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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1959

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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.

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.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1959.

NELSON ET AL. *v.* COUNTY OF LOS ANGELES ET AL.

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 152. Argued January 13, 1960.—Decided February 29, 1960.

Petitioners, when employees of a California County, were subpoenaed by and appeared before a Subcommittee of the House Un-American Activities Committee; but, in violation of specific orders of the County Board of Supervisors and the requirements of § 1028.1 of the Government Code of California, refused to answer certain questions concerning subversion. The County discharged them on grounds of insubordination and violation of § 1028.1. Nelson, a permanent employee, was given a Civil Service Commission hearing, which resulted in confirmation of his discharge. Globe, a temporary employee, was denied a hearing, since he was not entitled to it under the applicable rules. Both sued for reinstatement, contending that § 1028.1 and their discharges violated the Due Process Clause of the Fourteenth Amendment; but their discharges were affirmed by a California State Court. *Held:*

1. In Nelson's case, the judgment is affirmed by an equally divided Court. P. 4.

2. Globe's discharge did not violate the Due Process Clause of the Fourteenth Amendment, and the judgment in his case is affirmed. Pp. 4–9.

(a) Globe's discharge was not based on his invocation before the Subcommittee of his rights under the First and Fifth Amendments; it was based solely on insubordination and violation of § 1028.1. P. 6.

(b) Under California law, Globe had no vested right to county employment and was subject to summary discharge. P. 6.

(c) Globe's discharge was not arbitrary and unreasonable. *Slochower* v. *Board of Education,* 350 U. S. 551, distinguished. *Beilan* v. *Board of Education,* 357 U. S. 399, and *Lerner* v. *Casey,* 357 U. S. 468, followed. Pp. 6–8.

(d) The remand on procedural grounds required in *Vitarelli* v. *Seaton,* 359 U. S. 535, has no bearing on this case. Pp. 8–9.

163 Cal. App. 2d 607, 329 P. 2d 978, affirmed by an equally divided Court.

163 Cal. App. 2d 595, 329 P. 2d 971, affirmed.

A. L. Wirin and *Fred Okrand* argued the cause for petitioners. With them on the brief was *Nanette Dembitz.*

Wm. E. Lamoreaux argued the cause for respondents. With him on the brief was *Harold W. Kennedy.*

Murray A. Gordon filed a brief for the National Association of Social Workers, as *amicus curiae,* urging reversal.

MR. JUSTICE CLARK delivered the opinion of the Court.

Petitioners, when employees of the County of Los Angeles, California, were subpoenaed by and appeared before a Subcommittee of the House Un-American Activities Committee, but refused to answer certain questions concerning subversion. Previously, each petitioner had been ordered by the County Board of Supervisors to answer any questions asked by the Subcommittee relating to his subversive activity, and § 1028.1 of the Government Code of the State of California [1] made it the duty of any

[1] California Government Code, § 1028.1:

"It shall be the duty of any public employee who may be subpenaed or ordered by the governing body of the state or local agency by which such employee is employed, to appear before such governing body, or a committee or subcommittee thereof, or by a duly authorized committee of the Congress of the United States or of the Legislature of this State, or any subcommittee of any such

public employee to give testimony relating to such activity on pain of discharge "in the manner provided by law." Thereafter the County discharged petitioners on the ground of insubordination and violation of § 1028.1 of the Code. Nelson, a permanent social worker employed by the County's Department of Charities, was, upon his request, given a Civil Service Commission hearing which resulted in a confirmation of his discharge. Globe was a temporary employee of the same department and was denied a hearing on his discharge on the ground that, as such, he was not entitled to a hearing under the Civil Service Rules adopted pursuant to the County Charter. Petitioners then filed these petitions for mandates seeking

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committee, to appear before such committee or subcommittee, and to answer under oath a question or questions propounded by such governing body, committee or subcommittee, or a member or counsel thereof, relating to:

"(a) Present personal advocacy by the employee of the forceful or violent overthrow of the Government of the United States or of any state.

"(b) Present knowing membership in any organization now advocating the forceful or violent overthrow of the Government of the United States or of any state.

"(c) Past knowing membership at any time since October 3, 1945, in any organization which, to the knowledge of such employee, during the time of the employee's membership advocated the forceful or violent overthrow of the Government of the United States or of any state.

"(d) Questions as to present knowing membership of such employee in the Communist Party or as to past knowing membership in the Communist Party at any time since October 3, 1945.

"(e) Present personal advocacy by the employee of the support of a foreign government against the United States in the event of hostilities between said foreign government and the United States.

"Any employee who fails or refuses to appear or to answer under oath on any ground whatsoever any such questions so propounded shall be guilty of insubordination and guilty of violating this section and shall be suspended and dismissed from his employment in the manner provided by law."

reinstatement, contending that the California statute and their discharges violated the Due Process Clause of the Fourteenth Amendment. Nelson's discharge was affirmed by the District Court of Appeal, 163 Cal. App. 2d 607, 329 P. 2d 978, and Globe's summary dismissal was likewise affirmed, 163 Cal. App. 2d 595, 329 P. 2d 971. A petition for review in each of the cases was denied without opinion by the Supreme Court of California, three judges dissenting. 163 Cal. App. 2d 614, 329 P. 2d 983; 163 Cal. App. 2d 606, 329 P. 2d 978. We granted certiorari. 360 U. S. 928. The judgment in Nelson's case is affirmed by an equally divided Court and will not be discussed. We conclude that Globe's dismissal was valid.

On April 6, 1956, Globe was served with a subpoena to appear before the Subcommittee at Los Angeles. On the same date, he was served with a copy of an order of the County Board of Supervisors, originally issued February 19, 1952, concerning appearances before the Subcommittee. This order provided, among other things, that it was the duty of any employee to appear before the Subcommittee when so ordered or subpoenaed, and to answer questions concerning subversion. The order specifically stated that any "employee who disobeys the declaration of this duty and order will be considered to have been insubordinate . . . and that such insubordination shall constitute grounds for discharge . . . ." [2] At the appointed time, Globe appeared before the Subcommittee and was interrogated by its counsel concerning his familiarity with the John Reid Club. He claimed that this was a matter which was entirely his "own business," and, upon being

[2] This original order was the forerunner of § 1028.1 of the California Government Code, enacted in 1953, which with certain refinements embodied the requirements of the order into state law. It is against this section that petitioner levels his claims of unconstitutionality. See note 1, *supra*.

pressed for an answer, he stated that the question was "completely out of line as far as my rights as a citizen are concerned, [and] I refuse to answer this question under the First and Fifth Amendments of the Constitution of the United States." On the same grounds he refused to answer further questions concerning the Club, including one relating to his own membership. Upon being asked if he had observed any Communist activities on the part of members of the Club, Globe refused to answer, and suggested to committee counsel "that you get one of your trained seals up here and ask them." He refused to testify whether he was "a member of the Communist Party now" "on the same grounds" and "as previously stated for previous reasons." On May 2, by letter, Globe was discharged, "without further notice," on "the grounds that [he had] been guilty of insubordination and of violation of Section 1028.1 of the Government Code of the State of California . . . ." The letter recited the fact that Globe had been served with a copy of the Board order relating to his "duty to testify as a County employee . . . before said committee" and that, although appearing as directed, he had refused to answer the question, "Are you a member of the Communist Party now?" Thereafter Globe requested a hearing before the Los Angeles County Civil Service Commission, but it found that, as a temporary employee, he was not entitled to a hearing under the Civil Service Rules.[3] This the petitioner does not dispute.

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[3] "19.07. *Probationary Period Following First Appointment.*

"An employee who has not yet completed his first probationary period may be discharged or reduced in accordance with Rule 19.09 by the appointing power by written notice, served on the employee and copy filed with the Commission, specifying the grounds and the particular facts on which the discharge or reduction is based. Such an employee shall be entitled to answer, explain, or deny the charges in writing within ten business days but shall not be entitled to a

However, Globe contends that, despite his temporary status, his summary discharge was arbitrary and unreasonable and, therefore, violative of due process. He reasons that his discharge was based on his invocation before the Subcommittee of his rights under the First and Fifth Amendments. But the record does not support even an inference in this regard, and both the order and the statute upon which the discharge was based avoided it. In fact, California's court held to the contrary, saying, "At no time has the cause of petitioner's discharge been alleged to be anything but insubordination and a violation of section 1028.1, nor indeed under the record before us could it be." 163 Cal. App. 2d, at 599, 329 P. 2d, at 974. Moreover, this finding is buttressed by the language of the order and of California's statute. Both require the employee to answer any interrogation in the field outlined. Failure to answer "on any ground whatsoever any such questions" renders the employee "guilty of insubordination" and requires that he "be suspended and dismissed from his employment in the manner provided by law." California law in this regard, as declared by its court, is that Globe "has no vested right to county employment and may therefore be discharged summarily." We take this interpretation of California law as binding upon us.

We, therefore, reach Globe's contention that his summary discharge was nevertheless arbitrary and unreasonable. In this regard he places his reliance on *Slochower* v. *Board of Education,* 350 U. S. 551 (1956). However,

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hearing, except in case of fraud or of discrimination because of political or religious opinions, racial extraction, or organized labor membership."

"19.09. *Consent of Commission.*

. . . . .

"No consent need be secured to the discharge or reduction of a temporary or recurrent employee."

the New York statute under which Slochower was discharged specifically operated "to discharge every city employee who invokes the Fifth Amendment. In practical effect the questions asked are taken as confessed and made the basis of the discharge." *Id.*, at 558. This "built-in" inference of guilt, derived solely from a Fifth Amendment claim, we held to be arbitrary and unreasonable. But the test here, rather than being the invocation of any constitutional privilege, is the failure of the employee to answer. California has not predicated discharge on any "built-in" inference of guilt in its statute, but solely on employee insubordination for failure to give information which we have held that the State has a legitimate interest in securing. See *Garner* v. *Board of Public Works of Los Angeles,* 341 U. S. 716 (1951); *Adler* v. *Board of Education,* 342 U. S. 485 (1952). Moreover it must be remembered that here—unlike *Slochower*—the Board had specifically ordered its employees to appear and answer.

We conclude that the case is controlled by *Beilan* v. *Board of Education of Philadelphia,* 357 U. S. 399 (1958), and *Lerner* v. *Casey,* 357 U. S. 468 (1958). It is not determinative that the interrogation here was by a federal body rather than a state one, as it was in those cases. Globe had been ordered by his employer as well as by California's law to appear and answer questions before the federal Subcommittee. These mandates made no reference to Fifth Amendment privileges. If Globe had simply refused, without more, to answer the Subcommittee's questions, we think that under the principles of *Beilan* and *Lerner* California could certainly have discharged him. The fact that he chose to place his refusal on a Fifth Amendment claim puts the matter in no different posture, for as in *Lerner, supra,* at 477, California did not employ that claim as the basis for drawing an inference of guilt. Nor do we think that this discharge

is vitiated by any deterrent effect that California's law might have had on Globe's exercise of his federal claim of privilege. The State may nevertheless legitimately predicate discharge on refusal to give information touching on the field of security. See *Garner* and *Adler, supra.* Likewise, we cannot say as a matter of due process that the State's choice of securing such information by means of testimony before a federal body[4] can be denied. Finally, we do not believe that California's grounds for discharge constituted an arbitrary classification. See *Lerner, id.,* at 478. We conclude that the order of the County Board was not invalid under the Due Process Clause of the Fourteenth Amendment.

Nor do we believe that the remand on procedural grounds required in *Vitarelli* v. *Seaton,* 359 U. S. 535 (1959), has any bearing here. First, we did not reach the constitutional issues raised in that case. Next, Vitarelli was a Federal Department of Interior employee who "could have been summarily discharged by the Secretary at any time without the giving of a reason." *Id.,* at 539. The Court held, however, that, since Vitarelli was dismissed on the grounds of national security rather than by summary discharge, and his dismissal "fell substantially short of the requirements of the applicable departmental regulations," it was "illegal and of no effect." *Id.,* at 545. But petitioner here raises no such point, and clearly asserts that "whether or not petitioner Globe was accorded a hearing is not the issue here."[5] He bases his whole case on the claim "that due process affords petitioner Globe protection against the State's depriving him of employment on this

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[4] It is noteworthy that the California statute requires such information to be given before both state and federal bodies.

[5] Nor does petitioner make any attack on the failure of California's statute to afford temporary employees such as he an opportunity to explain his failure to answer questions. It will be noted that permanent employees are granted such a privilege.

arbitrary ground" of his refusal on federal constitutional grounds to answer questions of the Subcommittee. Having found that on the record here the discharge for "insubordination" was not arbitrary, we need go no further.

We do not pass upon petitioner's contention as to the Privileges and Immunities Clause of the Fourteenth Amendment, since it was neither raised in nor considered by the California courts. The judgments are

Affirmed.

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

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

Section 1028.1 of the California Code, as here applied, provides that any California public employee who refuses to incriminate himself when asked to do so by a Congressional Committee "shall be suspended and dismissed from his employment in the manner provided by law." The Fifth Amendment, which is a part of the Bill of Rights, provides that no person shall be compelled to incriminate ("to be a witness against") himself. The petitioner, Globe, an employee of the State of California, appeared before the House Un-American Activities Committee of the United States Congress and claimed this federal constitutional privilege. California promptly discharged him, as the Court's opinion says, for "insubordination and violation of § 1028.1 of the Code." The "insubordination and violation" consisted exclusively of Globe's refusal to testify before the Congressional Committee; a ground for his refusal was that his answers might incriminate him. It is beyond doubt that the State took Globe's job away from him only because he claimed his privilege under the Federal Constitution.

Here, then, is a plain conflict between the Federal Constitution and § 1028.1 of the California Code. The Federal Constitution told Globe he could, without penalty, refuse to incriminate himself before any arm of the Federal Government; California, however, has deprived him of his job solely because he exercised this federal constitutional privilege. In giving supremacy to the California law, I think the Court approves a plain violation of Article VI of the Constitution of the United States which makes that Constitution "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." I also think that this discharge under state law is a violation of the Due Process Clause of the Fourteenth Amendment in its authentic historical sense: that a State may not encroach upon the individual rights of people except for violation of a law that is valid under the "law of the land." "Law of the land" of necessity includes the supreme law, the Constitution itself.

The basic purpose of the Bill of Rights was to protect individual liberty against governmental procedures that the Framers thought should not be used. That great purpose can be completely frustrated by holdings like this. I would hold that no State can put any kind of penalty on any person for claiming a privilege authorized by the Federal Constitution. The Court's holding to the contrary here does not bode well for individual liberty in America.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS joins, dissenting.

This is another in the series of cases involving discharges of state and local employees from their positions after they claim their constitutional privilege against self-incrimination before investigating committees. See *Slochower* v. *Board of Higher Education,* 350 U. S. 551;

Beilan v. *Board of Public Education,* 357 U. S. 399; *Lerner* v. *Casey,* 357 U. S. 468. While I adhere on this matter of constitutional law to the views I expressed in dissent in the latter two cases, 357 U. S., at 417, it is enough to say here that I believe this case to be governed squarely by *Slochower,* and on that basis I put my dissent. Of course this opinion is limited solely to Globe's discharge.

