENT, STATE PENITENTIARY, ET AL. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 603, Misc. VAN BOGART *v.* ARIZONA. Supreme Court of Arizona. Certiorari denied. Reported below: 85 Ariz. 63, 331 P. 2d 597.

No. 628, Misc. SAUER *v.* CALIFORNIA. District Court of Appeal of California, Third Appellate District. Certiorari denied. Reported below: 163 Cal. App. 2d 740, 329 P. 2d 962.

No. 632, Misc. GRIGG *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Cyril S. Lawrence* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 104 U. S. App. D. C. 308, 262 F. 2d 20.

No. 633, Misc. SMITH *v.* UNITED STATES VETERANS' ADMINISTRATION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States.

No. 634, Misc. COLE *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 635, Misc. LEGG *v.* MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied.

No. 651, Misc. CASH *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: 105 U. S. App. D. C. 154, 265 F. 2d 346.

No. 638, Misc. MOUNTS *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 639, Misc. FLUERY *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 640, Misc. STONE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 642, Misc. CONTRERAS *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 643, Misc. FLETCHER *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *Eugene Stanley* for petitioner.

No. 644, Misc. MCGANN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 261 F. 2d 956.

No. 645, Misc. MEISEL *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 661, Misc. TYNE *v.* VENETUCCI ET AL. C. A. 7th Cir. Certiorari denied. *Benjamin Wham* and *John E. Owens* for petitioner. *Charles F. Grimes, Daniel S. Wentworth, L. A. Wescott* and *Eugene A. Tappy* for Oak Park National Bank, respondent. Reported below: 261 F. 2d 249.

No. 665, Misc. UNITED STATES EX REL. WOJCULEWICZ *v.* RICHMOND, WARDEN. C. A. 2d Cir. Certiorari denied. *Frederick J. Rundbaken* for petitioner. *Albert S. Bill* for respondent. Reported below: 263 F. 2d 604.

No. 666, Misc. CARRIGAN *v.* SUNLAND-TUJUNGA TELEPHONE CO. ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *J. Thomason Phelps* for the Public Utilities Commission of California, appellee. Reported below: 263 F. 2d 568.

No. 668, Misc. MEYERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 260 F. 2d 956.

No. 670, Misc. TART *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Henry Lincoln Johnson, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 263 F. 2d 272.

No. 671, Misc. MCLENAGHAN, ADMINISTRATOR, *v.* BILLOW. C. A. 3d Cir. Certiorari denied. *Benjamin Pomerantz* for petitioner. *Richard W. Galiher* for respondent. Reported below: 260 F. 2d 360.

No. 676, Misc. DAVIS *v.* ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 678, Misc. MILLS *v.* MCGEE, DIRECTOR, CALIFORNIA STATE DEPARTMENT OF CORRECTIONS, ET AL. Supreme Court of California. Certiorari denied.

No. 587, Misc. CULVER *v.* GOODMAN, WARDEN. Supreme Court of New Jersey. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

No. 708, Misc. COLEY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 715, Misc. FRANKLIN *v.* BOSLOW, DIRECTOR, PATUXENT INSTITUTION. Circuit Court of Wicomico County, Maryland. Certiorari denied.

No. 730, Misc. UNITED STATES EX REL. MCCONNELL *v.* RAGEN, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 615, Misc. BURDETTE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application. Petitioner *pro se*. *Solicitor General Rankin* for the United States. Reported below: 254 F. 2d 610.

Rehearing Denied.

No. 4. BROWN *v.* UNITED STATES, *ante*, p. 41;

No. 11. HARRIS *v.* UNITED STATES, *ante*, p. 19;

No. 153. GANGER ET AL. *v.* CITY OF MIAMI, *ante*, p. 64;

No. 524. E T & W N C TRANSPORTATION CO. *v.* CURRIE, COMMISSIONER OF REVENUE OF NORTH CAROLINA, *ante*, p. 28;

No. 644. CHAPIN ET AL. *v.* UNITED STATES, *ante*, p. 924;

No. 646. FIREMAN'S FUND INSURANCE CO. *v.* WILBURN BOAT CO. ET AL., *ante*, p. 925;

No. 648. TAMARKIN *v.* UNITED STATES, *ante*, p. 925;

No. 661. UNITED STATES *v.* WIGGINS, *ante*, p. 942;

No. 686. TAITEL ET AL., DOING BUSINESS AS I. TAITEL & SON, *v.* NATIONAL LABOR RELATIONS BOARD, *ante*, p. 944;

No. 451, Misc. CROMWELL *v.* DULLES, SECRETARY OF STATE, ET AL., *ante*, p. 929; and

No. 585, Misc. MOORE *v.* UNITED STATES, *ante*, p. 941. Petitions for rehearing denied.

No. 760, Misc., October Term, 1957. SCHUMACHER *v.* GAYNOR, EXECUTOR, ET AL., 357 U. S. 941. Motion for leave to file second petition for rehearing denied. MR. JUSTICE FRANKFURTER and MR. JUSTICE STEWART took no part in the consideration or decision of this application.

APRIL 27, 1959.

Miscellaneous Orders.

No. 380. COMMISSIONER OF INTERNAL REVENUE *v.* HÁNSEN ET UX. Certiorari, 358 U. S. 879, to the United States Court of Appeals for the Ninth Circuit;

No. 381. COMMISSIONER OF INTERNAL REVENUE *v.* GLOVER. Certiorari, 358 U. S. 879, to the United States Court of Appeals for the Eighth Circuit; and

No. 512. BAIRD ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. Certiorari, 358 U. S. 918, to the United States Court of Appeals for the Seventh Circuit. The motion of Vance L. Wiley et al. for leave to file brief, as *amici curiae,* is granted. *William Waller* for movants.

No. 587. UNITED STATES *v.* HALEY. The motion to vacate the judgment (358 U. S. 644) and for other relief is denied. *William F. Billings, James P. Donovan* and *Daniel L. O'Connor* for appellee-movant.

No. 681, Misc. ROBINSON *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY; and

No. 821, Misc. THOMPSON *v.* BOYLE, DISTRICT ATTORNEY, ALLEGHENY COUNTY, PENNSYLVANIA. Motions for leave to file petitions for writs of habeas corpus denied.

No. 673, Misc. MORICONI *v.* BANNAN, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus and for other relief denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

Certiorari Granted.

No. 722. STIRONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. *Vincent M. Casey* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States.

No. 622, Misc. GRISHAM *v.* TAYLOR, WARDEN. Motions for leave to proceed *in forma pauperis* and to substitute Charles R. Hagan, Warden, in the place of John C. Taylor, Warden, as the party respondent granted. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit granted. *H. Clay Espey* for petitioner. *Solicitor General Rankin* for respondent. Reported below: 261 F. 2d 204.