California has commanded that its employees answer certain broad categories of questions when propounded to them by investigating bodies, including federal bodies such as the Subcommittee of the Un-American Activities Committee involved here. Cal. Government Code § 1028.1. Invocation of the privilege against self-incrimination before such a body, in response to questions of those sorts, is made a basis for discharge.[1] In the case

[1] The Court appears to treat the fact that the California statute is not in terms directed at the exercise of the privilege against self-incrimination, but rather covers all refusals to answer, as a factor militating in favor of its validity. The Court seems to view the privilege against self-incrimination as a somewhat strange and singular basis on which to decline to answer questions put in an investigation; or at most as an individual private soldier in a large army of reasons that might commonly be given for declining to respond. I am afraid I must view the matter more realistically. But even if the statute were taken as wholeheartedly at face value as the Court does, the consequence would not be that it was more reasonable, but rather that it was more arbitrary. It hardly avoids the rationale of this Court's decision in the *Slochower* case if the State adds other constitutional privileges to the list, exercise of which results *per se* in discharge. Such a statute would be even the more undifferentiating and arbitrary in its basis for discharge than the one involved in *Slochower.* And of course the crowning extent of arbitrariness is exposed by the contention that the fact that discharge would have followed a refusal to answer predicated on no reason at all justifies discharge upon claim of a constitutional privilege. It would appear of the essence of arbitrariness for the State to lump together refusals to answer based on good reasons and those based

of a permanent employee, it is held that discharge may come only after a hearing at which the employee is given, at least, an opportunity to explain his exercise of the privilege. *Board of Education* v. *Mass,* 47 Cal. 2d 494, 304 P. 2d 1015. But for a temporary or probationary employee like Globe the state law, as interpreted authoritatively by the California courts below, requires a discharge of the employee upon his claim of the privilege, without further ado. 163 Cal. App. 2d, at 605–606, 329 P. 2d, at 978. Opportunity for an explanation by the employee or for administrative consideration of the circumstances of the claim of privilege is foreclosed under the state law.

In *Slochower,* this Court had a substantially identical situation before it. There a local law which made a claim of the constitutional privilege "equivalent to a resignation" was struck down as violative of the Due Process Clause of the Fourteenth Amendment. Only one word is necessary to add here to the Court's statement there of its reason for voiding the provision: "As interpreted and applied by the state courts, it operates to discharge every [temporary] . . . employee who invokes the Fifth Amendment. In practical effect the questions asked are taken as confessed and made the basis of the discharge. No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege. It matters not whether the plea resulted from mistake, inadvertence or legal advice conscientiously given, whether wisely or unwisely. The heavy hand of the statute falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive." 350 U. S., at 558.

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on no reason at all, and make discharge automatically ensue on all. What was struck down in *Slochower* as unconstitutionally arbitrary—undifferentiating treatment merely among those pleading the self-incrimination privilege—seems almost reasonable by comparison.

The Court distinguished instances in which the employing government itself might be conducting an investigation into the "fitness" of the employee.

As applied, then, to temporary or probationary employees, the California statute contains the identical vice of automatic discharge for a Fifth Amendment plea made before another body, not concerned with investigating the "fitness" of the employee involved. It is sought here to equate Globe's case with those of Beilan and Lerner. But in the latter cases the Court took the view that the state discharges were sustainable because the employees' pleas of self-incrimination before local administrative agency investigations of their competence and reliability prevented those employing bodies from having an adequate record on which to reach an affirmative conclusion as to their competence and reliability. This failure to cooperate fully (styled lack of candor) within the framework of the employer's own proceeding to determine fitness, was said to be a constitutional basis for discharge. 357 U. S., at 405–408; 357 U. S., at 475–479; and see 357 U. S., at 410 (concurring opinion). But here there was not the vaguest semblance of any local administrative procedure designed to determine the fitness of Globe for further employment.[2] It has not been hitherto suggested that the authorizing resolutions of the Un-American Activities Committee extend to enabling it to perform these functions on a grant-in-aid basis to the States. Accordingly there is presented here the very same arbitrary action—the drawing of an infer-

[2] In *Slochower* it was said, "It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at 'the property, affairs, or government of the city, or . . . official conduct of city employees.'" 350 U. S., at 558. This distinction was asserted in *Beilan* and *Lerner*. 357 U. S., at 408; 357 U. S., at 477.

ence of unfitness for employment from exercise of the privilege before another body, without opportunity to explain on the part of the employee, or duty on the part of the employing body to attempt to relate the employee's conduct specifically to his fitness for employment—as was involved in *Slochower*. There is the same announced abdication of the local administrative body's own function of determining the fitness of its employees, in favor of an arbitrary and *per se* rule dependent on the behavior of the employee before another body not charged with determining his fitness.

It is said that this case differs from *Slochower* because that case involved a determination, based on his invocation of the privilege, that the employee was guilty of substantive misconduct, while this one simply involves a case of "insubordination" in the employee's failure to answer questions asked by the Congressional Committee which the employing agency has ordered be answered. In the first place, *Slochower* did not involve any finding by the New York authorities that the employee was guilty of the matters as to which he claimed the privilege. The claim of the privilege was treated by the State as equivalent to a resignation, 350 U. S., at 554, and it was only "in practical effect," *id.*, at 558, that the questions asked were taken as confessed;[3] that is, the State claimed the power to take the same action, discharge of the employee from employment, upon a plea of the privilege, as it could have taken upon a confession of the matters charged. The case involved an inference of unfitness for office, then, drawn arbitrarily and without opportunity to explain, from the assertion of the privilege. The same is involved here, and the thin patina of "insubordination" that the

[3] The opinion in the New York Court of Appeals also makes it quite clear that Slochower was not being discharged as guilty of the matters inquired about. *Daniman* v. *Board of Education*, 306 N. Y. 532, 538, 119 N. E. 2d 373, 377.

statute encrusts on the exercise of the privilege does not change the matter. If the State labeled as "insubordination" and mandatory ground for discharge every failure by an employee to respond to questions asked him by strangers on the street, its action would be as pointless as it was arbitrary. The point of the direction given to all employees here to answer the sort of questions covered by the statute must have been that the State thought that the matters involved in the questions bore some generic relationship to the "fitness" of the employee to hold his position. But on this basis the case is again indistinguishable from *Slochower*. If it is unconstitutionally arbitrary for the State to treat every invocation of the privilege as conclusive on his fitness and in effect as an automatic discharge, then the command of the State that no temporary employee shall claim the privilege under pain of automatic discharge must be an unconstitutionally arbitrary command. A State could not, I suppose, discharge an employee for attending religious services on Sunday, see *Wieman* v. *Updegraff*, 344 U. S. 183, 192; and equally so it could not enforce, by discharges for "insubordination," a general command to its employees not to attend such services.

The state court distinguished this case from *Slochower* on the grounds that Slochower was a state employee with tenure, but Globe was a temporary or probationary employee not entitled to a hearing on discharge. On this basis, it concluded that the requirement outlined by this Court in *Slochower*—that he could not be discharged *ipso facto* on his claim of the privilege, but only after a more particularized inquiry administered by his employer—did not apply. 163 Cal. App. 2d, at 601–603, 329 P. 2d, at 975–976. But this Court has nothing to do with the civil service systems of the States, as such. And Globe does not here contend that he could not have been discharged without a hearing; but he does attack the

specified basis of his discharge. Doubtless a probationary employee can constitutionally be discharged without specification of reasons at all; and this Court has not held that it would offend the Due Process Clause, without more, for a State to put its entire civil service on such a basis, if as a matter of internal polity it could stand to do so. But if a State discharged even a probationary employee because he was a Negro or a Jew, giving that explicit reason, its action could not be squared with the Constitution. So with Slochower's case; this Court did not reverse the judgment of New York's highest court because it had disrespected Slochower's state tenure rights, but because it had sanctioned administrative action taken expressly on an unconstitutionally arbitrary basis. So here California could have summarily discharged Globe, and that would have been an end to the matter; without more appearing, its action would be taken to rest on a permissible judgment by his superiors as to his fitness. But if it chooses expressly to bottom his discharge on a basis—like that of an automatic, unparticularized reaction to a plea of self-incrimination—which cannot by itself be sustained constitutionally, it cannot escape its constitutional obligations on the ground that as a general matter it could have effected his discharge with a minimum of formality. Cf. *Vitarelli* v. *Seaton,* 359 U. S. 535, 539.

For these reasons the judgment as to Globe should be reversed.

UNITED STATES *v.* RAINES ET AL.

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

No. 64. Argued January 12, 1960.—Decided February 29, 1960.

Under authority of R. S. § 2004, as amended by the Civil Rights Act of 1957, the Attorney General brought this civil action on behalf of the United States in a Federal District Court to enjoin certain public officials of the State of Georgia from discriminating against Negro citizens who desired to register to vote in elections in Georgia. The District Court dismissed the complaint on the ground that subsection (c), which authorizes the Attorney General to bring such an action, is unconstitutional. Although the complaint involved only official actions, the Court construed subsection (c) as authorizing suits to enjoin purely private actions and held that this went beyond the permissible scope of the Fifteenth Amendment and that the Act must be considered unconstitutional in all its applications. On direct appeal to this Court, *held:* The judgment is reversed. Pp. 19–28.

1. The case is properly here on direct appeal under 28 U. S. C. § 1252, since the basis of the decision below was that the Act of Congress was unconstitutional, no matter what the contentions of the parties might be as to what its proper basis should have been. P. 20.

2. The District Court erred in dismissing the complaint on the theory that the Act would exceed the permissible limits of the Fifteenth Amendment if applied to purely private actions by private persons, since that question was not properly before that Court on the record in this case. Pp. 20–24.

(a) One to whom application of a statute is constitutional will not be heard to attack it on the ground that it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. P. 21.

(b) The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases. P. 22.

(c) In this case there are no countervailing considerations sufficient to warrant the District Court's action in considering the

constitutionality of this Act in applications not presented by the facts before it. Pp. 22–24.

(d) To the extent that *United States* v. *Reese*, 92 U. S. 214, depended on an approach inconsistent with what this Court considers the better one and the one established by the weightiest of the subsequent cases, it cannot be followed here. P. 24.

3. Insofar as it authorizes the Attorney General to bring this action to enjoin racial discrimination by public officials in the performance of their official duties pertaining to elections, the Act is clearly constitutional. Pp. 24–28.

(a) Whatever precisely may be the reach of the Fifteenth Amendment, the conduct charged here—discrimination by state officials, within the course of their official duties, against the voting rights of citizens, on grounds of race or color—is certainly subject to the ban of that Amendment, and legislation designed to deal with such discrimination is "appropriate legislation" under it. P. 25.

(b) It cannot be said that appellees' action was not "state action" merely because the aggrieved parties had not exhausted their administrative or other remedies under state law, since Congress has power to provide for the correction of the constitutional violations of every state official, high and low, without regard to the presence of other authority in the State that might possibly revise their actions. P. 25.

(c) Insofar as *Barney* v. *City of New York*, 193 U. S. 430, points to a different conclusion, its authority has been so restricted by later decisions that it might be regarded as having been worn away by the erosion of time and of contrary authority. Pp. 25–26.

(d) It is not beyond the power of Congress to authorize the United States to bring this action to vindicate the public interest in the due observance of private constitutional rights. P. 27.

172 F. Supp. 552, reversed.

Attorney General Rogers argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General White, John F. Davis, Harold H. Greene* and *David L. Norman.*

Charles J. Bloch argued the cause for appellees. With him on the brief was *Ellsworth Hall, Jr.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The United States brought this action in the United States District Court for the Middle District of Georgia against the members of the Board of Registrars and certain Deputy Registrars of Terrell County, Georgia. Its complaint charged that the defendants had through various devices, in the administration of their offices, discriminated on racial grounds against Negroes who desired to register to vote in elections conducted in the State. The complaint sought an injunction against the continuation of these discriminatory practices, and other relief.

The action was founded upon R. S. § 2004, as amended by § 131 of the Civil Rights Act of 1957, 71 Stat. 637, 42 U. S. C. § 1971. Subsections (a) and (c), which are directly involved, provide: [1]

> "(a) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.
>
> . . . . .
>
> "(c) Whenever any person has engaged or there are reasonable grounds to believe that any person is

[1] Subsection (a) was originally § 1 of the Enforcement Act of May 31, 1870, c. 114, 16 Stat. 140, and was brought forward as R. S. § 2004. The remaining subsections were added by the 1957 legislation. Subsection (b) forbids various forms of intimidation and coercion in respect of voting for federal elective officers, and the enforcement provisions of subsection (c) likewise apply to it; but subsection (b) is not involved in this litigation.

about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) . . . , the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. . . ."

On the defendants' motion, the District Court dismissed the complaint, holding that subsection (c) was unconstitutional. 172 F. Supp. 552. The court held that the statutory language quoted allowed the United States to enjoin purely private action designed to deprive citizens of the right to vote on account of their race or color. Although the complaint in question involved only official action, the court ruled that since, in its opinion, the statute on its face was susceptible of application beyond the scope permissible under the Fifteenth Amendment, it was to be considered unconstitutional in all its applications. The Government appealed directly to this Court and we postponed the question of jurisdiction to the hearing of the case on the merits. 360 U. S. 926. Under the terms of 28 U. S. C. § 1252, the case is properly here on appeal since the basis of the decision below in fact was that the Act of Congress was unconstitutional, no matter what the contentions of the parties might be as to what its proper basis should have been.

The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power—"the gravest and most delicate duty that this Court is called on to perform." [2] *Marbury* v. *Madison,* 1 Cranch 137, 177–

[2] Holmes, J., in *Blodgett* v. *Holden,* 275 U. S. 142, 148.

180. This Court, as is the case with all federal courts, "has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration,* 113 U. S. 33, 39. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. *United States* v. *Wurzbach,* 280 U. S. 396; *Heald* v. *District of Columbia,* 259 U. S. 114, 123; *Yazoo & Mississippi Valley R. Co.* v. *Jackson Vinegar Co.,* 226 U. S. 217; *Collins* v. *Texas,* 223 U. S. 288, 295–296; *New York ex rel. Hatch* v. *Reardon,* 204 U. S. 152, 160–161. Cf. *Voeller* v. *Neilston Warehouse Co.,* 311 U. S. 531, 537; *Carmichael* v. *Southern Coal & Coke Co.,* 301 U. S. 495, 513; *Virginian R. Co.* v. *System Federation,* 300 U. S. 515, 558; *Blackmer* v. *United States,* 284 U. S. 421, 442; *Roberts & Schaefer Co.* v. *Emmerson,* 271 U. S. 50, 54–55; *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571, 576; *Tyler* v. *Judges of the Court of Registration,* 179 U. S. 405; *Ashwander* v. *TVA,* 297 U. S. 288, 347–348 (concurring opinion). In *Barrows* v. *Jackson,* 346 U. S. 249, this Court developed various reasons for this rule. Very significant is the incontrovertible proposition that it "would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation."

Id., at 256. The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined. The Court further pointed to the fact that a limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were in fact concretely presented. We might add that application of this rule frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.

The District Court relied on, and appellees urge here, certain cases which are said to be inconsistent with this rule and with its closely related corollary that a litigant may only assert his own constitutional rights or immunities. In many of their applications, these are not principles ordained by the Constitution, but constitute rather "rule[s] of practice," *Barrows* v. *Jackson, supra,* at 257, albeit weighty ones; hence some exceptions to them where there are weighty countervailing policies have been and are recognized. For example, where, as a result of the very litigation in question, the constitutional rights of one not a party would be impaired, and where he has no effective way to preserve them himself, the Court may consider those rights as before it. *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 459–460; *Barrows* v. *Jackson, supra.* This Court has indicated that where the application of these rules would itself have an inhibitory effect on freedom of speech, they may not be applied. See *Smith* v. *California,* 361 U. S. 147, 151; *Thornhill* v. *Alabama,* 310 U. S. 88, 97–98. Perhaps cases can be put where their application to a criminal statute would necessitate such a revision of its text as to create a situation in which the statute no longer gave an intelligible warning of the conduct it prohibited. See *United States* v. *Reese,* 92 U. S.