Certiorari Denied. (*See also No. 719, ante, p. 341, and No. 673, Misc., supra.*)

No. 771. GART ET AL. *v.* COLE, ADMINISTRATOR, FEDERAL HOUSING AND HOME FINANCE AGENCY, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Harris L. Present* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for Cole et al., *Edward D. Burns, Porter R. Chandler* and *Martin Fogelman* for Fordham University, *William Eldred Jackson* and *Rebecca M. Cutler* for Lincoln Center for the Performing Arts, Inc., *Leo A. Larkin, Pauline K. Berger, Benjamin Offner* and *Anthony Curreri* for Wagner et al., and *Samuel I. Rosenman* and *Max Freund* for Webb & Knapp Lincoln Square Corporation, respondents. Reported below: 263 F. 2d 244.

No. 601, Misc. HYYPPA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 737. WRIGHT *v.* CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO. Court of Appeals of Ohio, Hamilton County. Certiorari denied. *Otto F. Putnick* and *Jerome Goldman* for petitioner. *Henry Burton Street* for respondent. Reported below: 107 Ohio App. 310, 152 N. E. 2d 421.

No. 764. EISTRAT *v.* WESTERN HARDWOOD LUMBER CO. District Court of Appeal of California, Second Appellate District. Certiorari denied. Reported below: 164 Cal. App. 2d 374, 330 P. 2d 629.

No. 765. GREGORY ET AL. *v.* COLUMBIA GAS SYSTEM, INC., ET AL.;

No. 766. KERN *v.* COLUMBIA GAS SYSTEM, INC., ET AL.; and

No. 774. ALLEN ET AL. *v.* COLUMBIA GAS SYSTEM, INC., ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of these applications. *Walter H. Brown, Jr., John L. Smith* and *George W. Jaques* for petitioners in No. 765. *George Zolotar* and *Leo T. Wolford* for petitioner in No. 766. *Robert S. Spilman, Jr.* for petitioners in No. 774. *Edward S. Pinney* for the Columbia Gas System, Inc., *Oscar S. Rosner* for the Independent Committee for American Fuel Noteholders, *James Park* for Harbison, Trustee, and *Selden S. McNeer* and *Robert K. Emerson* for Williamson, Trustee, respondents. *Solicitor General Rankin, Thomas G. Meeker, David Ferber* and *Arthur Blasberg, Jr.* for the Securities and Exchange Commission, in support of the petitions for writs of certiorari. Reported below: 262 F. 2d 510.

No. 650, Misc. GRANGER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 262 F. 2d 802.

No. 775. ORLANDO *v.* ROBINSON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *Anna R. Lavin* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Carl H. Imlay* for respondent. Reported below: 262 F. 2d 850.

No. 466, Misc. PERRONI *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se. Latham Castle,* Attorney General of Illinois, for respondent. Reported below: 14 Ill. 2d 581, 153 N. E. 2d 578.

No. 570, Misc. FULTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 260 F. 2d 957.

No. 646, Misc. BONDS *v.* REID, SUPERINTENDENT OF DISTRICT OF COLUMBIA JAIL, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Edward J. Skeens* for petitioner. *Solicitor General Rankin, Assistant Attorney General White* and *Harold H. Greene* for respondents.

No. 657, Misc. CARRIGAN *v.* CALIFORNIA STATE LEGISLATURE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 263 F. 2d 560.

No. 660, Misc. LOTT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 262 F. 2d 332.

No. 658, Misc. CEPERO *v.* PAN AMERICAN AIRWAYS, INC. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Robert C. Barnard* for respondent.

No. 663, Misc. CARTER *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 667, Misc. TUCKER *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 669, Misc. COWAN *v.* ILLINOIS. Circuit Court of Will County, Illinois. Certiorari denied.

No. 697, Misc. DAVIS *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 698, Misc. HICKS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 699, Misc. TANNER *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

Rehearing Denied.

No. 587. UNITED STATES *v.* HALEY, 358 U. S. 644;

No. 707. BEITER *v.* ERB ET AL., *ante*, p. 953;

No. 511, Misc. GILLIAM *v.* UNITED STATES, *ante*, p. 947;

No. 525, Misc. CLINTON *v.* UNITED STATES, *ante*, p. 948;

No. 538, Misc. COLLINS *v.* ILLINOIS, *ante*, p. 954; and

No. 588, Misc. GRANT *v.* UNITED STATES, *ante*, p. 955.

Petitions for rehearing denied.

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MAY 4, 1959.

Miscellaneous Orders.

No. 41. NEW YORK CENTRAL RAILROAD CO. *v.* BOARD OF PUBLIC UTILITY COMMISSIONERS OF NEW JERSEY ET AL. Appeal from the United States District Court for the District of New Jersey. (Probable jurisdiction noted, 357 U. S. 917.) The motion to vacate the decree is granted and the case is remanded to the United States District Court for the District of New Jersey with directions to dismiss the complaint as moot. *Thomas E. Dewey* and *Gerald E. Dwyer* for the New York Central Railroad Co., appellant-movant. On a stipulation of the parties for dismissal of the case as moot were *Thomas E. Dewey* for the New York Central Railroad Co., appellant; and *David D. Furman* for the Board of Public Utility Commissioners of New Jersey et al., *William A. Roberts* for Bergen County et al., *Solicitor General Rankin* for the United States, and *Robert W. Ginnane* for the Interstate Commerce Commission, appellees. Reported below: 158 F. Supp. 98.

No. 776. LOCAL NO. 8–6, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL–CIO, ET AL. *v.* MISSOURI. Appeal from the Supreme Court of Missouri. Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. *Mozart G. Ratner* and *Morris J. Levin* for appellants. Reported below: 317 S. W. 2d 309.

Certiorari Granted. (*See also No. 169, ante, p. 434.*)

No. 779. FORMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *Solomon J. Bischoff* and *George W. Mead* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph F. Goetten* for the United States. Reported below: 259 F. 2d 128, 261 F. 2d 181, 264 F. 2d 955.

No. 790. NATIONAL LABOR RELATIONS BOARD *v.* DEENA ARTWARE, INC., ET AL. C. A. 6th Cir. Certiorari granted. MR. JUSTICE STEWART took no part in the consideration or decision of this application. *Solicitor General Rankin, Ralph S. Spritzer, Jerome D. Fenton, Thomas J. McDermott, Dominick L. Manoli* and *Irving M. Herman* for petitioner. *James G. Wheeler, Mervin N. Bachman, Thomas J. Marshall, Jr.* and *Sidney R. Zatz* for respondents. Reported below: 261 F. 2d 503.

No. 32, Misc. ARNOLD *v.* BEN KANOWSKY, INC. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted. *Arthur J. Riggs* and *Charles R. Cravens, Jr.* for petitioner. *G. H. Kelsoe, Jr.* for respondent. *Solicitor General Rankin, Stuart Rothman, Bessie Margolin* and *Sylvia S. Ellison* for the Secretary of Labor, as *amicus curiae,* in support of the petition. Reported below: 250 F. 2d 47, 252 F. 2d 787.