214, 219–220; cf. *Winters* v. *New York,* 333 U. S. 507, 518–520. And the rules' rationale may disappear where the statute in question has already been declared unconstitutional in the vast majority of its intended applications, and it can fairly be said that it was not intended to stand as valid, on the basis of fortuitous circumstances, only in a fraction of the cases it was originally designed to cover. See *Butts* v. *Merchants & Miners Transportation Co.,* 230 U. S. 126. The same situation is presented when a state statute comes conclusively pronounced by a state court as having an otherwise valid provision or application inextricably tied up with an invalid one, see *Dorchy* v. *Kansas,* 264 U. S. 286, 290; [3] or possibly in that rarest of cases where this Court can justifiably think itself able confidently to discern that Congress would not have desired its legislation to stand at all unless it could validly stand in its every application. Cf. *The Trade-Mark Cases,* 100 U. S. 82, 97–98; *The Employers' Liability Cases,* 207 U. S. 463, 501. But we see none of the countervailing considerations suggested by these examples, or any other countervailing consideration, as warranting the District Court's action here in considering the constitutionality of the Act in applications not before it.[4]

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[3] Cf. *Mountain Timber Co.* v. *Washington,* 243 U. S. 219, 234. But a State's determination of the class of persons who can invoke the protection of provisions of the Federal Constitution has been held not conclusive here. *Tileston* v. *Ullman,* 318 U. S. 44.

[4] Certainly it cannot be said that the sort of action proceeded against here, and validly reachable under the Constitution (see pp. 25–26, *infra*), was so small and inessential a part of the evil Congress was concerned about in the statute that these defendants should be permitted to make an attack on the statute generally. Subsection (d) and innumerable items in the legislative history show Congress' particular concern with the sort of action charged here. See, *e. g.,* Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, on Proposals to

This case is rather the most typical one for application of the rules we have discussed.

There are, to be sure, cases where this Court has not applied with perfect consistency these rules for avoiding unnecessary constitutional determinations,[5] and we do not mean to say that every case we have cited for various exceptions to their application was considered to turn on the exception stated, or is perfectly justified by it. The District Court relied primarily on *United States* v. *Reese, supra.* As we have indicated, that decision may have drawn support from the assumption that if the Court had not passed on the statute's validity *in toto* it would have left standing a criminal statute incapable of giving fair warning of its prohibitions. But to the extent *Reese* did depend on an approach inconsistent with what we think the better one and the one established by the weightiest of the subsequent cases, we cannot follow it here.

Accordingly, if the complaint here called for an application of the statute clearly constitutional under the

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Secure, Protect, and Strengthen Civil Rights of Persons under the Constitution and Laws of the United States, 85th Cong., 1st Sess., pp. 4–7, 36–37, 77, 81, 189, 205, 293, 300; Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, on Miscellaneous Bills Regarding the Civil Rights of Persons within the Jurisdiction of the United States, 85th Cong., 1st Sess., pp. 656, 1220; 103 Cong. Rec. 8705, 12149, 12898, 13126, 13732.

Nor can there be any serious contention that the statute, as a civil enactment, would fail to give adequate notice of the conduct it validly proscribed, even if certain applications of it were to be deemed unconstitutional. Criminal proceedings under the statute must depend on violation of a restraining order embracing the party charged.

[5] Cf., *e. g., Illinois Central R. Co.* v. *McKendree,* 203 U. S. 514; *United States* v. *Ju Toy,* 198 U. S. 253, 262–263.

Fifteenth Amendment, that should have been an end to the question of constitutionality. And as to the application of the statute called for by the complaint, whatever precisely may be the reach of the Fifteenth Amendment, it is enough to say that the conduct charged—discrimination by state officials, within the course of their official duties, against the voting rights of United States citizens, on grounds of race or color—is certainly, as "state action" and the clearest form of it, subject to the ban of that Amendment, and that legislation designed to deal with such discrimination is "appropriate legislation" under it. It makes no difference that the discrimination in question, if state action, is also violative of state law. *Snowden* v. *Hughes,* 321 U. S. 1, 11. The appellees contend that since Congress has provided in subsection (d) of the statutory provision in question here that the District Courts shall exercise their jurisdiction "without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law," and since such remedies were not exhausted here, appellees' action cannot be ascribed to the State. The argument is that the ultimate voice of the State has not spoken, since higher echelons of authority in the State might revise the appellees' action. It is, however, established as a fundamental proposition that every state official, high and low, is bound by the Fourteenth and Fifteenth Amendments. See *Cooper* v. *Aaron,* 358 U. S. 1, 16–19. We think this Court has already made it clear that it follows from this that Congress has the power to provide for the correction of the constitutional violations of every such official without regard to the presence of other authority in the State that might possibly revise their actions. The appellees can draw no support from the expressions in *Barney* v. *City of New*

York, 193 U. S. 430, on which they so much rely.[6] The authority of those expressions has been "so restricted by our later decisions," see *Snowden* v. *Hughes, supra,* at 13, that *Barney* must be regarded as having "been worn away by the erosion of time," *Tigner* v. *Texas,* 310 U. S. 141, 147, and of contrary authority. See *Raymond* v. *Chicago Union Traction Co.,* 207 U. S. 20, 37; *Home Tel. & Tel. Co.* v. *Los Angeles,* 227 U. S. 278, 283–289, 294; *Iowa-Des Moines Nat. Bank* v. *Bennett,* 284 U. S. 239, 247; *Snowden* v. *Hughes, supra; Screws* v. *United States,* 325 U. S. 91, 107–113, 116. Cf. *United States* v. *Classic,* 313 U. S. 299, 326. It was said of *Barney's* doctrine in *Home Tel. & Tel. Co.* v. *Los Angeles, supra,* at 284, by Mr. Chief Justice White: "[its] enforcement . . . would . . . render impossible the performance of the duty with which the Federal courts are charged under the Constitution." The District Court seems to us to have recognized that the complaint clearly charged a violation of the Fifteenth Amendment and of the statute, and that the statute, if applicable only to this class of cases, would unquestionably be valid legislation under that Amendment. We think that under the rules we have stated, that court should then have gone no further and should have upheld the Act as applied in the present action, and that its dismissal of the complaint was error.

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[6] *Barney* was a property owner's action to enjoin state officials from construction of a rapid transit tunnel in a particular place. The suit was brought directly under the Fourteenth Amendment in federal court, and it was averred that the proposed action of the state officials was not authorized under state law. It does not appear that the complainant alleged that higher state administrative echelons were indisposed to halt the unauthorized actions or that the State offered no remedy at all to a property owner threatened with interference with his property by state officials acting without authority. There was not presented any specific federal statute expressly authorizing federal judicial intervention with matters in this posture.

The appellees urge alternative grounds on which they seek to support the judgment of the District Court dismissing the complaint.[7] We do not believe these grounds are well taken. It is urged that it is beyond the power of Congress to authorize the United States to bring this action in support of private constitutional rights. But there is the highest public interest in the due observance of all the constitutional guarantees, including those that bear the most directly on private rights, and we think it perfectly competent for Congress to authorize the United States to be the guardian of that public interest in a suit for injunctive relief. See *United Steelworkers* v. *United States,* 361 U. S. 39, 43, and cases cited. Appellees raise questions as to the scope of the equitable discretion reserved to the courts in suits under § 2004. Cf. *id.,* at 41–42. We need not define the scope of the discretion of a District Court in proceedings of this nature, because, exercising a traditional equity discretion, the court below declined to dismiss the complaint on that ground, and we do not discern any basis in the present posture of the case for any contention that it has abused its discretion. Questions as to the relief sought by the United States are

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[7] Many of these contentions are raised by what appellees style a "cross-appeal." Notice of cross-appeal was filed in the District Court, but the cross-appeal was not docketed here. However, since the judgment of the District Court awarded appellees all the relief they requested (despite rejecting most of their contentions, except the central one), no cross-appeal was necessary to bring these contentions before us if they can be considered otherwise. They would simply be alternative grounds on which the judgment below could be supported. In view of the broad nature of § 1252, which seems to indicate a desire of Congress that the whole case come up (contrast 18 U. S. C. § 3731, *United States* v. *Borden Co.,* 308 U. S. 188, 193), we have the power to pass on these other questions, and since the District Court expressed its views on most of them, we also deem it appropriate to do so.

posed, but remedial issues are hardly properly presented at this stage in the litigation.

The parties have engaged in much discussion concerning the ultimate scope in which Congress intended this legislation to apply, and concerning its constitutionality under the Fifteenth Amendment in these various applications. We shall not compound the error we have found in the District Court's judgment by intimating any views on either matter.

Reversed.

MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE HARLAN concurs, joining in the judgment.

The weighty presumptive validity with which the Civil Rights Act of 1957, like every enactment of Congress, comes here is not overborne by any claim urged against it. To deal with legislation so as to find unconstitutionality is to reverse the duty of courts to apply a statute so as to save it. Here this measure is sustained under familiar principles of constitutional law. Nor is there any procedural hurdle left to be cleared to sustain the suit of the United States. Whatever may have been the original force of *Barney* v. *New York,* 193 U. S. 430, that decision has long ceased to be an obstruction, nor is any other decision in the way of our result in this case. And so I find it needless to canvass the multitude of opinions that may generally touch on, but do not govern, the issues now before us.

UNITED STATES *v.* PARKE, DAVIS & CO.

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

No. 20. Argued November 10, 1959.—Decided February 29, 1960.

In a civil suit under § 4 of the Sherman Act charging appellee with combining and conspiring to maintain resale prices of its products in areas which have no "fair trade" laws, the Government introduced evidence showing that appellee had (1) announced a policy of refusing to deal with retailers who failed to observe appellee's suggested minimum resale prices or who advertised discount prices on appellee's products, (2) discontinued direct sales to those retailers who failed to abide by the announced policy, (3) induced wholesale distributors to stop selling appellee's products to the offending retailers, (4) secured unanimous adherence by informing a number of the retailers that if each of them would adhere to the announced policy one of their principal competitors would also do so, and (5) permitted the retailers to resume purchasing its products after they had indicated willingness to observe the policy. The evidence further established that appellee had terminated these practices after becoming aware that the Department of Justice had begun an investigation of its price maintenance activities. The District Court dismissed the complaint on the ground that the Government had not shown a right to relief. *Held:* The judgment is reversed and the case remanded with directions to enter an appropriate judgment enjoining appellee from further violations of the Sherman Act, unless it elects to submit evidence in defense and refutes the Government's right to injunctive relief established by the present record. Pp. 30–49.

(a) The District Court erred in holding that these practices constituted only unilateral action by appellee in selecting its customers, as permitted by *United States* v. *Colgate & Co.*, 250 U. S. 300. Appellee did not merely announce its policy and then decline to have further dealings with retailers who failed to abide by it, but, by utilizing wholesalers and other retailers, it actively induced unwilling retailers to comply with the policy. The resulting concerted action to maintain the resale prices constituted a conspiracy or combination in violation of the Sherman Act, although it was not based on any contract, express or implied. Pp. 36–47.

(b) Rule 52 of the Federal Rules of Civil Procedure does not require affirmance of the District Court's ultimate finding that respondent did not violate the Sherman Act, because that conclusion was based on an erroneous interpretation of the law. Pp. 43–45.

(c) The District Court's alternative holding that dismissal of the complaint was warranted because there was no reasonable probability that appellee would resume its attempts to maintain resale prices is erroneous, because it is not supported by the evidence. Pp. 47–48.

164 F. Supp. 827, reversed.

Daniel M. Friedman argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon, Edward R. Kenney* and *Henry Geller.*

Gerhard A. Gesell argued the cause for appellee. With him on the brief were *Edward S. Reid, Jr.* and *Weaver W. Dunnan.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Government sought an injunction under § 4 of the Sherman Act against the appellee, Parke, Davis & Company, on a complaint alleging that Parke Davis conspired and combined, in violation of §§ 1 and 3 of the Act,[1] with

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[1] The pertinent provision of Sections 1, 3 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. §§ 1, 3, 4), commonly known as the Sherman Act, are as follows:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . . Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor . . . ."

"Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in . . . the District

retail and wholesale druggists in Washington, D. C., and Richmond, Virginia, to maintain the wholesale and retail prices of Parke Davis pharmaceutical products. The violation was alleged to have occurred during the summer of 1956 when there was no Fair Trade Law in the District of Columbia or the State of Virginia.[2] After the Government completed the presentation of its evidence at the trial, and without hearing Parke Davis in defense, the District Court for the District of Columbia dismissed the complaint under Rule 41 (b) on the ground that upon the facts and the law the Government had not shown a right to relief. 164 F. Supp. 827. We noted probable jurisdiction of the Government's direct appeal under § 2 of the Expediting Act.[3] 359 U. S. 903.

Parke Davis makes some 600 pharmaceutical products which it markets nationally through drug wholesalers and

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of Columbia, or in restraint of trade or commerce . . . between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor . . . .

"Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. . . ."

[2] Congress has provided that where a State adopts a "Fair Trade Law" which permits sellers under certain circumstances to make price-fixing agreements with purchasers, such agreements shall not be held illegal under the Sherman Act, 15 U. S. C. § 1. The Fair Trade Laws adopted in 16 States have been invalidated by their state courts on state grounds. H. R. Rep. No. 467, 86th Cong., 1st Sess. 6–7. On June 9, 1959, the House Committee on Interstate Commerce favorably reported a bill which, if passed, would enact a National Fair Trade Practice Act.

[3] 32 Stat. 823, 15 U. S. C. § 29, as amended by § 17 of the Act of June 25, 1948, 62 Stat. 989.

drug retailers. The retailers buy these products from the drug wholesalers or make large quantity purchases directly from Parke Davis. Sometime before 1956 Parke Davis announced a resale price maintenance policy in its wholesalers' and retailers' catalogues. The wholesalers' catalogue contained a Net Price Selling Schedule listing suggested minimum resale prices on Parke Davis products sold by wholesalers to retailers. The catalogue stated that it was Parke Davis' continuing policy to deal only with drug wholesalers who observed that schedule and who sold only to drug retailers authorized by law to fill prescriptions. Parke Davis, when selling directly to retailers, quoted the same prices listed in the wholesalers' Net Price Selling Schedule but granted retailers discounts for volume purchases. Wholesalers were not authorized to grant similar discounts. The retailers' catalogue contained a schedule of minimum retail prices applicable in States with Fair Trade Laws and stated that this schedule was suggested for use also in States not having such laws. These suggested minimum retail prices usually provided a 50% markup over cost on Parke Davis products purchased by retailers from wholesalers but, because of the volume discount, often in excess of 100% markup over cost on products purchased in large quantities directly from Parke Davis.

There are some 260 drugstores in Washington, D. C., and some 100 in Richmond, Virginia. Many of the stores are units of Peoples Drug Stores, a large retail drug chain. There are five drug wholesalers handling Parke Davis products in the locality who do business with the drug retailers. The wholesalers observed the resale prices suggested by Parke Davis. However, during the spring and early summer of 1956 drug retailers in the two cities advertised and sold several Parke Davis vitamin products at prices substantially below the suggested minimum retail prices; in some instances the prices apparently

reflected the volume discounts on direct purchases from Parke Davis since the products were sold below the prices listed in the wholesalers' Net Price Selling Schedule. The Baltimore office manager of Parke Davis in charge of the sales district which included the two cities sought advice from his head office on how to handle this situation. The Parke Davis attorney advised that the company could legally "enforce an adopted policy arrived at unilaterally" to sell only to customers who observed the suggested minimum resale prices. He further advised that this meant that "we can lawfully say 'we will sell you only so long as you observe such minimum retail prices' but cannot say 'we will sell you only if you agree to observe such minimum retail prices,' since except as permitted by Fair Trade legislations [*sic*] agreements as to resale price maintenance are invalid." Thereafter in July the branch manager put into effect a program for promoting observance of the suggested minimum retail prices by the retailers involved. The program contemplated the participation of the five drug wholesalers. In order to insure that retailers who did not comply would be cut off from sources of supply, representatives of Parke Davis visited the wholesalers and told them, in effect, that not only would Parke Davis refuse to sell to wholesalers who did not adhere to the policy announced in its catalogue, but also that it would refuse to sell to wholesalers who sold Parke Davis products to retailers who did not observe the suggested minimum retail prices. Each wholesaler was interviewed individually but each was informed that his competitors were also being apprised of this. The wholesalers without exception indicated a willingness to go along.

Representatives called contemporaneously upon the retailers involved, individually, and told each that if he did not observe the suggested minimum retail prices, Parke Davis would refuse to deal with him, and that fur-

thermore he would be unable to purchase any Parke Davis products from the wholesalers. Each of the retailers was also told that his competitors were being similarly informed.

Several retailers refused to give any assurances of compliance and continued after these July interviews to advertise and sell Parke Davis products at prices below the suggested minimum retail prices. Their names were furnished by Parke Davis to the wholesalers. Thereafter Parke Davis refused to fill direct orders from such retailers and the wholesalers likewise refused to fill their orders.[4] This ban was not limited to the Parke Davis products being sold below the suggested minimum prices but included all the company's products, even those necessary to fill prescriptions.

The president of Dart Drug Company, one of the retailers cut off, protested to the assistant branch manager of Parke Davis that Parke Davis was discriminating against him because a drugstore across the street, one of the Peoples Drug chain, had a sign in its window advertising Parke Davis products at cut prices. The retailer was told that if this were so the branch manager "would see Peoples and try to get them in line." The branch manager testified at the trial that thereafter he talked to a vice-president of Peoples and that the following occurred:

> "Q. Well, now, you told Mr. Downey [the vice-president of Peoples] at this meeting, did you not, Mr. Powers, [the assistant branch manager of Parke Davis] that you noticed that Peoples were cutting prices?
>
> "A. Yes.

[4] When Parke Davis learned from a wholesaler's invoice that he had filled an order of one of the retailers, Parke Davis protested but was satisfied when the wholesaler explained that this was an oversight.

"Q. And you told him, did you not, that it had been the Parke, Davis policy for many years to do business only with individuals that maintained the scheduled prices?

"A. I told Mr. Downey that we had a policy in our catalog, and that anyone that did not go along with our policy, we were not interested in doing business with them.

. . . . . .

"Q. . . . Now, Mr. Downey told you on the occasion of this visit, did he not, that Peoples would stop cutting prices and would abide by the Parke-Davis policy, is that right?

"A. That is correct.

. . . . . .

"Q. When you went to call on Mr. Downey, you solicited his support of Parke, Davis policies, is not that right?

"A. That is right.

"Q. And he said, I will abide by your policy?

"A. That is right."

The District Court found, apparently on the basis of this testimony, that "The Peoples' representative stated that Peoples would stop cutting prices on Parke, Davis' products and Parke, Davis continued to sell to Peoples."

But five retailers continued selling Parke Davis products at less than the suggested minimum prices from stocks on hand. Within a few weeks Parke Davis modified its program. Its officials believed that the selling at discount prices would be deterred, and the effects minimized of any isolated instances of discount selling which might continue, if all advertising of such prices were discontinued. In August the Parke Davis representatives again called on the retailers individually. When interviewed, the president of Dart Drug Company indi-

cated that he might be willing to stop advertising, although continuing to sell at discount prices, if shipments to him were resumed. Each of the other retailers was then told individually by Parke Davis representatives that Dart was ready to discontinue advertising. Each thereupon said that if Dart stopped advertising he would also. On August 28 Parke Davis reported this reaction to Dart. Thereafter all of the retailers discontinued advertising of Parke Davis vitamins at less than suggested minimum retail prices and Parke Davis and the wholesalers resumed sales of Parke Davis products to them. However, the suspension of advertising lasted only a month. One of the retailers again started newspaper advertising in September and, despite efforts of Parke Davis to prevent it, the others quickly followed suit. Parke Davis then stopped trying to promote the retailers' adherence to its suggested resale prices, and neither it nor the wholesalers have since declined further dealings with them.[5] A reason for this was that the Department of Justice, on complaint of Dart Drug Company, had begun an investigation of possible violation of the antitrust laws.

The District Court held that the Government's proofs did not establish a violation of the Sherman Act because "the actions of [Parke Davis] were properly unilateral and sanctioned by law under the doctrine laid down in the case of United States v. Colgate & Co., 250 U. S. 300 . . . ." 164 F. Supp., at 829.

The *Colgate* case came to this Court on writ of error under the Criminal Appeals Act, 34 Stat. 1246, from a District Court judgment dismissing an indictment for violation of the Sherman Act. The indictment proceeded

[5] Except that in December 1957, Parke Davis informed Dart Drug Company that it did not intend to have any further dealings with Dart. The latter has, however, continued to purchase Parke Davis products from wholesalers. Thus, Dart Drug cannot receive the volume discount on large quantity purchases.

solely upon the theory of an unlawful combination between Colgate and its wholesale and retail dealers for the purpose and with the effect of procuring adherence on the part of the dealers to resale prices fixed by the company. However, the District Court construed the indictment as not charging a combination by *agreement* between Colgate and its customers to maintain prices. This Court held that it must disregard the allegations of the indictment since the District Court's interpretation of the indictment was binding and that without an allegation of unlawful *agreement* there was no Sherman Act violation charged. The Court said:

> "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell." 250 U. S., at 307.

The Government concedes for the purposes of this case that under the *Colgate* doctrine a manufacturer, having announced a price maintenance policy, may bring about adherence to it by refusing to deal with customers who do not observe that policy. The Government contends, however, that subsequent decisions of this Court compel the holding that what Parke Davis did here by entwining the wholesalers and retailers in a program to promote general compliance with its price maintenance policy went

beyond mere customer selection and created combinations or conspiracies to enforce resale price maintenance in violation of §§ 1 and 3 of the Sherman Act.

The history of the *Colgate* doctrine is best understood by reference to a case which preceded the *Colgate* decision, *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373. Dr. Miles entered into written contracts with its customers obligating them to sell its medicine at prices fixed by it. The Court held that the contracts were void because they violated both the common law and the Sherman Act. The *Colgate* decision distinguished *Dr. Miles* on the ground that the *Colgate* indictment did not charge that company with selling its products to dealers *under agreements* which obligated the latter not to resell except at prices fixed by the seller. The *Colgate* decision created some confusion and doubt as to the continuing vitality of the principles announced in *Dr. Miles*. This brought *United States* v. *Schrader's Son, Inc.*, 252 U. S. 85, to the Court. The case involved the prosecution of a components manufacturer for entering into price-fixing agreements with retailers, jobbers and manufacturers who used his products. The District Court dismissed, saying:

> "Granting the fundamental proposition stated in the Colgate case, that the manufacturer has an undoubted right to specify resale prices and refuse to deal with any one who fails to maintain the same, or, as further stated, the act does not restrict the long-recognized right of a trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal, and that he of course may announce in advance the circumstances under which he will refuse to sell, it seems to me that it is a distinction without a difference to say that he may do so by the subter-

> fuges and devices set forth in the [*Colgate*] opinion and not violate the Sherman Anti-Trust Act, yet if he had done the same thing in the form of a written agreement, adequate only to effectuate the same purpose, he would be guilty of a violation of the law. . . ." 264 F. 175, 184.

This Court reversed, and said:

> "The court below misapprehended the meaning and effect of the opinion and judgment in [*Colgate*]. We had no intention to overrule or modify the doctrine of *Dr. Miles Medical Co.* v. *Park & Sons Co.*, where the effort was to destroy the dealers' independent discretion through restrictive agreements." 252 U. S., at 99.

The Court went on to explain that the statement from *Colgate* quoted earlier in this opinion meant no more than that a manufacturer is not guilty of a combination or conspiracy if he merely "indicates his wishes concerning prices and declines further dealings with all who fail to observe them . . ."; however there is unlawful combination where a manufacturer "enters into agreements—whether express or implied from a course of dealing or other circumstances—with all customers . . . which undertake to bind them to observe fixed resale prices." *Ibid.*

The next decision was *Frey & Son, Inc.*, v. *Cudahy Packing Co.*, 256 U. S. 208. That was a treble damage suit alleging a conspiracy in violation of the Sherman Act between the manufacturer and jobbers to maintain resale prices. The plaintiff recovered a judgment. The Court of Appeals for the Fourth Circuit reversed on the authority of *Colgate*. The Court of Appeals concluded: "There was no formal written or oral agreement with jobbers for the maintenance of prices" and in that circumstance held

that under *Colgate* the trial court should have directed a verdict for the defendant. In holding that the Court of Appeals erred, this Court referred to the decision in *Schrader* as holding that the "essential agreement, combination or conspiracy might be implied from a course of dealing or other circumstances," so that in *Cudahy*, "Having regard to the course of dealing and all the pertinent facts disclosed by the present record, we think whether there existed an unlawful combination or agreement between the manufacturer and jobbers was a question for the jury to decide, and that the Circuit Court of Appeals erred when it held otherwise." 256 U. S., at 210.

But the Court also held improper an instruction which was given to the jury that a violation of the Sherman Act might be found if the jury should find as facts that the defendant "indicated a sales plan to the wholesalers and jobbers, which plan fixed the price below which the wholesalers and jobbers were not to sell to retailers, and . . . [that] . . . defendant called this particular feature of this plan to their attention on very many different occasions, and . . . [that] . . . the great majority of them not only [expressed] no dissent from such plan, but actually [cooperated] in carrying it out by themselves selling at the prices named . . . ." 256 U. S. 210–211. However, the authority of this holding condemning the instruction has been seriously undermined by subsequent decisions which we are about to discuss. Therefore, *Cudahy* does not support the District Court's action in this case, and we cannot follow it here. Less than a year after *Cudahy* was handed down, the Court decided *Federal Trade Comm'n* v. *Beech-Nut Packing Co.*, 257 U. S. 441, which presented a situation bearing a marked resemblance to the Parke Davis program.

In *Beech-Nut* the company had adopted a policy of refusing to sell its products to wholesalers or retailers who did not adhere to a schedule of resale prices. Beech-Nut

later implemented this policy by refusing to sell to wholesalers who sold to retailers who would not adhere to the policy. To detect violations the company utilized code numbers on its products and instituted a system of reporting. When an offender was cut off, he would be reinstated upon the giving of assurances that he would maintain prices in the future. The Court construed the Federal Trade Commission Act to authorize the Commission to forbid practices which had a "dangerous tendency unduly to hinder competition or create monopoly." 257 U. S., at 454. The Sherman Act was held to be a guide to what constituted an unfair method of competition. The company had urged that its conduct was entirely legal under the Sherman Act as interpreted by *Colgate*. The Court rejected this contention, saying that "the Beech-Nut system goes far beyond the simple refusal to sell goods to persons who will not sell at stated prices, which in the *Colgate Case* was held to be within the legal right of the producer." *Ibid.* The Court held further that the nonexistence of contracts covering the practices was irrelevant since "[t]he specific facts found show suppression of the freedom of competition by methods in which the company secures the coöperation of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose." *Id.*, at 455. That the Court considered that the Sherman Act violation thus established was dispositive of the issue before it is shown by the ground taken by Mr. Justice McReynolds in dissent. The parties had stipulated that there were no contracts covering the policy. Relying on his view of *Colgate*, he asked: "How can there be methods of coöperation . . . when the existence of the essential contracts is definitely excluded?" *Id.*, at 459. The majority did not read *Colgate* as requiring such contracts; rather, the Court dispelled the confusion over whether a combination effected by contractual arrange-

ments, express or implied, was necessary to a finding of Sherman Act violation by limiting *Colgate* to a holding that when the only act specified in the indictment amounted to saying that the trader had exercised his right to determine those with whom he would deal, and to announce the circumstances under which he would refuse to sell, no Sherman Act violation was made out. However, because Beech-Nut's methods were as effective as agreements in producing the result that "all who would deal in the company's products are constrained to sell at the suggested prices," 257 U. S., at 455, the Court held that the securing of the customers' adherence by such methods constituted the creation of an unlawful combination to suppress price competition among the retailers.

That *Beech-Nut* narrowly limited *Colgate* and announced principles which subject to Sherman Act liability the producer who secures his customers' adherence to his resale prices by methods which go beyond the simple refusal to sell to customers who will not resell at stated prices, was made clear in *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 722:

> "The *Beech-Nut* case recognizes that a simple refusal to sell to others who do not maintain the first seller's fixed resale prices is lawful but adds as to the Sherman Act, 'He [the seller] may not, consistently with the act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade.' 257 U. S. at 453. The Beech-Nut Company, without agreements, was found to suppress the freedom of competition by coercion of its customers through special agents of the company, by reports of competitors about customers who violated resale prices, and by boycotts of price cutters. . . ."

Bausch & Lomb, like the instant case, was an action by the United States to restrain alleged violations of §§ 1 and 3 of the Sherman Act. The Court, relying on *Beech-Nut,* held that a distributor, Soft-Lite Lens Company, Inc., violated the Sherman Act when, as was the case with Parke Davis, the refusal to sell to wholesalers was not used simply to induce acquiescence of the wholesalers in the distributor's published resale price list; the wholesalers "accepted Soft-Lite's proffer of a plan of distribution by cooperating in prices, limitation of sales to and approval of retail licensees. That is sufficient. . . . Whether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial." 321 U. S., at 723. Thus, whatever uncertainty previously existed as to the scope of the *Colgate* doctrine, *Bausch & Lomb* and *Beech-Nut* plainly fashioned its dimensions as meaning no more than that a simple refusal to sell to customers who will not resell at prices suggested by the seller is permissible under the Sherman Act. In other words, an unlawful combination is not just such as arises from a price maintenance *agreement,* express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy.

In the cases decided before *Beech-Nut* the Court's inquiry was directed to whether the manufacturer had entered into illicit contracts, express or implied. The District Court in this case apparently assumed that the Government could prevail only by establishing a contractual arrangement, albeit implied, between Parke Davis and its customers. Proceeding from the same premise Parke Davis strenuously urges that Rule 52 of the Rules of Civil Procedure compels an affirmance of the

District Court since under that Rule the finding that there were no contractual arrangements should "not be set aside unless clearly erroneous." But Rule 52 has no application here. The District Court premised its ultimate finding that Parke Davis did not violate the Sherman Act on an erroneous interpretation of the standard to be applied. The *Bausch & Lomb* and *Beech-Nut* decisions cannot be read as merely limited to particular fact complexes justifying the inference of an agreement in violation of the Sherman Act. Both cases teach that judicial inquiry is not to stop with a search of the record for evidence of purely contractual arrangements. The Sherman Act forbids combinations of traders to suppress competition. True, there results the same economic effect as is accomplished by a prohibited combination to suppress price competition if each customer, although induced to do so solely by a manufacturer's announced policy, independently decides to observe specified resale prices. So long as *Colgate* is not overruled, this result is tolerated but only when it is the consequence of a mere refusal to sell in the exercise of the manufacturer's right "freely to exercise his own independent discretion as to parties with whom he will deal." When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, this countervailing consideration is not present and therefore he has put together a combination in violation of the Sherman Act. Thus, whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used. See *Eastern States Retail Lumber Dealers' Assn.* v. *United States,* 234 U. S. 600, 612. Because of the nature of the District Court's error we are reviewing a question of law, namely, whether the District Court applied the proper standard to essentially undisputed facts. See *Interstate*

Circuit v. *United States,* 306 U. S. 208; *United States* v. *Masonite Corp.,* 316 U. S. 265; *United States* v. *United States Gypsum Co.,* 333 U. S. 364; *United States* v. *du Pont,* 353 U. S. 586; and also *United States* v. *Felin & Co.,* 334 U. S. 624; *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.,* 340 U. S. 147.