Certiorari Denied. (*See also No. 749, ante, p. 435, and No. 767, ante, p. 436.*)

No. 723. DAVID DAVIES, INC., *v.* SENSENBRENNER ET AL. Supreme Court of Ohio. Certiorari denied. *John L. Davies, Jr.* for petitioner. *Russell Leach* for the City of Columbus, Ohio, respondent. Reported below: 168 Ohio St. 356, 154 N. E. 2d 822.

No. 781. MERCER *v.* THERIOT. C. A. 5th Cir. Certiorari denied. *Warren E. Miller* for petitioner. *Robert G. Hughes* for respondent. Reported below: 262 F. 2d 754.

No. 689, Misc. HERGE *v.* BANMILLER, SUPERINTENDENT, EASTERN STATE PENITENTIARY. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

495957 O–59–46

No. 782. GOLDMAN ET AL. *v.* H. HARRIS & Co., INC., ET AL. C. A. 1st Cir. Certiorari denied. *Sigmund Timberg* for petitioners. *Richard Maguire* and *John L. Saltonstall, Jr.* for respondents. Reported below: 260 F. 2d 958.

No. 785. HARTSHORN *v.* DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *David E. Hartshorn pro se. Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for the United States.

No. 788. HENSLEE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Joseph W. Cash* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 262 F. 2d 750.

No. 807. INTERNATIONAL SHOE Co. *v.* FONTENOT, COLLECTOR OF REVENUE. Supreme Court of Louisiana. Certiorari denied. *C. V. Porter, L. W. Brooks, F. W. Middleton, Jr.* and *B. B. Taylor, Jr.* for petitioner. *Robert L. Roland* for respondent. Reported below: 236 La. 279, 107 So. 2d 640.

No. 789. EATON ET AL. *v.* BOARD OF MANAGERS OF THE JAMES WALKER MEMORIAL HOSPITAL ET AL. C. A. 4th Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. *Thurgood Marshall, Jack Greenberg* and *Conrad O. Pearson* for petitioners. *Louis J. Poisson, Jr.* for the James Walker Memorial Hospital, and *I. Beverly Lake* and *James B. Swails* for the City of Wilmington, N. C., et al., respondents. Reported below: 261 F. 2d 521.

No. 710. PALMER *v.* WATERMAN STEAMSHIP CORP. Supreme Court of Washington. Certiorari denied. *Edwin J. Friedman* for petitioner. *Francis L. Tetreault* for respondent. Reported below: 52 Wash. 2d 604, 328 P. 2d 169.

No. 778. BROTT *v.* UNITED STATES. Motion to dispense with printing petition for writ of certiorari granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Henry K. Chapman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph F. Goetten* for the United States. Reported below: 264 F. 2d 433.

No. 684, Misc. CLEMENTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 266 F. 2d 397.

Rehearing Denied.

No. 675. FRIEDMAN *v.* UNITED STATES ET AL., *ante*, p. 205; and

No. 545, Misc. BARNES *v.* UNITED STATES, *ante*, p. 949. Petitions for rehearing denied.

No. 135. WOODY *v.* UNITED STATES, *ante*, p. 118. Petition for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application.

No. 215. GOLDSTEIN *v.* UNITED STATES, 358 U. S. 830. Motion for leave to file petition for rehearing out of time denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application.

MAY 11, 1959.

Dismissal Under Rule 60.

No. 792, Misc. BROWN *v.* NEW YORK. On petition for writ of certiorari to the Appellate Division of the Supreme Court of New York, First Judicial Department. Petition dismissed pursuant to Rule 60 of the Rules of this Court. Petitioner *pro se.*

MAY 18, 1959.

Miscellaneous Orders.

No. 252. SAFEWAY STORES, INC., *v.* OKLAHOMA RETAIL GROCERS ASSOCIATION, INC., ET AL. Appeal from the Supreme Court of Oklahoma. The motion of the National Association of Tobacco Distributors, Inc., for leave to file brief, as *amicus curiae,* is granted. MR. JUSTICE CLARK took no part in the consideration or decision of this motion. *Chester Inwald* on the motion. Reported below: 322 P. 2d 179.

No. 380. COMMISSIONER OF INTERNAL REVENUE *v.* HANSEN ET UX. Certiorari, 358 U. S. 879, to the United States Court of Appeals for the Ninth Circuit;

No. 381. COMMISSIONER OF INTERNAL REVENUE *v.* GLOVER. Certiorari, 358 U. S. 879, to the United States Court of Appeals for the Eighth Circuit; and

No. 512. BAIRD ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. Certiorari, 358 U. S. 918, to the United States Court of Appeals for the Seventh Circuit. The motion of Vance L. Wiley et al. for leave to file supplemental brief, as *amici curiae,* is granted. *William Waller* for movants.

No. 703, Misc. DAVIS *v.* PEGELOW, SUPERINTENDENT, DISTRICT OF COLUMBIA REFORMATORY. Motion for leave to file petition for writ of habeas corpus and for other relief denied.

No. 398. LOUISIANA POWER & LIGHT CO. *v.* CITY OF THIBODAUX. Certiorari, 358 U. S. 893, to the United States Court of Appeals for the Fifth Circuit. The motion of petitioner for leave to file reply brief to respondent's supplemental brief is granted. *J. Blanc Monroe, Monte M. Lemann, J. Raburn Monroe, Malcolm L. Monroe* and *Andrew P. Carter* for petitioner. Reported below: 255 F. 2d 774.

No. 604, Misc. RAMIREZ *v.* UNITED STATES ATTORNEY GENERAL. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General White* and *Harold H. Greene* for respondent.

No. 685, Misc. MORSE *v.* MOORE, CHIEF JUDGE; and No. 763, Misc. SIMUNICH *v.* SUPREME COURT OF ILLINOIS ET AL. Motions for leave to file petitions for writs of mandamus denied. Petitioners *pro se. Solicitor General Rankin* for respondent in No. 685, Misc.

No. 770, Misc. AMERICAN OIL CO. *v.* UNITED STATES ET AL. Motion for leave to file petition for writ of mandamus or other relief denied. *Perry S. Patterson* and *Herbert J. Miller, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for respondents. Reported below: See 169 F. Supp. 904.

Probable Jurisdiction Noted.

No. 769. PHILLIPS CHEMICAL CO. *v.* DUMAS INDEPENDENT SCHOOL DISTRICT. Appeal from the Supreme Court of Texas. Probable jurisdiction noted. The Solicitor General is invited to file a brief setting forth the views of the United States. *Clark M. Clifford, Carson M. Glass, Rayburn L. Foster, Harry D. Turner* and *C. J.*

Roberts for appellant. *James W. Witherspoon* and *Earnest L. Langley* for appellee. *Solicitor General Rankin* and *Assistant Attorney General Rice* for the United States, as *amicus curiae,* in opposition to the motion of appellee to dismiss. Reported below: 159 Tex. —, 316 S. W. 2d 382.