The program upon which Parke Davis embarked to promote general compliance with its suggested resale prices plainly exceeded the limitations of the *Colgate* doctrine and under *Beech-Nut* and *Bausch & Lomb* effected arrangements which violated the Sherman Act. Parke Davis did not content itself with announcing its policy regarding retail prices and following this with a simple refusal to have business relations with any retailers who disregarded that policy. Instead Parke Davis used the refusal to deal with the wholesalers in order to elicit their willingness to deny Parke Davis products to retailers and thereby help gain the retailers' adherence to its suggested minimum retail prices. The retailers who disregarded the price policy were promptly cut off when Parke Davis supplied the wholesalers with their names. The large retailer who said he would "abide" by the price policy, the multi-unit Peoples Drug chain, was not cut off.[6] In thus involving the wholesalers to stop the flow of Parke Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices, Parke Davis created a combination with the retailers and the wholesalers to maintain retail prices and violated the Sherman Act. Although Parke Davis' originally announced wholesalers' policy would not under *Colgate* have violated the

[6] Indeed, if Peoples resumed adherence to the Parke Davis price scale after the interview between its vice-president and Parke Davis' assistant branch manager, p. 34, *supra,* shows that Parke Davis and Peoples entered into a price maintenance agreement, express, tacit or implied, such agreement violated the Sherman Act without regard to any wholesalers' participation.

Sherman Act if its action thereunder was the simple refusal without more to deal with wholesalers who did not observe the wholesalers' Net Price Selling Schedule, that entire policy was tainted with the "vice of . . . illegality," cf. *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 724, when Parke Davis used it as the vehicle to gain the wholesalers' participation in the program to effectuate the retailers' adherence to the suggested retail prices.

Moreover, Parke Davis also exceeded the "limited dispensation which [*Colgate*] confers," *Times-Picayune Pub. Co.* v. *United States,* 345 U. S. 594, 626, in another way, which demonstrates how far Parke Davis went beyond the limits of the *Colgate* doctrine. With regard to the retailers' suspension of advertising, Parke Davis did not rest with the simple announcement to the trade of its policy in that regard followed by a refusal to sell to the retailers who would not observe it. First it discussed the subject with Dart Drug. When Dart indicated willingness to go along the other retailers were approached and Dart's apparent willingness to cooperate was used as the lever to gain their acquiescence in the program. Having secured those acquiescences Parke Davis returned to Dart Drug with the report of that accomplishment. Not until all this was done was the advertising suspended and sales to all the retailers resumed. In this manner Parke Davis sought assurances of compliance and got them, as well as the compliance itself. It was only by actively bringing about substantial unanimity among the competitors that Parke Davis was able to gain adherence to its policy. It must be admitted that a seller's announcement that he will not deal with customers who do not observe his policy may tend to engender confidence in each customer that if he complies his competitors will also. But if a manufacturer is unwilling to rely on individual self-interest to bring

about general voluntary acquiescence which has the collateral effect of eliminating price competition, and takes affirmative action to achieve uniform adherence by inducing each customer to adhere to avoid such price competition, the customers' acquiescence is not then a matter of individual free choice prompted alone by the desirability of the product. The product then comes packaged in a competition-free wrapping—a valuable feature in itself—by virtue of concerted action induced by the manufacturer. The manufacturer is thus the organizer of a price-maintenance combination or conspiracy in violation of the Sherman Act. Under that Act "competition not combination, should be the law of trade," *National Cotton Oil Co.* v. *Texas,* 197 U. S. 115, 129, and "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se.*" *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 223. And see *United States* v. *McKesson & Robbins, Inc.,* 351 U. S. 305; *Kiefer-Stewart Co.* v. *Seagram & Sons, Inc.,* 340 U. S. 211; *Eastern States Retail Lumber Dealers' Assn.* v. *United States,* 234 U. S. 600.

The District Court also alternatively rested its judgment of dismissal on the holding that ". . . even if the unlawful conditions alleged in the Complaint had actually been proved, since 1956 they no longer existed, and [there is] no reason to believe, or even surmise, the unlawful acts alleged can possibly be repeated . . . ." 164 F. Supp. 827, 830. We are of the view that the evidence does not justify any such finding. The District Court stated that "the compelling reason for defendant's so doing [ceasing its efforts] was forced upon it by business and economic conditions in its field." There is no evidence in the record that this was the reason and any such conclusion must rest on speculation. It does not appear even that

Parke Davis has announced to the trade that it will abandon the practices we have condemned. So far as the record indicates any reason, it is that Parke Davis stopped its efforts because the Department of Justice had instituted an investigation. The president of Dart Drug Company testified that he had told the Parke Davis representatives in August that he had just been talking to the Department of Justice investigators. He stated that the Parke Davis representatives had said that "they [knew] that the Antitrust Division was investigating them all over town," and that this was one of their reasons for visiting him. The witness testified that it was on this occasion, after the discussion of the investigation, that the Parke Davis representatives finally stated that if Dart would stop advertising, Parke Davis "would resume shipment, in so far as there was an Antitrust investigation going on." Moreover Parke Davis' own employees, who were called by the Government as witnesses at the trial, admitted that they were aware of the investigation at the time and that the investigation was a reason for the discontinuance of the program. It seems to us that if the investigation would prompt Parke Davis to discontinue its efforts, even more so would the litigation which ensued.

On the record before us the Government is entitled to the relief it seeks. The courts have an obligation, once a violation of the antitrust laws has been established, to protect the public from a continuation of the harmful and unlawful activities. A trial court's wide discretion in fashioning remedies is not to be exercised to deny relief altogether by lightly inferring an abandonment of the unlawful activities from a cessation which seems timed to anticipate suit. See *United States* v. *Oregon State Medical Society,* 343 U. S. 326, 333.

The judgment is reversed and the case remanded to the District Court with directions to enter an appropriate

judgment enjoining Parke Davis from further violations of the Sherman Act unless the company elects to submit evidence in defense and refutes the Government's right to injunctive relief established by the present record.

It is so ordered.

MR. JUSTICE STEWART, concurring.

I concur in the judgment. The Court's opinion amply demonstrates that the present record shows an illegal combination to maintain retail prices. I therefore find no occasion to question, even by innuendo, the continuing validity of the *Colgate* decision, 250 U. S. 300, or of the Court's ruling as to the jury instruction in *Cudahy,* 256 U. S. 210–211.

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

The Court's opinion reaches much further than at once may meet the eye, and justifies fuller discussion than otherwise might appear warranted. Scrutiny of the opinion will reveal that the Court has done no less than send to its demise the *Colgate* doctrine which has been a basic part of antitrust law concepts since it was first announced in 1919 in *United States* v. *Colgate,* 250 U. S. 300.

I begin with that doctrine and how it was applied by the District Court in this case. In the words of the Court's opinion, *Colgate* held that in the absence of a monopolistic setting, "a manufacturer, having announced a price maintenance policy, may bring about adherence to it by refusing to deal with customers who do not observe that policy." "And," as said in *Colgate* (at 307), "of course, he may announce in advance the circumstances under which he will refuse to sell."

The Government's complaint, seeking to enjoin alleged violations of §§ 1 and 3 of the Sherman Act,[1] in substance charged Parke Davis with having combined and conspired with wholesalers and retailers of its products in the District of Columbia and Virginia, in four respects: (1) with retailers, to fix retail prices; (2) with retailers, to suppress advertising of cut prices; (3) with wholesalers, to fix wholesale prices; and (4) with wholesalers, to boycott retail price cutters. The Company's defense was that the activities complained of simply constituted a legitimate exercise of its rights under the *Colgate* doctrine. The detailed findings of the District Court are epitomized in its opinion as follows:

> (1) Parke Davis "had well-established policies concerning the prices at which [its] products were to be sold by wholesalers and retailers, and the type of retailers to whom the wholesalers could re-sell"; [2]
>
> (2) Parke Davis' "representatives . . . notified retailers concerning the policy under which its goods must be sold, but the retailers were free either to do without such goods or sell them in accordance with defendant's policy";
>
> (3) Parke Davis' "representatives likewise contacted wholesalers, notifying them of its policy and the wholesalers were likewise free to refuse to comply and thus risk being cut off by the defendant";
>
> (4) "every visit made by the representatives to the retailers and wholesalers was, to each of them, separate and apart from all others";
>
> (5) "[t]he evidence is clear that both wholesalers and retailers valued [Parke Davis'] business so highly that they acceded to its policy";

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[1] These are the "restraint of trade," not the "monopoly," provisions of the Sherman Act. See Note 1 of the Court's opinion.

[2] Those "authorized by law to fill or dispense prescriptions."

(6) "there was no coercion by defendant and no agreement with [wholesaler or retailer] co-conspirators as alleged in the Complaint";

(7) as to the Government's contention that proof of the alleged conspiracy "is implicit in (1) defendant's calling the attention of both retailers and wholesalers to its policy, and (2) the distributors' acquiescence to the policy . . . [t]he Court cannot agree to such a nebulous deduction from the record before it."

On these premises the District Court concluded: "Clearly, the actions of defendant were properly unilateral and sanctioned by law under the doctrine laid down in the case of United States v. Colgate & Co., 250 U. S. 300. . . ."

The Court appears to recognize that as the *Colgate* doctrine was originally understood, the District Court's findings would require affirmance of its judgment here. It is said, however, that reversal is required because *Federal Trade Comm'n* v. *Beech-Nut Packing Co.*, 257 U. S. 441, and *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, subsequently "narrowly limited" the *Colgate* rule. The claim is that whereas prior to *Beech-Nut* it was considered that, fair trade laws apart, resale price maintenance came within the ban of the Sherman Act only if it was brought about by express or implied agreement between the parties—which the Court says meant "contractual arrangements"—*Beech-Nut,* which was carried forward by *Bausch & Lomb,* later established that such agreements or contractual arrangements need not be shown. Recognizing that §§ 1 and 3 of the Sherman Act explicitly require a "contract, combination . . . or conspiracy," the Court says this requirement is satisfied by conduct which falls short of express or implied agreement, if it goes beyond the seller's mere announcement of terms and his refusal to deal with those who will not comply with them. Concluding that the District

Court in the present case mistakenly proceeded solely on the "agreement" view of *Colgate,* it is then said that its findings of fact are not binding on us because they were based on an erroneous legal standard, and that therefore "Rule 52 has no application here." [3]

I think this reasoning not only misconceives the *Beech-Nut* and *Bausch & Lomb* cases, but also mistakes the premises on which the District Court decided this case, and its actual findings of fact.

First. I cannot read *Beech-Nut* or *Bausch & Lomb* as introducing a new narrowing concept into the *Colgate* doctrine. Until today I had not supposed that any informed antitrust practitioner or judge would have had to await *Beech-Nut* to know that the concerted action proscribed by the Sherman Act need not amount to a contractual agreement. But neither do I think it would have been supposed that the Sherman Act does not require concerted action in some form. In *Beech-Nut* itself the Court stated the rule to be that a seller may not restrain trade "by contracts or combinations, express or implied," and there found suppression of competition "by methods in which the company secures the coöperation of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose." 257 U. S., at 453, 455. It is obvious that the "methods" thus referred to were the "coöperative methods" which the Federal Trade Commission had found to exist, for the Court expressly limited the Commission's order to the granting of relief against such methods. *Id.,* 455–456. Far from announcing that no concerted action need be shown, the Court accepted the Commission's factual determination that such action did exist.

[3] Rule 52 (a), Fed. Rules Civ. Proc. provides in relevant part: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Similarly, in *Bausch & Lomb,* the District Court had found that Soft-Lite had entered into "agreements with wholesale customers" to fix prices and boycott unlicensed retailers. 321 U. S., at 717. This Court held that the facts "all amply support, indeed require, the inference of the trial court that a conspiracy to maintain prices down the distribution system existed between the wholesalers and Soft-Lite." *Id.,* 720. The Court reiterated that resale price maintenance could not be achieved "by agreement, express or implied." *Id.,* 721. In rejecting the applicability of the *Colgate* doctrine, it said that none of the cases applying the doctrine "involve, as the present case does, an agreement between the seller and purchaser to maintain resale prices." *Ibid.* It justified the finding of concerted action on the ground that "[t]he wholesalers accepted Soft-Lite's proffer of a plan of distribution by cooperating in prices, limitation of sales to and approval of retail licensees." *Id.,* 723.

The results in *Beech-Nut* and *Bausch & Lomb,* as in all Sherman Act cases, turned on the application of established standards of concerted action to the full sweep of the particular facts in those cases, and not upon any new meaning given to the words "contract, combination . . . or conspiracy." The Court now says that the seller runs afoul of the Sherman Act when he goes beyond mere announcement of his policy and refusal to sell, not because the bare announcement and refusal fall outside the statutory phrase, but because any additional step removes a "countervailing consideration" in favor of permitting a seller to choose his customers. But we are left wholly in the dark as to what the purported new standard is for establishing a "contract, combination . . . or conspiracy."

Second. The Court is mistaken in attributing to the District Court the limited view that Parke Davis' activities should, under *Colgate,* be upheld unless they involved some express or implied "contractual arrangement" with

wholesalers or retailers. The Government's complaint specifically charged a "combination and conspiracy" between Parke Davis and its wholesale and retail customers in the areas involved, comprising a "continuing agreement, understanding and concert of action" in the four aspects already noted. *Ante,* p. 50. In its 31 detailed findings of fact the District Court repeatedly emphasized that Parke Davis did not have an "agreement or understanding of any kind" with its distributors, and it concluded that the evidence as a whole did not support the Government's allegations. It determined with respect to each of the four facets of the alleged conspiracy that "there was no coercion" and that "Parke, Davis did not combine, conspire or enter into an agreement, understanding or concert of action" with the wholesalers, retailers, or anyone else. I cannot detect in the record any indication that the District Court in making these findings applied anything other than the standard which has always been understood to govern prosecutions based on §§ 1 and 3 of the Sherman Act.

Third. Bearing down heavily on the statement in *Beech-Nut* that the conduct there involved showed more than "the simple refusal to sell," 257 U. S., at 454 (see also *Bausch & Lomb, supra,* at 722), the Court finds that Parke Davis' conduct exceeded the permissible limits of *Colgate* in two respects. The first is that Parke Davis announced that it would, and did, cut off wholesalers who continued to sell to price-cutting retailers. The second is that the Company in at least one instance reported its talks with one or more retailers to other retailers; that in "this manner Parke Davis sought assurances of compliance and got them"; and that it "was only by actively bringing about substantial unanimity among the competitors that Parke Davis was able to gain adherence to its policy."

There are two difficulties with the Court's analysis on these scores. The first is the findings of the District Court. As to refusals to sell to wholesalers, the lower court found that such conduct did not involve any concert of action, but was wholly unilateral on Parke Davis' part. And I cannot see how such unilateral action, permissible in itself, becomes any less unilateral because it is taken simultaneously with similar unilateral action at the retail level. As to the other respect in which the Court holds Parke Davis' conduct was illegal, the District Court found that the Company did not make "the enforcement of its policies as to any one wholesaler or retailer dependent upon the action of any other wholesaler or retailer." And it further stated that the "evidence is clear that both wholesalers and retailers valued defendant's business so highly that they acceded to its policy," and that such acquiescence was not brought about by "coercion" or "agreement." Even if this were not true, so that concerted action among the retailers at the "horizontal" level might be inferred, as the Court indicates, under the principles of *Interstate Circuit, Inc.*, v. *United States,* 306 U. S. 208, I do not see how that itself would justify an inference that concerted action at the "vertical" level existed between Parke Davis and the retailers or wholesalers.

The second difficulty with the Court's analysis is that even reviewing the District Court's findings only as a matter of law, as the Court purports to do, the cases do not justify overturning the lower court's resulting conclusions. *Beech-Nut* did not say that refusals to sell to wholesalers who persisted in selling to cut-price retailers—conduct which was present in that case (257 U. S., at 448)—was a *per se* infraction of the *Colgate* rule, but only that it was offensive if it was the result of cooperative group action. While the Court in *Beech-Nut* and

Bausch & Lomb inferred from the aggressive, widespread, highly organized, and successful merchandising programs involved there that such concerted action existed in those cases, the defensive, limited, unorganized, and unsuccessful effort of Parke Davis to maintain its resale price policy [4] does not justify our disregarding the District Court's finding to the contrary in this case.[5]

In light of the whole history of the *Colgate* doctrine, it is surely this Court, and not the District Court, that has proceeded on erroneous premises in deciding this case. Unless there is to be attributed to the Court a purpose to overturn the findings of fact of the District Court—something which its opinion not only expressly disclaims doing, but which would also be in plain defiance of the Federal Rules of Civil Procedure, Rule 52 (a),

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[4] The District Court found, among other things, that the efforts of Parke Davis in the District of Columbia and Virginia came about only after some of its competitors had engaged in damaging local "deep price cutting" on Parke Davis products (Fdg. 12); that Parke Davis' sales in those areas constituted less than 5% of the total pharmaceutical sales therein (Fdg. 3); that these efforts followed the legal advice previously given by the Company's counsel (Fdg. 12); that Parke Davis did not have "any regularized or systematic machinery for maintaining its suggested minimum prices as to either retailers or wholesalers" (Fdg. 10); that the entire episode lasted only from July to the fall of 1956, when the Company "in good faith" abandoned all further such efforts (Fdgs. 12, 27); and that since that time retailers in these areas "have continuously sold and advertised Parke, Davis products at cut prices, and have been able to obtain those products from both the wholesalers and/or Parke, Davis itself." (Fdg. 27.)

[5] It may be observed that the facts found by the District Court militate more strongly against violation of the Sherman Act than those which formed the basis of the charge held erroneous by this Court in *Cudahy*, 256 U. S., at 210–211. Although the Court now repudiates what was said in *Cudahy* in this respect, I submit that there is nothing in *Beech-Nut*, *Bausch & Lomb*, or any other case in this Court which justifies this.

and principles announced in past cases (see, *e. g., United States* v. *Yellow Cab Co.,* 338 U. S. 338, 341–342; *International Boxing Club of New York, Inc.,* v. *United States,* 358 U. S. 242, 252)—I think that what the Court has really done here is to throw the *Colgate* doctrine into discard.

To be sure, the Government has explicitly stated that it does not ask us to overrule *Colgate,* and the Court professes not to do so. But contrary to the long understanding of bench and bar, the Court treats *Colgate* as turning not on the absence of the concerted action explicitly required by §§ 1 and 3 of the Sherman Act, but upon the Court's notion of "countervailing" social policies. I can regard the Court's profession as no more than a bow to the fact that *Colgate,* decided more than 40 years ago, has become part of the economic regime of the country upon which the commercial community and the lawyers who advise it have justifiably relied.

If the principle for which *Colgate* stands is to be reversed, it is, as the Government's position plainly indicates, something that should be left to the Congress. It is surely the emptiest of formalisms to profess respect for *Colgate* and eviscerate it in application.

I would affirm.

UNITED STATES *v.* THOMAS, REGISTRAR OF VOTERS OF WASHINGTON PARISH, LOUISIANA, ET AL.

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

No. 667. Argued February 23–24, 1960.—Decided February 29, 1960.

Under authority of R. S. § 2004, as amended by the Civil Rights Act of 1957, the Attorney General brought a civil action on behalf of the United States in a United States District Court to enjoin certain individuals from challenging, on a racially discriminatory basis, the right of certain Negro citizens to remain on the registration rolls of a Louisiana parish as qualified voters and to enjoin respondent, the official Registrar of Voters, from giving effect to such racially discriminatory challenges and removing their names from the rolls. The District Court denied defendants' motion to dismiss the complaint; found that the challenges were "massively discriminatory in purpose and effect" and in violation of the Fifteenth Amendment and of 42 U. S. C. § 1971 (a); enjoined the individual defendants from making further racially discriminatory challenges; enjoined respondent from giving legal effect to any of said challenges; and ordered respondent to restore to the registration rolls those so illegally removed. Upon appeal by respondent, the Court of Appeals granted a stay of the injunction pending appeal. The Solicitor General then applied to this Court to vacate the stay and for a writ of certiorari to review the judgment of the District Court. *Held:* Certiorari is granted, and, upon the opinion, findings of fact and conclusions of law of the District Court and the decision of this Court today in *United States* v. *Raines, ante,* p. 17, the stay is vacated and the judgment of the District Court as to respondent is affirmed. P. 59.

Stay vacated and District Court's judgment affirmed as to respondent.

Reported below: 180 F. Supp. 10.

Solicitor General Rankin argued the cause and filed a brief for the United States.

Weldon A. Cousins and *Henry J. Roberts, Jr.,* Assistant Attorneys General of Louisiana, argued the cause for

respondent Thomas. With them on the brief were *Jack P. F. Gremillion,* Attorney General of Louisiana, and *M. E. Culligan,* Assistant Attorney General.

PER CURIAM.

Pursuant to its order of January 26, 1960, 361 U. S. 950, the Court has before it (1) the application of the United States for an order vacating the order of the Court of Appeals, dated January 21, 1960, staying the judgment of the District Court for the Eastern District of Louisiana, New Orleans Division, dated January 11, 1960; and (2) the petition of the United States for a writ of certiorari to the Court of Appeals to review the judgment of the District Court as to the respondent, Curtis M. Thomas, Registrar of Voters, Washington Parish, Louisiana. Having considered the briefs and oral arguments submitted by both sides, the Court makes the following disposition of these matters:

The petition for certiorari is granted. Upon the opinion, findings of fact, and conclusions of law of the District Court and the decision of this Court rendered today in No. 64, *United States* v. *Raines, ante,* p. 17, the aforesaid stay order of the Court of Appeals is vacated, and the judgment of the District Court as to the respondent Thomas is affirmed.

It is so ordered.

TALLEY *v.* CALIFORNIA.

CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY.

No. 154. Argued January 13–14, 1960.—Decided March 7, 1960.

Over petitioner's protest that it invaded his freedom of speech and press in violation of the Fourteenth and First Amendments to the Federal Constitution, he was convicted of violating a city ordinance which forbade distribution, in any place under any circumstances, of any handbill which did not have printed thereon the name and address of the person who prepared, distributed or sponsored it. *Held:* The ordinance is void on its face, and the conviction is reversed. *Lovell* v. *Griffin*, 303 U. S. 444. Pp. 60–66.

172 Cal. App. 2d Supp. 797, 332 P. 2d 447, reversed.

A. L. Wirin and *Hugh R. Manes* argued the cause for petitioner. With them on the brief was *Fred Okrand.*

Philip E. Grey argued the cause for respondent. With him on the brief was *Roger Arnebergh.*

Shad Polier, Will Maslow, Leo Pfeffer and *Joseph B. Robison* filed a brief for the American Jewish Congress, as *amicus curiae,* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

The question presented here is whether the provisions of a Los Angeles City ordinance restricting the distribution of handbills "abridge the freedom of speech and of the press secured against state invasion by the Fourteenth Amendment of the Constitution."[1] The ordinance, § 28.06 of the Municipal Code of the City of Los Angeles, provides:

> "No person shall distribute any hand-bill in any place under any circumstances, which does not have

[1] *Schneider* v. *State*, 308 U. S. 147, 154. Cf. *Lovell* v. *Griffin*, 303 U. S. 444, 450.

printed on the cover, or the face thereof, the name and address of the following:

"(a) The person who printed, wrote, compiled or manufactured the same.

"(b) The person who caused the same to be distributed; provided, however, that in the case of a fictitious person or club, in addition to such fictitious name, the true names and addresses of the owners, managers or agents of the person sponsoring said hand-bill shall also appear thereon."

The petitioner was arrested and tried in a Los Angeles Municipal Court for violating this ordinance. It was stipulated that the petitioner had distributed handbills in Los Angeles, and two of them were presented in evidence. Each had printed on it the following:

National Consumers Mobilization,
Box 6533,
Los Angeles 55, Calif.
PLeasant 9–1576.

The handbills urged readers to help the organization carry on a boycott against certain merchants and businessmen, whose names were given, on the ground that, as one set of handbills said, they carried products of "manufacturers who will not offer equal employment opportunities to Negroes, Mexicans, and Orientals." There also appeared a blank, which, if signed, would request enrollment of the signer as a "member of National Consumers Mobilization," and which was preceded by a statement that "I believe that every man should have an equal opportunity for employment no matter what his race, religion, or place of birth."

The Municipal Court held that the information printed on the handbills did not meet the requirements of the ordinance, found the petitioner guilty as charged, and fined him $10. The Appellate Department of the Supe-

rior Court of the County of Los Angeles affirmed the conviction, rejecting petitioner's contention, timely made in both state courts, that the ordinance invaded his freedom of speech and press in violation of the Fourteenth and First Amendments to the Federal Constitution.[2] 172 Cal. App. 2d Supp. 797, 332 P. 2d 447. Since this was the highest state court available to petitioner, we granted certiorari to consider this constitutional contention. 360 U. S. 928.

In *Lovell* v. *Griffin,* 303 U. S. 444, we held void on its face an ordinance that comprehensively forbade any distribution of literature at any time or place in Griffin, Georgia, without a license. Pamphlets and leaflets, it was pointed out, "have been historic weapons in the defense of liberty" [3] and enforcement of the Griffin ordinance "would restore the system of license and censorship in its baldest form." *Id.,* at 452. A year later we had before us four ordinances each forbidding distribution of leaflets—one in Irvington, New Jersey, one in Los Angeles, California, one in Milwaukee, Wisconsin, and one

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[2] Petitioner also argues here that the ordinance both on its face and as construed and applied "arbitrarily denies petitioner equal protection of the laws in violation of the Due Process and Equal Protection" Clauses of the Fourteenth Amendment. This argument is based on the fact that the ordinance applies to handbills only, and does not include within its proscription books, magazines and newspapers. Our disposition of the case makes it unnecessary to consider this contention.

[3] The Court's entire sentence was: "These [pamphlets and leaflets] indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest." It has been noted that some of Thomas Paine's pamphlets were signed with pseudonyms. See Bleyer, Main Currents in the History of American Journalism (1927), 90–93. Illustrations of other anonymous and pseudonymous pamphlets and other writings used to discuss important public questions can be found in this same volume.

in Worcester, Massachusetts. *Schneider* v. *State*, 308 U. S. 147. Efforts were made to distinguish these four ordinances from the one held void in the *Griffin* case. The chief grounds urged for distinction were that the four ordinances had been passed to prevent either frauds, disorder, or littering, according to the records in these cases, and another ground urged was that two of the ordinances applied only to certain city areas. This Court refused to uphold the four ordinances on those grounds pointing out that there were other ways to accomplish these legitimate aims without abridging freedom of speech and press. Frauds, street littering and disorderly conduct could be denounced and punished as offenses, the Court said. Several years later we followed the *Griffin* and *Schneider* cases in striking down a Dallas, Texas, ordinance which was applied to prohibit the dissemination of information by the distribution of handbills. We said that although a city could punish any person for conduct on the streets if he violates a valid law, "one who is rightfully on a street . . . carries with him there as elsewhere the constitutional right to express his views in an orderly fashion . . . by handbills and literature as well as by the spoken word." *Jamison* v. *Texas*, 318 U. S. 413, 416.

The broad ordinance now before us, barring distribution of "any hand-bill in any place under any circumstances," [4] falls precisely under the ban of our prior cases unless this ordinance is saved by the qualification that handbills can be distributed if they have printed on them the names and addresses of the persons who prepared, dis-

[4] Section 28.00 of the Los Angeles Municipal Code defines "handbill" as follows: " 'HAND-BILL' shall mean any hand-bill, dodger, commercial advertising circular, folder, booklet, letter, card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter calculated to attract attention of the public."

tributed or sponsored them. For, as in *Griffin,* the ordinance here is not limited to handbills whose content is "obscene or offensive to public morals or that advocates unlawful conduct." [5] Counsel has urged that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet the ordinance is in no manner so limited, nor have we been referred to any legislative history indicating such a purpose. Therefore we do not pass on the validity of an ordinance limited to prevent these or any other supposed evils. This ordinance simply bars all handbills under all circumstances anywhere that do not have the names and addresses printed on them in the place the ordinance requires.

There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Lovell* v. *Griffin,* 303 U. S., at 452.

Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious

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[5] *Lovell* v. *Griffin,* 303 U. S., at 451.

to the rulers. John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books.[6] Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day.[7] Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

We have recently had occasion to hold in two cases that there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified. *Bates* v. *Little Rock,* 361 U. S. 516; *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 462. The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. This broad Los Angeles ordinance is subject to the same infirmity. We hold that it, like the Griffin, Georgia, ordinance, is void on its face.

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[6] Penry was executed and Udal died as a result of his confinement. 1 Hallam, The Constitutional History of England (1855), 205–206, 232.

[7] In one of the letters written May 28, 1770, the author asked the following question about the tea tax imposed on this country, a question which he could hardly have asked but for his anonymity: "What is it then, but an odious, unprofitable exertion of a speculative right, and fixing a badge of slavery upon the Americans, without service to their masters?" 2 Letters of Junius (1821) 39.

The judgment of the Appellate Department of the Superior Court of the State of California is reversed and the cause is remanded to it for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN, concurring.

In judging the validity of municipal action affecting rights of speech or association protected against invasion by the Fourteenth Amendment, I do not believe that we can escape, as Mr. Justice Roberts said in *Schneider* v. *State,* 308 U. S. 147, 161, "the delicate and difficult task" of weighing "the circumstances" and appraising "the substantiality of the reasons advanced in support of the regulation of the free enjoyment of" speech. More recently we have said that state action impinging on free speech and association will not be sustained unless the governmental interest asserted to support such impingement is compelling. See *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 463, 464; *Sweezy* v. *New Hampshire,* 354 U. S. 234, 265 (concurring opinion); see also *Bates* v. *Little Rock,* 361 U. S. 516.