Certiorari Granted. (See also No. 67, ante, p. 499, and No. 551, ante, p. 498.)

No. 770. BATES ET AL. *v.* CITY OF LITTLE ROCK ET AL. Supreme Court of Arkansas. Certiorari granted. *Robert L. Carter* and *Frank D. Reeves* for petitioners. *Joseph C. Kemp* for the City of Little Rock, respondent. Reported below: — Ark. —, 319 S. W. 2d 37.

No. 809. UNITED STATES *v.* PRICE. C. A. 9th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Rice, Ralph S. Spritzer, A. F. Prescott* and *George F. Lynch* for the United States. *W. Lee McLane, Jr.* for respondent. Reported below: 263 F. 2d 382.

No. 836. FEDERAL TRADE COMMISSION *v.* TRAVELERS HEALTH ASSOCIATION. C. A. 8th Cir. Certiorari granted. *Acting Solicitor General Davis, Assistant Attorney General Hansen, Richard A. Solomon, Earl W. Kintner* and *James E. Corkey* for petitioner. *C. C. Fraizer* for respondent. Reported below: 262 F. 2d 241.

No. 627, Misc. JONES *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted. *Herbert S. Marks* and *Louis Henkin* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 104 U. S. App. D. C. 345, 262 F. 2d 234.

Certiorari Denied. (*See also No. 718, Misc., ante, p. 499.*)

No. 732. BERMAN ET AL. *v.* UNITED STATES; and

No. 733. FABRIC GARMENT CO., INC., ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Milton C. Weisman* and *Harry I. Rand* for petitioners in No. 732. *Simon H. Rifkind* for petitioners in No. 733. *Solicitor General Rankin, Assistant Attorney General Wilkey, Robert S. Erdahl* and *Eugene L. Grimm* for the United States. Reported below: 262 F. 2d 631.

No. 794. TITLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Joseph Forer, David Rein* and *Daniel G. Marshall* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 263 F. 2d 28.

No. 795. DE SOUZA *v.* BARBER, DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Dora Berres* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 263 F. 2d 470.

No. 796. COHEN ET AL. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. *Richard H. Markowitz* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *Meyer Rothwacks* for respondents. Reported below: 263 F. 2d 466.

No. 797. CATO BROS., INC., ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *A. C. Epps* and *Charles W. Laughlin* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for the United States. Reported below: 263 F. 2d 697.

No. 798. SHAFFER *v.* EVANS. C. A. 10th Cir. Certiorari denied. *Clinton R. Barry* and *D. L. Grace* for petitioner. Reported below: 263 F. 2d 134.

No. 800. BURGER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *John T. Sapienza, Don O. Russell* and *Robert L. Randall* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph F. Goetten* for the United States. Reported below: 262 F. 2d 946.

No. 801. DOUGLAS *v.* DOUGLAS. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Manuel Ruiz, Jr.* for petitioner. Reported below: 164 Cal. App. 2d 230, 330 P. 2d 659.

No. 802. CRABTREE *v.* OKLAHOMA. Criminal Court of Appeals of Oklahoma. Certiorari denied. *Edward L. Carey* and *Walter E. Gillcrist* for petitioner.

No. 804. COUCH ET VIR *v.* CITY OF RICHARDSON ET AL. Supreme Court of Texas. Certiorari denied. *James P. Donovan* and *William F. Billings* for petitioners. *Lewis B. Lefkowitz, John Plath Green* and *William H. Shook* for Gillespie, respondent.

No. 808. NEW YORK CENTRAL RAILROAD CO. ET AL. *v.* CITY OF DETROIT. Supreme Court of Michigan. Certiorari denied. *George H. Wyatt* for petitioners. *Nathaniel H. Goldstick* and *Julius C. Pliskow* for respondent. Reported below: 354 Mich. 637, 93 N. W. 2d 481.

No. 812. GORSKA *v.* PENNSYLVANIA RAILROAD CO. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *Edward F. Butler, Joseph P. Allen* and *Herbert J. Kaplow* for respondent. Reported below: 262 F. 2d 198.

No. 810. VAN BEUREN ET AL. *v.* MCLOUGHLIN (FORMER ACTING COLLECTOR OF INTERNAL REVENUE) ET AL. C. A. 1st Cir. Certiorari denied. *William R. Spofford* and *Sherwin T. McDowell* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Baum* for respondent. Reported below: 262 F. 2d 315.

No. 811. MID-SOUTHERN FOUNDATION *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Robert A. Littleton* and *John R. Stivers* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Baum* for respondent. Reported below: 262 F. 2d 134.

No. 813. HEXAGON LABORATORIES, INC., *v.* ROGERS, ATTORNEY GENERAL, ET AL. C. A. 3d Cir. Certiorari denied. *Allan L. Tumarkin, Montrose H. Massler* and *Theodore R. Kupferman* for petitioner. *Anthony T. Augelli, Irving H. Jurow* and *William D. Denson* for Schering Corporation, respondent. Reported below: 262 F. 2d 180.

No. 814. UNITED STATES *v.* MERCHANTS MATRIX CUT SYNDICATE, INC. C. A. 7th Cir. Certiorari denied. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for the United States. *Robert N. Burchmore* for respondent. Reported below: 259 F. 2d 747.

No. 817. AMERICAN OIL CO. *v.* UNITED STATES ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Perry S. Patterson* and *Herbert J. Miller, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for respondents.

No. 815. DARLINGTON *v.* STUDEBAKER-PACKARD CORP. C. A. 7th Cir. Certiorari denied. *Owen W. Crumpacker* for petitioner. *Wayne B. Easton* for respondent. Reported below: 261 F. 2d 903.

No. 816. GULF OIL CORP. *v.* INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 715, AFL-CIO. C. A. 5th Cir. Certiorari denied. *Chas. J. Murray, David W. Stephens* and *David T. Searls* for petitioner.

No. 822. ERRINGTON *v.* MISSOURI EX REL. COLLET, PROSECUTING ATTORNEY. Supreme Court of Missouri. Certiorari denied. *Robt. M. Murray* for petitioner. *Phineas Rosenberg* for respondent. Reported below: 317 S. W. 2d 326.

No. 844. WEIN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Russell E. Parsons* and *Richard Gladstein* for petitioner.

No. 470, Misc. KENDALL *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied. Petitioner *pro se*. *Latham Castle,* Attorney General of Illinois, for respondent.

No. 504, Misc. GRESSETTE *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 Wilkey, Beatrice Rosenberg* and *J. F. Bishop* for the United States.

No. 537, Misc. CLARK *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *Latham Castle,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

No. 558, Misc. GRAY *v.* KEENAN, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied. Petitioner *pro se*. *Edward C. Boyle* for respondent.

No. 607, Misc. HADLEY *v.* OREGON. Supreme Court of Oregon. Certiorari denied. Petitioner *pro se*. *Thomas W. Hansen* for respondent.

No. 637, Misc. STRADER *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 649, Misc. BIFIELD ET AL. *v.* HALBERT, U. S. DISTRICT JUDGE, ET AL. C. A. 9th Cir. Certiorari denied.

No. 672, Misc. BRANCH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 261 F. 2d 530.

No. 675, Misc. TORRES *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 679, Misc. TURNER *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM. Court of Criminal Appeals of Texas. Certiorari denied.

No. 680, Misc. BATES *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Ruth Jacobs* for petitioner. *Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Norman H. Sokolow,* Deputy Attorney General, for respondent. Reported below: 50 Cal. 2d 778, 329 P. 2d 907.

No. 682, Misc. KENNEDY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 259 F. 2d 883.

No. 683, Misc. GILMORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William F. Walsh* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 264 F. 2d 44.

No. 687, Misc. ROGERS *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 Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 105 U. S. App. D. C. 65, 263 F. 2d 902.

No. 690, Misc. SCHERER *v.* WYOMING. Supreme Court of Wyoming. Certiorari denied.

No. 693, Misc. BAUMGART *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 694, Misc. MEIKLE *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 696, Misc. MAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Joseph P. Jenkins* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 261 F. 2d 629.

No. 700, Misc. SHANNON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 263 F. 2d 596.

No. 701, Misc. PELIO *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied. Petitioner *pro se*. *Benj. J. Jacobson* for respondent.

No. 702, Misc. UNITED STATES EX REL. ALLEN *v.* MURPHY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 704, Misc. GILLIAM *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 705, Misc. MOORELAND *v.* CAVELL, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 711, Misc. JONES *v.* COMMISSIONERS OF THE DISTRICT OF COLUMBIA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 712, Misc. LEWIS *v.* OKLAHOMA. Criminal Court of Appeals of Oklahoma. Certiorari denied.

No. 713, Misc. GRANT *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 714, Misc. MORGAN *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 727, Misc. UNITED STATES EX REL. FARROW *v.* BANMILLER, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 716, Misc. UNITED STATES EX REL. CHASE *v.* KEENAN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 717, Misc. VALENTINE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 719, Misc. HOLLMAN *v.* MANNING, WARDEN. C. A. 4th Cir. Certiorari denied. Petitioner *pro se.* *Daniel R. McLeod,* Attorney General of South Carolina, *William F. Austin,* Assistant Attorney General, and *Julian S. Wolfe* for respondent. Reported below: 262 F. 2d 656.

No. 720, Misc. GATENS *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 722, Misc. BARANOWSKI *v.* CAVELL, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 726, Misc. TILLERY *v.* CAVELL, WARDEN. Court of Common Pleas of Allegheny County, Pennsylvania. Certiorari denied.

No. 728, Misc. STREIT *v.* BENNETT, WARDEN. District Court of Lee County, Iowa. Certiorari denied. Petitioner *pro se.* *Norman A. Erbe,* Attorney General of Iowa, for respondent.

No. 734, Misc. REYNOLDS *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 729, Misc. SHERIDAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 264 F. 2d 237.

No. 739, Misc. RAKES *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 741, Misc. CALDERON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 742, Misc. BYOMIN *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *Paul J. Mikus* and *Adrian F. Betleski* for respondent. Reported below: 168 Ohio St. 256, 153 N. E. 2d 672.

No. 743, Misc. CRENSHAW *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 748, Misc. DUFFY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Edward S. Silver* for respondent.

No. 753, Misc. KESSLER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 754, Misc. METCALFE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 758, Misc. JAMES *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 768, Misc. PULASKI *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 769, Misc. ECKWERTH *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 766, Misc. LAUGHTON *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 787, Misc. JENKINS *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *George H. Fust* for petitioner. Reported below: 236 La. 256, 107 So. 2d 632.

No. 853, Misc. KEITH *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Nancy Carley* for petitioner. *Irving Anolik* for respondent.

No. 600, Misc. KING *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *J. F. Bishop* for the United States.

No. 707, Misc. ELLIS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Kingdon Gould, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 105 U. S. App. D. C. 86, 264 F. 2d 372.

No. 648, Misc. SCHLETTE *v.* HALBERT, JUDGE, ET AL. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit and for other relief denied.

Rehearing Denied.

No. 178. THE MONROSA ET AL. *v.* CARBON BLACK EXPORT, INC., *ante*, p. 180;

No. 716. PECKHAM *v.* CASALDUC, TRUSTEE OF RONRICO CORPORATION, ET AL., *ante*, p. 958;

No. 736. BRIGHT LEAF INDUSTRIES, INC., *v.* STABLER ET AL., *ante*, p. 960;

No. 397, Misc. STARR *v.* UNITED STATES, *ante*, p. 936;

No. 580, Misc. MINTON *v.* ELLIS, GENERAL MANAGER, TEXAS DEPARTMENT OF CORRECTIONS, *ante*, p. 955;

No. 582, Misc. HOLLIS *v.* ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *ante*, p. 971; and

No. 589, Misc. WORLEY, ADMINISTRATRIX, ET AL. *v.* DUNN, TRUSTEE IN BANKRUPTCY, ET AL., *ante*, p. 955. Petitions for rehearing denied.

No. 581, Misc. BRISTOL ET AL. *v.* HEATON ET AL., *ante*, p. 230. Petition for rehearing denied. MR. JUSTICE DOUGLAS is of the opinion that a rehearing should be granted.

MAY 22, 1959.

Rehearing Denied.

No. 874, Misc., October Term, 1957. RISER *v.* TEETS, WARDEN, 357 U. S. 944. The motion for leave to file a petition for rehearing and recall of order denying certiorari is denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application. *George T. Davis* for petitioner. Reported below: 253 F. 2d 844.

MAY 25, 1959.

Miscellaneous Orders.

No. 894, Misc. DUNCAN *v.* CALIFORNIA. Motion for leave to file petition for writ of habeas corpus denied.

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No. 252. SAFEWAY STORES, INC., *v.* OKLAHOMA RETAIL GROCERS ASSOCIATION, INC., ET AL. Appeal from the Supreme Court of Oklahoma. (Probable jurisdiction noted, 358 U. S. 807.) The motion of the State of Oklahoma for leave to file brief, as *amicus curiae,* is granted. MR. JUSTICE CLARK took no part in the consideration or decision of this motion. *Mac Q. Williamson,* Attorney General of Oklahoma, movant. Reported below: 322 P. 2d 179.

Certiorari Denied. (*See also No. 803, ante, p. 533, and No. 805, ante, p. 531.*)

No. 745. DE LUCIA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Wm. Scott Stewart* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph F. Goetten* for the United States. Reported below: 262 F. 2d 610.

No. 818. KIRKPATRICK ET AL. *v.* SANDERS, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Raymond Kyle Hayes* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Melva M. Graney* and *L. W. Post* for respondent. Reported below: 261 F. 2d 480.

No. 819. GREENBERG ET AL. *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Thomas Cartelli* for petitioners.