Here the State says that this ordinance is aimed at the prevention of "fraud, deceit, false advertising, negligent use of words, obscenity, and libel," in that it will aid in the detection of those responsible for spreading material of that character. But the ordinance is not so limited, and I think it will not do for the State simply to say that the circulation of all anonymous handbills must be suppressed in order to identify the distributors of those that may be of an obnoxious character. In the absence of a more substantial showing as to Los Angeles' actual experience with the distribution of obnoxious handbills,* such a

*On the oral argument the City Attorney stated:

"We were able to find out that prior to 1931 an effort was made by the local Chamber of Commerce, urging the City Council to do

generality is for me too remote to furnish a constitutionally acceptable justification for the deterrent effect on free speech which this all-embracing ordinance is likely to have.

On these grounds I concur in the judgment of the Court.

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

To me, Los Angeles' ordinance cannot be read as being void on its face. Certainly a fair reading of it does not permit a conclusion that it prohibits the distribution of handbills "of any kind at any time, at any place, and in any manner," *Lovell* v. *Griffin,* 303 U. S. 444, 451 (1938), as the Court seems to conclude. In *Griffin,* the ordinance completely prohibited the unlicensed distribution of any handbills. As I read it, the ordinance here merely prohibits the distribution of a handbill which does not carry the identification of the name of the person who "printed, wrote, compiled . . . manufactured [or] . . . caused" the distribution of it. There could well be a compelling reason for such a requirement. The Court implies as much when it observes that Los Angeles has not "referred

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something about these handbills and advertising matters which were false and misleading—had no names of sponsors. They were particularly interested in the fictitious name. They said, 'Who are these people that are distributing; who are advertising; doing things of that sort?' The meager record that we were able to find indicates that a request from the Council to the City Attorney as to their legal opinion on this subject [*sic*]. The City Attorney wrote back and formed the conclusion that distribution of handbills, pamphlets, or other matters, without the name of the fictitious firm or officers would be legal [*sic*]. Thereafter in the early part of 1932 an ordinance was drafted, and submitted to the City Council, and approved by them, which related to the original subject—unlawful for any person, firm or association to distribute in the city of Los Angeles any advertisement or handbill—or any other matter which does not have the names of the sponsors of such literature."

to any legislative history indicating" that the ordinance was adopted for the purpose of preventing "fraud, false advertising and libel." But even as to its legislative background there is pertinent material which the Court overlooks. At oral argument, the City's chief law enforcement officer stated that the ordinance was originally suggested in 1931 by the Los Angeles Chamber of Commerce in a complaint to the City Council urging it to "do something about these handbills and advertising matters which were false and misleading." Upon inquiry by the Council, he said, the matter was referred to his office, and the Council was advised that such an ordinance as the present one would be valid. He further stated that this ordinance, relating to the original inquiry of the Chamber of Commerce, was thereafter drafted and submitted to the Council. It was adopted in 1932. In the face of this and the presumption of validity that the ordinance enjoys, the Court nevertheless strikes it down, stating that it "falls precisely under the ban of our prior cases." This cannot follow, for in each of the three cases cited, the ordinances either "forbade any distribution of literature . . . without a license," *Lovell* v. *Griffin, supra,* or forbade, without exception, any distribution of handbills on the streets, *Jamison* v. *Texas,* 318 U. S. 413 (1943); or, as in *Schneider* v. *State,* 308 U. S. 147 (1939), which covered different ordinances in four cities, they were either outright bans or prior restraints upon the distribution of handbills. I, therefore, cannot see how the Court can conclude that the Los Angeles ordinance here "falls precisely" under any of these cases. On the contrary, to my mind, they neither control this case nor are apposite to it. In fact, in *Schneider,* depended upon by the Court, it was held, through Mr. Justice Roberts, that, "In every case . . . where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation . . .

weigh the circumstances and . . . appraise the substantiality of the reasons advanced . . . ." *Id.*, at 161. The Court here, however, makes no appraisal of *the circumstances,* or *the substantiality* of the claims of the litigants, but strikes down the ordinance as being "void on its face." I cannot be a party to using such a device as an escape from the requirements of our cases, the latest of which was handed down only last month. *Bates* v. *Little Rock,* 361 U. S. 516.[1]

Therefore, before passing upon the validity of the ordinance, I would weigh the interests of the public in its enforcement against the claimed right of Talley. The record is barren of any claim, much less proof, that he will suffer any injury whatever by identifying the handbill with his name. Unlike *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449 (1958), which is relied upon, there is neither allegation nor proof that Talley or any group sponsoring him would suffer "economic reprisal, loss of employment, threat of physical coercion [or] other manifestations of public hostility." *Id.*, at 462. Talley makes no showing whatever to support his contention that a restraint upon his freedom of speech will result from the enforcement of the ordinance. The existence of such a restraint is necessary before we can strike the ordinance down.

But even if the State had this burden, which it does not, the substantiality of Los Angeles' interest in the enforcement of the ordinance sustains its validity. Its chief law enforcement officer says that the enforcement of the ordinance prevents "fraud, deceit, false advertising, negligent use of words, obscenity, and libel," and, as we have said, that such was its purpose. In the absence of

[1] "When it is shown that state action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification." 361 U. S., at 525.

any showing to the contrary by Talley, this appears to me entirely sufficient.

I stand second to none in supporting Talley's right of free speech—but not his freedom of anonymity. The Constitution says nothing about freedom of anonymous speech. In fact, this Court has approved laws requiring no less than Los Angeles' ordinance. I submit that they control this case and require its approval under the attack made here. First, *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288 (1913), upheld an Act of Congress requiring any newspaper using the second-class mails to publish the names of its editor, publisher, owner, and stockholders. 39 U. S. C. § 233. Second, in the Federal Regulation of Lobbying Act, 2 U. S. C. § 267, Congress requires those engaged in lobbying to divulge their identities and give "a modicum of information" to Congress. *United States* v. *Harriss,* 347 U. S. 612, 625 (1954). Third, the several States have corrupt practices acts outlawing, *inter alia,* the distribution of anonymous publications with reference to political candidates.[2] While these statutes are leveled at political campaign and election practices, the underlying ground sustaining their validity applies with equal force here.

No civil right has a greater claim to constitutional protection or calls for more rigorous safeguarding than voting rights. In this area the danger of coercion and reprisals—economic and otherwise—is a matter of common knowledge. Yet these statutes, disallowing anonymity in promoting one's views in election campaigns, have expressed the overwhelming public policy of the Nation. Nevertheless the Court is silent about this impressive authority relevant to the disposition of this case.

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[2] Thirty-six States have statutes prohibiting the anonymous distribution of materials relating to elections. *E. g.:* Kan. Gen. Stat., 1949, § 25–1714; Minn. Stat. Ann. § 211.08; Page's Ohio Rev. Code Ann. § 3599.09; Purdon's Pa. Stat. Ann., Title 25, § 3546.

All three of the types of statutes mentioned are designed to prevent the same abuses—libel, slander, false accusations, etc. The fact that some of these statutes are aimed at elections, lobbying, and the mails makes their restraint no more palatable, nor the abuses they prevent less deleterious to the public interest, than the present ordinance.

All that Los Angeles requires is that one who exercises his right of free speech through writing or distributing handbills identify himself just as does one who speaks from the platform. The ordinance makes for the responsibility in writing that is present in public utterance. When and if the application of such an ordinance in a given case encroaches on First Amendment freedoms, then will be soon enough to strike that application down. But no such restraint has been shown here. After all, the public has some rights against which the enforcement of freedom of speech would be "harsh and arbitrary in itself." *Kovacs* v. *Cooper,* 336 U. S. 77, 88 (1949). We have upheld complete proscription of uninvited door-to-door canvassing as an invasion of privacy. *Breard* v. *Alexandria,* 341 U. S. 622 (1951). Is this less restrictive than complete freedom of distribution—regardless of content—of a signed handbill? And commercial handbills may be declared *verboten, Valentine* v. *Chrestensen,* 316 U. S. 52 (1942), regardless of content or identification. Is Talley's anonymous handbill, designed to destroy the business of a commercial establishment, passed out at its very front door, and attacking its then lawful commercial practices, more comportable with First Amendment freedoms? I think not. Before we may expect international responsibility among nations, might not it be well to require individual responsibility at home? Los Angeles' ordinance does no more.

Contrary to petitioner's contention, the ordinance as applied does not arbitrarily deprive him of equal pro-

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tection of the law. He complains that handbills are singled out, while other printed media—books, magazines, and newspapers—remain unrestrained. However, "[t]he problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. [I] cannot say that that point has been reached here." *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955).

I dissent.

FLORIDA LIME AND AVOCADO GROWERS, INC., ET AL. *v.* JACOBSEN, DIRECTOR OF THE DEPARTMENT OF AGRICULTURE OF CALIFORNIA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 49. Argued December 9–10, 1959.—Decided March 7, 1960.

Appellants, who are engaged in the business of growing, packing and marketing Florida avocados in interstate commerce, sued in a Federal District Court to enjoin appellees, state officers of California, from enforcing § 792 of the California Agricultural Code, which prohibits the importation or sale in California of avocados containing less than 8% of oil by weight. Appellants claimed that § 792 violated the Commerce and Equal Protection Clauses of the Federal Constitution as well as the Federal Agricultural Marketing Agreement Act of 1937 and Florida Avocado Order No. 69 issued thereunder. A three-judge District Court convened to hear the case dismissed the action, and a direct appeal was taken to this Court. *Held:*

1. Since the complaint sought an injunction against enforcement of the state statute on grounds of federal unconstitutionality, the action was required to be heard by a three-judge District Court under 28 U. S. C. § 2281, and this Court has jurisdiction of this direct appeal under 28 U. S. C. § 1253—notwithstanding the fact that the complaint also alleged that the state statute conflicted with the federal Act. Pp. 75–85.

2. In view of the allegation of the complaint that appellants have made more than a score of shipments of Florida avocados to California and that appellees have consistently condemned them for failure to contain 8% or more of oil by weight, thus forcing appellants to reship them and sell them in other States to prevent their destruction and complete loss, there is an existing dispute between the parties as to present legal rights amounting to a justiciable controversy; and the fact that appellants did not contest the validity of § 792 or seek abatement of appellees' condemnation of the avocados in California state courts does not bar their right

to seek an injunction in the federal courts against its enforcement on the ground that it violates both the Federal Constitution and the Federal Agricultural Marketing Agreement Act of 1937. Pp. 85–86.

169 F. Supp. 774, reversed.

Isaac E. Ferguson argued the cause and filed a brief for appellants.

John Fourt, Deputy Attorney General of California, argued the cause for appellees. With him on the brief was *Stanley Mosk,* Attorney General of California.

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

Appellants, engaged in the business of growing, packing, and marketing in commerce, Florida avocados, brought this action in the District Court of the United States for the Northern District of California to enjoin respondents, state officers of California, from enforcing § 792 of the California Agricultural Code.[1]

Section 792 prohibits, among other things, the importation into or sale in California of avocados containing "less than 8 per cent of oil, by weight of the avocado excluding the skin and seed." The complaint alleged, *inter alia,* that the varieties of avocados grown in Florida do not normally, or at least not uniformly, contain at maturity as much as 8% of oil by weight; that in each year since 1954 appellants have shipped in interstate commerce, in full compliance with the Federal Agricultural Marketing Agreement Act of 1937[2] and Florida Avocado Order No. 69 issued under that Act by the Secretary of Agriculture on June 11, 1954, Florida avocados into the State of California and have attempted to sell them there; that

[1] Deering's Agricultural Code of the State of California, 1950; c. 2, Div. 5, of West's Ann. California Agricultural Code.

[2] 50 Stat. 246, 7 U. S. C. § 601 *et seq.*

appellees, or their agents, have consistently barred the sale of appellants' avocados in California for failure uniformly to contain not less than 8% of oil by weight, resulting in denial to appellants of access to the California market, and forcing reshipment of the avocados to and their sale in other States, to the injury of appellants, all in violation of the Commerce and Equal Protection Clauses of the United States Constitution, as well as of the Federal Agricultural Marketing Agreement Act of 1937 and Florida Avocado Order No. 69 issued thereunder.

Inasmuch as the complaint alleged federal unconstitutionality of the California statute, appellants requested the convening of, and there was convened, a three-judge District Court pursuant to 28 U. S. C. § 2281 to hear the case. After hearing, the court concluded that, because appellants had not contested the validity of § 792 nor sought abatement of appellees' condemnation of the avocados in the California state courts, the case presented "no more than a mere prospect of interference posed by the bare existence of the law in question," and that it had "no authority to take jurisdiction [and was] left with no course other than to dismiss the action," which it did. 169 F. Supp. 774, 776. Appellants brought the case here on direct appeal under 28 U. S. C. § 1253, and we postponed the question of our jurisdiction to the hearing on the merits. 360 U. S. 915.

The first and principal question presented is whether this action is one required by § 2281 to be heard by a District Court of three judges and, hence, whether we have jurisdiction of this direct appeal under § 1253.

Section 2281 provides [3] that an injunction restraining the enforcement of a state statute may not be granted

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[3] 28 U. S. C. § 2281 provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the

upon the ground of unconstitutionality of such statute "unless the application therefor is heard and determined by a district court of three judges . . . ," and § 1253 provides [4] that any order, granting or denying an injunction in any civil action required by any Act of Congress to be heard and determined by a District Court of three judges, may be appealed directly to this Court.

Appellees concede that if the complaint had attacked § 792 *solely* on the ground of conflict with the United States Constitution, the action would have been one required by § 2281 to be heard and determined by a District Court of three judges. But appellees contend that because the complaint also attacks § 792 on the ground of conflict with the Federal Agricultural Marketing Agreement Act of 1937 and the Secretary's Florida Avocado Order No. 69, it is possible that the action could be determined on the statutory rather than the constitutional ground, and, therefore, the action was not required to be heard by a District Court of three judges under § 2281 and, hence, a direct appeal does not lie to this Court under § 1253.

Section 2281 seems rather plainly to indicate a congressional intention to require an application for an injunction to be heard and determined by a court of three

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action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

[4] 28 U. S. C. § 1253 provides:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

judges in *any* case in which the injunction may be granted on grounds of federal unconstitutionality. The reason for this is quite clear. The impetus behind the first three-judge court statute was the decision in *Ex parte Young*, 209 U. S. 123 (1908), in which it was held that a federal court could enjoin a state officer from enforcing a state statute alleged to be unconstitutional, despite the prohibition of the Eleventh Amendment concerning suits against a State. Debate was immediately launched in the Senate with regard to cushioning the impact of the *Young* case, the principal concern being with the power thus activated in one federal judge to enjoin the operation or enforcement of state legislation on grounds of federal unconstitutionality.[5]

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[5] In the Senate debates Senator Overman of North Carolina commented as follows:

"This measure proposes that whenever a petition is presented the circuit judge before whom it is presented shall, before granting the injunction, call in one circuit judge and one district judge or another circuit court judge, making three judges who shall pass upon the question of the injunction.

"We think, sir, that if this could be done it would allay much intense feeling in the States. As was said by Mr. Justice Harlan, in his dissenting opinion in the Minnesota case [*Ex parte Young*], we have come to a sad day when one subordinate Federal judge can enjoin the officer of a sovereign State from proceeding to enforce the laws of the State passed by the legislature of his own State, and thereby suspending for a time the laws of the State. . . . That being so, there being great feeling among the people of the States by reason of the fact that one Federal judge has tied the hands of a sovereign State and enjoined in this manner the great officer who is charged with the enforcement of the laws of the State, causing almost a revolution, as it did in my State, and in order to allay this feeling, if this substitute is adopted and three judges have to pass upon the question of the constitutionality of a State statute and three great judges say that the statute is unconstitutional, the officers of the State will be less inclined to resist the orders and decrees of our Federal courts. The people and the courts of the State are more inclined to abide by the decision of three judges than they would of one subordinate

The result of the debates on this subject was passage of a three-judge-court statute in 1910, 36 Stat. 557, which was codified as § 266 of the Judicial Code, 36 Stat. 1162.[6] This statute prohibited the granting of an interlocutory injunction against a state statute upon grounds of federal unconstitutionality unless the application for injunction was heard and determined by a court of three judges.