No. 821. REVARD *v.* OKLAHOMA. Court of Criminal Appeals of Oklahoma. Certiorari denied. *O. B. Martin* for petitioner. Reported below: 332 P. 2d 967.

No. 823. UNIVERSE TANKSHIPS, INC., *v.* BARTHOLOMEW. C. A. 2d Cir. Certiorari denied. *Victor S. Cichanowicz* for petitioner. *Morton M. Shreck* for respondent. Reported below: 263 F. 2d 437.

No. 692. CONSOLIDATED FREIGHTWAYS, INC., *v.* UNITED TRUCK LINES, INC. Supreme Court of Oregon. Certiorari denied. *Donald A. Schafer* for petitioner. *James A. Williams* for respondent. Reported below: —— Ore. ——, 330 P. 2d 522.

No. 834. COUNTY OF LOS ANGELES ET AL. *v.* FLYING TIGER LINE, INC. Supreme Court of California. Certiorari denied. *Harold W. Kennedy* for petitioners. *Carl A. Stutsman, Jr.* for respondent. Reported below: 51 Cal. 2d 314, 333 P. 2d 323.

No. 835. HALTOM CITY STATE BANK OF FORT WORTH *v.* SEABOARD SURETY CO. ET AL. Court of Claims. Certiorari denied. *Leo Brewster* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for the United States, respondent. Reported below: —— Ct. Cl. ——.

No. 839. WRIGHT ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Otis Mark Waters* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Bernard Cedarbaum* for the United States. Reported below: —— Ct. Cl. ——, —— F. Supp. ——.

No. 845. HARDY ET AL. *v.* IVINS. Supreme Court of Montana. Certiorari denied. *Wellington D. Rankin* for Hardy, petitioner. *Howard A. Johnson* for respondent. Reported below: —— Mont. ——, 333 P. 2d 471, 334 P. 2d 721.

No. 751, Misc. GOLDENBERG *v.* MASSACHUSETTS. Superior Court of Massachusetts, Bristol County. Certiorari denied. *Melvin S. Louison* and *Leonard Louison* for petitioner. Reported below: 338 Mass. ——, 155 N. E. 2d 187.

No. 725, Misc. WASHINGTON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John H. Pickering* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States. Reported below: 105 U. S. App. D. C. 58, 263 F. 2d 742.

No. 740, Misc. WILKINS *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 Wilkey, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 104 U. S. App. D. C. 337, 262 F. 2d 226.

No. 824. VANT ET AL. *v.* MUTUAL BENEFIT LIFE INSURANCE CO. C. A. 3d Cir. Certiorari denied. *Paul Ginsburg* for petitioners. *Carl E. Glock* for respondent. Reported below: 262 F. 2d 803.

No. 825. FLEISCHER, TRUSTEE, *v.* BENJAMIN ET AL. C. A. 2d Cir. Certiorari denied. *Gustave B. Garfield* for petitioner. *Louis Nizer* for Paramount Pictures, Inc., et al., *Simon H. Rifkind* for Benjamin et al., and *Frank A. Bull* and *Daniel Huttenbrauck* for A. A. P., Inc., et al., respondents. Reported below: 264 F. 2d 515.

No. 826. WENGENROTH ET AL. *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Floyd Duke James* for petitioners.

No. 827. GILBERT ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Frederick R. Tansill* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Baum* for respondent. Reported below: 262 F. 2d 512.

No. 829. WILSON *v.* MILES ET AL. Court of Appeals of New York. Certiorari denied. *Sydney Snitow* and *Melvel W. Snitow* for petitioner. *Solomon Z. Ferziger* and *Herbert H. Pensig* for respondents. Reported below: 5 N. Y. 2d 822, 929, 181 N. Y. S. 2d 501, 183 N. Y. S. 2d 289.

No. 832. DUBILIER *v.* UNITED STATES. Court of Claims. Certiorari denied. *Samuel Ostrolenk* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Morton Hollander* and *Bernard Cedarbaum* for the United States. Reported below: 169 F. Supp. 489.

No. 837. RUTHERFORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Murray M. Chotiner* and *Russell E. Parsons* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 264 F. 2d 180.

No. 843. BIDART BROS. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *W. E. James* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, A. F. Prescott* and *Louise Foster* for the United States. Reported below: 262 F. 2d 607.

No. 634. SHEPTUR *v.* PROCTER & GAMBLE DISTRIBUTING CO. C. A. 6th Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application. Reported below: 261 F. 2d 221.

No. 709, Misc. RILEY *v.* RANDOLPH, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 737, Misc. WILSON *v.* BANMILLER, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 746. BARAY *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 747, Misc. WILLIAMS *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied.

No. 755, Misc. MAULT *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 757, Misc. MULVANEY *v.* GOODMAN, WARDEN. Supreme Court of New Jersey. Certiorari denied.

No. 759, Misc. UNITED STATES EX REL. DOPKOWSKI *v.* RANDOLPH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 262 F. 2d 10.

No. 762, Misc. UNITED STATES EX REL. JANOSKO *v.* MURPHY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 764, Misc. BLACKSHEAR *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.

No. 765, Misc. VEECH *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 782, Misc. PENNSYLVANIA EX REL. LEON *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 784, Misc. BUTCHER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 785, Misc. PERRONI *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 786, Misc. JONES *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 799, Misc. BAKER *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.

No. 801, Misc. WHEAT ET AL. *v.* BALTIMORE & OHIO RAILROAD CO. C. A. 7th Cir. Certiorari denied. *Clarence E. Clifton* and *Charles C. Montgomery* for petitioners. *Kenneth E. Ekin* for respondent. Reported below: 262 F. 2d 289.

No. 802, Misc. GREGORY *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 804, Misc. WITHERSPOON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States.

No. 752, Misc. THOMAS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Gerald W. Getty* and *James J. Doherty* for petitioner.

Rehearing Denied.

No. 713. SMOOT SAND & GRAVEL CORP. *v.* DISTRICT OF COLUMBIA, *ante*, p. 968;

No. 466, Misc. PERRONI *v.* ILLINOIS, *ante*, p. 980;

No. 650, Misc. GRANGER *v.* UNITED STATES, *ante*, p. 979; and

No. 658, Misc. CEPERO *v.* PAN AMERICAN AIRWAYS, INC., *ante*, p. 981. Petitions for rehearing denied.

No. 261. AMERICAN NATIONAL BANK OF JACKSONVILLE *v.* UNITED STATES ET AL., 358 U. S. 835. Motion for leave to file petition for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application.

Dismissal Under Rule 14.

ALMOND ET AL. *v.* JAMES ET AL. Appeal from the United States District Court for the Eastern District of Virginia. Appeal dismissed pursuant to stipulation under Rule 14 of the Rules of this Court. *J. Lindsay Almond, Jr.,* Governor of Virginia, *Albertis S. Harrison, Jr.,* Attorney General of Virginia, and *Walter E. Rogers,* Special Assistant Attorney General, for appellants. *Edmund D. Campbell* for appellees.

MAY 27, 1959.

Dismissal Under Rule 14.

CITY OF PASSAIC *v.* GENERAL ELECTRIC CO. ET AL. Appeal from the Supreme Court of New Jersey. Appeal dismissed pursuant to stipulation under Rule 14 of the Rules of this Court. *William N. Gurtman* for appellant. *John W. Hand* for the General Electric Co., and *David D. Furman,* Attorney General of New Jersey, and *Theodore I. Botter,* Deputy Attorney General, for the Division of Tax Appeals, Department of the Treasury of New Jersey, appellees.

JUNE 1, 1959.

Miscellaneous Orders.

No. 794, Misc. ORTIZ *v.* NEW MEXICO; and

No. 815, Misc. JOINER *v.* SINCLAIR, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 594, Misc. IN RE DISBARMENT OF CROW. It having been reported to the Court that John Harvey Crow, of Urbana, State of Ohio, has been disbarred from the practice of law in all the courts of the State of Ohio by judgment of the Common Pleas Court, Champagne County, State of Ohio, duly entered on the 16th day of August, A. D. 1956, and this Court by order of March 23, 1959,* having suspended the said John Harvey Crow from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent, who has filed a return thereto; now, upon consideration of the rule to show cause and the return aforesaid;

IT IS ORDERED that the said John Harvey Crow be, and he is hereby disbarred, and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

MR. JUSTICE STEWART took no part in the consideration or decision of this matter.

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

The disposition made of this disbarment proceeding does not conform to our practice. While admission to membership in our Bar is dependent on membership in a Bar of a State or other like political unit (Rule 5), dis-

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*[REPORTER'S NOTE: The order of March 23, 1959, referred to in the above order of the Court is as follows:

["No. 594, Misc. IN RE DISBARMENT OF CROW. IT IS ORDERED that John Harvey Crow, of Urbana, Ohio, be suspended from the practice of the law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of the law in this Court. MR. JUSTICE STEWART took no part in the consideration or decision of this case."]

barment there does not automatically result in disbarment here. When a State disbars a lawyer, we suspend him and issue a rule to show cause why he should not be disbarred. He then has an opportunity to make a return, after which (or on expiration of 40 days if no response is made) "the court will enter an appropriate order." Rule 8.

If a return is made challenging the fairness of the state proceedings that resulted in his disbarment there, it is our practice to appoint a committee to make an inquiry into the matter and submit a report and recommendation to us. That was done in *In re Capshaw*. Journal, Supreme Court of the United States, February 12, 1945, p. 167; 65 Sup. Ct. 673. The committee there appointed reported and, acting on that report, we entered an order of disbarment. Journal, Supreme Court of the United States, May 19, 1947, p. 260; 67 Sup. Ct. 1345.

Crow has made a return in this case denying the charges against him, alleging they were "manufactured." He challenges the reliability of the witnesses who spoke against him; he insists that the testimony of some witnesses refutes the charges; he maintains that persons with dishonorable motives induced witnesses to testify falsely against him; he alleges that one of the judges who sat in the disbarment proceedings should have been disqualified.

Three of the charges relate to Crow's conduct in divorce proceedings. The fourth involves a charge that $100 given him by a client for posting a bond was not so used and was never returned.

The charges are serious but no more so than those involved in the *Capshaw* case. It is for us to make our own determination as to the fitness of an attorney to remain on our rolls. State proceedings of disbarment, though presumptively correct, are not binding. See *Sell-*

ing v. *Radford,* 243 U. S. 46. This is not the first time that state disbarment proceedings have been challenged as lacking in procedural due process. See *Isserman* v. *Ethics Committee,* 345 U. S. 927 (dissent). Sometimes we can act on the face of the record, as where no serious issues of fact are involved. See *In re Isserman,* 345 U. S. 286, rev'd, 348 U. S. 1. But the important questions presented here turn on factual issues. The return in this case contains allegations which, if proved, would suggest that the requirements of fair procedure, without which no citizen can be deprived of his livelihood, were not satisfied in the Ohio proceedings.

These complaints that Crow makes may prove to be as fanciful as he thinks the charges against him are. But we should act only after a report of a committee that reflects none of the feelings and prejudices of the community which has condemned Crow.

No. 841. ANONYMOUS No. 14 *v.* ARKWRIGHT ET AL. Motion to dispense with printing of the petition granted. Joint motion to substitute Edward G. Baker in the place of George A. Arkwright (retired) as a party respondent granted. Petition for writ of certiorari to the Court of Appeals of New York denied. *David T. Berman* for petitioner. *Denis M. Hurley, Michael A. Castaldi* and *Zevie B. Schizer* for respondents.

No. 842. ANONYMOUS NOS. 16 AND 17 ET AL. *v.* ARKWRIGHT ET AL. Motion to dispense with printing of the petition granted. Joint motion to substitute Edward G. Baker in the place of George A. Arkwright (retired) as a party respondent granted. Petition for writ of certiorari to the Court of Appeals of New York denied. *David T. Berman* for petitioners. *Denis M. Hurley, Michael A. Castaldi* and *Zevie B. Schizer* for respondents.

No. 775, Misc. CROSS *v.* SUPREME COURT OF CALIFORNIA ET AL. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *Stanley A. Mosk*, Attorney General of California, *Willard A. Shank* and *John Fourt*, Deputy Attorneys General, and *Spencer M. Williams* for respondents.

Certiorari Granted. (*See also No. 851, ante, p. 552.*)

No. 833. BLACKBURN *v.* ALABAMA. Court of Appeals of Alabama. Certiorari granted. *W. H. Mitchell, Jr.* and *Truman Hobbs* for petitioner. *MacDonald Gallion*, Attorney General of Alabama, and *Paul T. Gish, Jr.*, Assistant Attorney General, for respondent. Reported below: 40 Ala. App. ——, 109 So. 2d 736.

No. 859. UNITED STATES *v.* REPUBLIC STEEL CORP. ET AL. C. A. 7th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for the United States. *Paul R. Conaghan* for Republic Steel Corp., *Peter A. Dammann* for International Harvester Co., and *Raymond T. Jackson, Warren Daane* and *Henry E. Seyfarth* for Interlake Iron Corp., respondents. Reported below: 264 F. 2d 289.

No. 858. UNITED STATES *v.* KAISER. C. A. 7th Cir. Certiorari granted. *Solicitor General Rankin* and *Assistant Attorney General Rice* for the United States. *Max Raskin, Harold A. Cranefield* and *Joseph L. Rauh, Jr.* for respondent. Reported below: 262 F. 2d 367.

Certiorari Denied. (*See also No. 783, ante, p. 550; and Nos. 841 and 842, ante, p. 1009.*)

No. 847. CENTURY INDUSTRIES, INC., *v.* WIEBOLDT STORES, INC., ET AL. C. A. 7th Cir. Certiorari denied. *James R. McKnight* for petitioner. *Warren C. Horton* for respondents. Reported below: 263 F. 2d 934.

No. 838. North American Van Lines, Inc., *v.* United States. Court of Claims. Certiorari denied. *Clifford J. Hynning* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Baum* for the United States. Reported below: —— Ct. Cl. ——, 169 F. Supp. 252.

No. 862. Memphis Transit Co. *v.* Tennessee ex rel. Leech, Commissioner of Highways. Supreme Court of Tennessee, Middle Division. Certiorari denied. *George T. Lewis, Jr.* and *Carmack Cochran* for petitioner. *James M. Glasgow* and *Jack Wilson,* Assistant Attorneys General of Tennessee, for the State of Tennessee. Reported below: —— Tenn. ——, 319 S. W. 2d 90.

No. 869. National Biscuit Division (Biscuit Council, Bakery and Confectionery Workers' International Union of America) *v.* Leedom et al., Constituting the National Labor Relations Board. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Abraham J. Harris* and *James H. Heller* for petitioner. *Solicitor General Rankin, Jerome D. Fenton, Thomas J. McDermott, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board. Reported below: 105 U. S. App. D. C. 117, 265 F. 2d 101.

No. 894. State Board of Equalization *v.* Gough Industries, Inc. Supreme Court of California. Certiorari denied. *Stanley Mosk,* Attorney General of California, *James E. Sabine,* Assistant Attorney General, and *Ernest P. Goodman,* Deputy Attorney General, for petitioner. *Francis R. Kirkham, Sigvald Nielson* and *Francis N. Marshall* for respondent. Reported below: 51 Cal. 2d 736, 336 P. 2d 161.

No. 828. SIEGEL ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *William G. Mulligan* for petitioners. *Solicitor General Rankin* and *Acting Assistant Attorney General Yeagley* for the United States. Reported below: 263 F. 2d 530.

No. 840. HOLEMAN *v.* LOUISVILLE & NASHVILLE RAILROAD CO. Court of Appeals of Kentucky. Certiorari denied. *Parker W. Duncan* for petitioner. *R. P. Hobson* and *John P. Sandidge* for respondent. Reported below: 319 S. W. 2d 47.

No. 846. WORTHINGTON *v.* COMMODITY CREDIT CORPORATION. C. A. 4th Cir. Certiorari denied. *Edwin R. Denney* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Lionel Kestenbaum* for respondent. Reported below: 263 F. 2d 178.

No. 848. KELLER ET AL. *v.* SANGER. C. A. 7th Cir. Certiorari denied. *Sol A. Hoffman* for petitioners. *Frederick J. Hertz* and *A. Louis Flynn* for respondent.

No. 849. LOUISIANA STATE BOARD OF MEDICAL EXAMINERS ET AL. *v.* ENGLAND ET AL. C. A. 5th Cir. Certiorari denied. *Robert E. LeCorgne, Jr.* for petitioners. *Russell Morton Brown* for respondents. Reported below: 259 F. 2d 626, 263 F. 2d 661.

No. 850. NEW PRODUCTS CORPORATION *v.* OUTBOARD, MARINE & MANUFACTURING CO. C. A. 7th Cir. Certiorari denied. *Warren C. Horton* for petitioner. *S. L. Wheeler* for respondent. Reported below: 263 F. 2d 521.

No. 861. DAVIDITIS ET AL. *v.* NATIONAL BANK OF MATTOON ET AL. C. A. 7th Cir. Certiorari denied. Petitioners *pro se*. Reported below: 262 F. 2d 884.

No. 863. MESSINA, ADMINISTRATRIX, *v.* CLARK EQUIPMENT CO. C. A. 2d Cir. Certiorari denied. *Julian Buchbinder* for petitioner. *John P. Smith* for respondent. Reported below: 263 F. 2d 291.

No. 864. PANNELL *v.* THE AMERICAN FLYER ETC. C. A. 2d Cir. Certiorari denied. *Arthur O. Louis, David L. Maloof* and *Joseph T. McGowan* for petitioner. *L. de Grove Potter* for respondent. Reported below: 263 F. 2d 497.

No. 853. UNITED MINE WORKERS OF AMERICA *v.* MEADOW CREEK COAL CO., INC. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *R. R. Kramer, E. H. Rayson, Willard P. Owens* and *M. E. Boiarsky* for petitioner. *Lewis S. Pope* for respondent. Reported below: 263 F. 2d 52.

No. 482, Misc. LEACH *v.* OVERHOLSER, SUPERINTENDENT, ST. ELIZABETHS HOSPITAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General White* and *Harold H. Greene* for respondent. Reported below: 103 U. S. App. D. C. 289, 257 F. 2d 667.

No. 583, Misc. TANNER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se. Grenville Beardsley,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

No. 662, Misc. FULLEN *v.* WYOMING. Supreme Court of Wyoming. Certiorari denied. Petitioner *pro se. W. M. Haight,* Assistant Attorney General of Wyoming, for respondent.

No. 692, Misc. EDELSON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 732, Misc. WEAVER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 263 F. 2d 577.

No. 774, Misc. CROSS *v.* TUSTIN, PERSONNEL DIRECTOR OF SANTA CLARA COUNTY, ET AL. District Court of Appeal of California, Third Appellate District. Certiorari denied. Petitioner *pro se*. *Stanley A. Mosk,* Attorney General of California, *Willard A. Shank* and *John Fourt,* Deputy Attorneys General, and *Spencer M. Williams* for respondents. Reported below: 165 Cal. App. 2d 146, 331 P. 2d 785.

No. 776, Misc. CURRY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 778, Misc. MILBERGER *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 809, Misc. LLOYD *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Petitioner *pro se*. *C. Ferdinand Sybert,* Attorney General of Maryland, *Joseph S. Kaufman,* Assistant Attorney General, and *James H. Norris, Jr.,* Special Assistant Attorney General, for respondent. Reported below: 219 Md. 343, 149 A. 2d 369.

No. 793, Misc. GLENN *v.* OKLAHOMA. Criminal Court of Appeals of Oklahoma. Certiorari denied.

No. 780, Misc. REED *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 816, Misc. HELSEL *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 818, Misc. JOHNSON *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 824, Misc. MERKIE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 921, Misc. GRIFFITH *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

Rehearing Denied.

No. 750. DAVID *v.* UNITED STATES, *ante*, p. 967;

No. 785. HARTSHORN *v.* DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY, *ante*, p. 984; and

No. 626, Misc. YATES *v.* UNITED STATES, *ante*, p. 972. Petitions for rehearing denied.

No. 221. COSTELLO *v.* UNITED STATES, 358 U. S. 830; and

No. 224. CANNELLA *v.* UNITED STATES, 358 U. S. 830. Motion for leave to file second petition for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application.

No. 613. ST. REGIS TRIBE OF MOHAWK INDIANS *v.* NEW YORK, *ante*, p. 910. Motion for leave to file petition for rehearing denied.

INDEX

U.S. GOVERNMENT PRINTING OFFICE : 1959 O—495957