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inferior Federal judge who simply upon petition or upon a hearing should tie the hands of a State officer from proceeding with the enforcement of the laws of his sovereign State. . . ." 42 Cong. Rec. 4847.

And Senator Bacon of Georgia remarked:

"The purpose of the bill is to throw additional safeguards around the exercise of the enormous powers claimed for the subordinate Federal courts. If these courts are to exercise the power of stopping the operation of the laws of a State and of punishing the officers of a State, then at least let it be done on notice and not hastily, and let there be the judgment of three judges to decide such questions, and not permit such dangerous power to one man.

"The necessity for this legislation is a very grave one. It is a most serious trouble which now exists—that by the action of one judge the machinery of State laws can be arrested. . . ." 42 Cong. Rec. 4853.

[6] Section 266 of the Judicial Code originally provided in pertinent part:

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court, or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. . . . An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case." 36 Stat. 1162.

The statute also contained its own provision for direct appeal to this Court from an order granting or denying an interlocutory injunction. The objective of § 266 was clearly articulated by Mr. Chief Justice Taft in *Cumberland Telephone & Telegraph Co.* v. *Louisiana Public Service Comm'n,* 260 U. S. 212:

> "The legislation was enacted for the manifest purpose of taking away the power of a single United States Judge, whether District Judge, Circuit Judge or Circuit Justice holding a District Court of the United States, to issue an interlocutory injunction against the execution of a state statute by a state officer or of an order of an administrative board of the State pursuant to a state statute, on the ground of the federal unconstitutionality of the statute. Pending the application for an interlocutory injunction, a single judge may grant a restraining order to be in force until the hearing of the application, but thereafter, so far as enjoining the state officers, his power is exhausted. The wording of the section leaves no doubt that Congress was by provisions *ex industria* seeking to make interference by interlocutory injunction from a federal court with the enforcement of state legislation, regularly enacted and in course of execution, a matter of the adequate hearing and the full deliberation which the presence of three judges, one of whom should be a Circuit Justice or Judge, was likely to secure. It was to prevent the improvident granting of such injunctions by a single judge, and the possible unnecessary conflict between federal and state authority always to be deprecated." 260 U. S., at 216.

In 1925, § 266 was amended to require a three-judge court for issuance of a permanent as well as an interlocutory injunction, and § 238 of the Judicial Code (a broad statute governing direct appeals to this Court from District

Courts) was amended, so far as here pertinent, to incorporate the provision for direct appeals to this Court from the orders of three-judge courts granting or denying an injunction in a § 266 case. 43 Stat. 938. Such is the present scheme of §§ 2281 and 1253.

With this background, it seems entirely clear that the central concern of Congress in 1910 was to prevent one federal judge from granting an interlocutory injunction against state legislation on grounds of federal unconstitutionality. And the 1925 amendment requiring a court of three judges for issuance of a permanent as well as an interlocutory injunction "was designed to end the anomalous situation in which a single judge might reconsider and decide questions already passed upon by three judges on the application for an interlocutory injunction." *Stratton* v. *St. Louis Southwestern R. Co.*, 282 U. S. 10, 14. Section 2281, read in the light of this background, seems clearly to require that when, in any action to enjoin enforcement of a state statute, the injunctive decree may issue on the ground of federal unconstitutionality of the state statute, the convening of a three-judge court is necessary; and the joining in the complaint of a nonconstitutional attack along with the constitutional one does not dispense with the necessity to convene such a court. To hold to the contrary would be to permit *one* federal district judge to enjoin enforcement of a state statute on the ground of federal unconstitutionality whenever a nonconstitutional ground of attack was also alleged, and this might well defeat the purpose of § 2281.

Cases in this Court since *Louisville & Nashville R. Co.* v. *Garrett,* 231 U. S. 298 (1913), have consistently adhered to the view that, in an injunction action challenging a state statute on substantial federal constitutional grounds, a three-judge court is required to be convened and has—just as we have on a direct appeal from its action—jurisdiction over *all* claims raised against the

statute.[7] These cases represent an unmistakable recognition of the congressional policy to provide for a three-judge court whenever a state statute is sought to be enjoined on grounds of federal unconstitutionality, and this consideration must be controlling.[8]

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[7] See, *e. g.*, *Van Dyke* v. *Geary*, 244 U. S. 39; *Cavanaugh* v. *Looney*, 248 U. S. 453; *Lemke* v. *Homer Farmers Elevator Co.*, 258 U. S. 65 (*Lemke II*); *Chicago, Great Western R. Co.* v. *Kendall*, 266 U. S. 94; *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189; *Herkness* v. *Irion*, 278 U. S. 92; *Sterling* v. *Constantin*, 287 U. S. 378; *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89; *Railroad Comm'n of California* v. *Pacific Gas & Electric Co.*, 302 U. S. 388; *Public Service Comm'n* v. *Brashear Freight Lines*, 312 U. S. 621; *Parker* v. *Brown*, 317 U. S. 341.

In the *Garrett* case, the following observations were made by Mr. Justice Hughes:

"Because of the Federal questions raised by the bill the Circuit [District] Court had jurisdiction and was authorized to determine all the questions in the case, local as well as Federal. *Siler* v. *Louisville & Nashville R. R.*, 213 U. S. 175, 191. A similar rule must be deemed to govern the application for preliminary injunction under the statute which requires a hearing before three judges, and authorizes an appeal to this court. 36 Stat. 557. This statute applies to cases in which the preliminary injunction is sought in order to restrain the enforcement of a state enactment upon the ground of its 'unconstitutionality.' The reference, undoubtedly, is to an asserted conflict with the Federal Constitution, and the question of unconstitutionality, in this sense, must be a substantial one. But, where such a question is presented, the application is within the provision, and this being so, it cannot be supposed that it was the intention of Congress to compel the exclusion of other grounds and thus to require a separate motion for preliminary injunction, and a separate hearing and appeal, with respect to the local questions which are involved in the case and would properly be the subject of consideration in determining the propriety of granting an injunction pending suit. The local questions arising under the state constitution and statutes were therefore before the Circuit [District] Court and the appeal brings them here." 231 U. S., at 303–304.

[8] In *Sterling* v. *Constantin*, 287 U. S. 378, for example, certain state administrative orders were sought to be enjoined on the ground that they violated both the State and Federal Constitutions. The

Appellees place some reliance on *Ex parte Buder,* 271 U. S. 461, and *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50 (*Lemke I*), in support of their position. *Buder* held merely that a claim of conflict between a state statute and a federal statute was not a constitutional claim requiring the convening of a three-judge court under § 266, and thus there could be no direct appeal here. *Buder* did not, however, require that a constitutional claim be the sole claim before the three-judge court. *Lemke I* held that it was permissible to appeal to the Court of Appeals rather than directly to this Court from the final order of a single district judge in a case in which a state statute was attacked on the grounds that it was both unconstitutional

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Governor of the State had declared martial law in an effort to enforce the orders, and his action was also challenged on the ground that any statute purporting to confer such authority on him was in violation of the State and Federal Constitutions. With regard to the jurisdiction of the three-judge court which had been convened for the purpose of considering an application for injunction, Mr. Chief Justice Hughes said:

"As the validity of provisions of the state constitution and statutes, if they could be deemed to authorize the action of the Governor, was challenged, the application for injunction was properly heard by three judges. *Stratton* v. *St. Louis Southwestern Ry. Co.,* 282 U. S. 10. The jurisdiction of the District Court so constituted, and of this Court upon appeal, extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case." 287 U. S., at 393–394.

In *Phillips* v. *United States,* 312 U. S. 246, it was held that a suit by the United States to enjoin the action of a Governor in interfering with the construction of a state power project using federal funds was not within § 266 because the validity of a state statute or order had not been challenged. *Sterling* v. *Constantin* was distinguished on the ground that it involved an attempt to restrain the action of a Governor as part of a main objective to enjoin execution of certain administrative orders as violative of the State and Federal Constitutions. As such, *Sterling* was said to have been "indubitably within § 266." 312 U. S., at 253.

and in conflict with a federal statute. The case was decided under § 238, which, until 1925, was a broad statute calling for a direct appeal to this Court from the action of a District Court "in any case that involves the construction or application of the Constitution of the United States . . . and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States." The breadth of § 238 had led the Court on several occasions to construe this provision to mean that a direct appeal to this Court was required only when the *sole* ground of District Court jurisdiction was the federal constitutional claim involved, *Union & Planters' Bank* v. *Memphis,* 189 U. S. 71, 73; *Carolina Glass Co.* v. *South Carolina,* 240 U. S. 305, 318, but if jurisdiction was based both on a constitutional ground and some other federal ground the appeal might properly be taken either to this Court or to the Court of Appeals. *Spreckels Sugar Refining Co.* v. *McClain,* 192 U. S. 397, 407–408; *Macfadden* v. *United States,* 213 U. S. 288, 293. *Lemke I,* decided in 1922, merely followed this line of decisions, and was not in any way concerned with a direct appeal to this Court under § 266 from the order of a three-judge court—the question now before us.

The distinction between the scope of our direct appellate jurisdiction under § 238 and § 266 prior to 1925 was effectively illustrated by the differing course of events in *Lemke I* and *Lemke* v. *Homer Farmers Elevator Co.,* 258 U. S. 65 (*Lemke II*). Both cases involved an attack on a state statute on grounds of federal unconstitutionality and conflict with a federal statute. In both, interlocutory injunctions were sought before three-judge courts, and the injunctions were granted. *Lemke I,* however, also sought a permanent injunction before a single district judge, and, from his order denying the injunction, the case was appealed to the Court of Appeals before coming here. *Lemke II,* on the other hand, was directly

appealed to this Court under § 266 from the interlocutory order of the three-judge court. As indicated, this Court held that the final order of the single judge in *Lemke I* was properly appealed to the Court of Appeals *under § 238* because of the additional nonconstitutional basis for District Court jurisdiction. But in *Lemke II* this Court took jurisdiction over all issues presented in the direct appeal *under § 266* from the interlocutory order of the three-judge court. See also *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189, a case virtually identical with *Lemke II*, in which this Court also took jurisdiction over all questions in a § 266 direct appeal from an interlocutory injunction granted by a three-judge court.

The problem was greatly simplified in 1925 when § 266 was amended to require three-judge courts for the granting of both interlocutory and permanent injunctions on grounds of federal unconstitutionality, and § 238, while substantially amended to reduce the scope of our general appellate jurisdiction, so far as here pertinent, merely incorporated the provision for direct appeals to this Court from injunctions granted or denied under § 266. We do not find in these amendments any intention to curtail either the jurisdiction of three-judge courts or our jurisdiction on direct appeal from their orders. Indeed, the cases since 1925 have continued to maintain the view that if the constitutional claim against the state statute is substantial, a three-judge court is required to be convened and has jurisdiction, as do we on direct appeal, over *all* grounds of attack against the statute. *E. g., Sterling* v. *Constantin*, 287 U. S. 378, 393–394; *Railroad Comm'n of California* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 391; *Public Service Comm'n* v. *Brashear Freight Lines*, 312 U. S. 621, 625, n. 5.

To hold that only one judge may hear and decide an action to enjoin the enforcement of a state statute on both constitutional and nonconstitutional grounds would be

to ignore the explicit language and manifest purpose of § 2281, which is to provide for a three-judge court whenever an injunction sought against a state statute may be granted on federal constitutional grounds. Where a complaint seeks to enjoin a state statute on substantial grounds of federal unconstitutionality, then even though nonconstitutional grounds of attack are also alleged, we think the case is one that is "*required* by . . . Act of Congress to be heard and determined by a district court of *three* judges." 28 U. S. C. § 1253. (Emphasis added.) We, therefore, hold that we have jurisdiction of this direct appeal.

We turn now to the merits. The Court is of the view that the District Court was in error in holding that, because appellants had not contested the validity of § 792 nor sought abatement of appellees' condemnation of their avocados, there was no "existing dispute as to present legal rights," but only "a mere prospect of interference posed by the bare existence of the law in question [§ 792]," and in accordingly dismissing the action for want of jurisdiction. As earlier stated, the complaint alleges that, since the issuance of the Secretary's Florida Avocado Order No. 69 in 1954, appellants have made more than a score of shipments in interstate commerce of Florida avocados to and for sale in California, and appellees, or their agents, have in effect consistently condemned those avocados for failure to contain 8% or more of oil by weight, thus requiring appellants—to prevent destruction and complete loss of their shipments—to reship the avocados to and sell them in other States, all in violation of the Commerce and Equal Protection Clauses of the United States Constitution as well as the Marketing Agreement Act of 1937. It is therefore evident that there is an existing dispute between the parties as to present legal rights amounting to a justiciable controversy which appellants are entitled to have determined on the

merits. In these circumstances, the fact that appellants did not contest the validity of § 792 nor seek abatement of appellees' condemnation of the avocados in the California state courts—which, because of the time period necessarily involved, would have resulted in the complete spoilage and loss of the product—does not constitute an impediment to their right to seek an injunction in the federal court against enforcement of § 792 on the ground that it violates both the Constitution of the United States and the Federal Agricultural Marketing Agreement Act of 1937.

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

Reversed and remanded.

MR. JUSTICE DOUGLAS joins in the part of the opinion that passes on the merits, the Court having held, contrary to his view, that the case is properly here on direct appeal from a three-judge court.

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

The statute providing for three-judge Federal District Courts, with direct appeal to this Court, in cases seeking interlocutory injunctions against the operation of state statutes on constitutional grounds, was enacted in 1910. 36 Stat. 557. It was amended in 1925 to apply to applications for final as well as interlocutory injunctive relief. 43 Stat. 938. Since that time this Court has taken jurisdiction by way of direct appeal in several cases like the present one, where a state statute was sought to be enjoined both on federal constitutional and non-constitutional grounds. See *Herkness* v. *Irion,* 278 U. S. 92; *Sterling* v. *Constantin,* 287 U. S. 378, 393 (limited in *Phil-*

lips v. *United States,* 312 U. S. 246); *Spielman Motor Sales Co.* v. *Dodge,* 295 U. S. 89; *Parker* v. *Brown,* 317 U. S. 341.[1] In none of these cases, however, was our jurisdiction challenged by the litigants because non-constitutional as well as constitutional relief was sought, nor did the Court notice the existence of a question as to our jurisdiction on that score. We should therefore feel free to apply Mr. Chief Justice Marshall's approach in a similar situation to unconsidered assumptions of jurisdiction: "No question was made, in that case, as to the jurisdiction. It passed *sub silentio,* and the court does not consider

[1] Prior to the 1925 extension of this three-judge-court statute to cover applications for final injunctions, there were also cases like the present one, where non-constitutional as well as constitutional claims were made, in which the Court accepted jurisdiction. See *Louisville & Nashville R. Co.* v. *Garrett,* 231 U. S. 298; *Lemke* v. *Homer Farmers Elevator Co.,* 258 U. S. 65 (*Lemke II*); *Cavanaugh* v. *Looney,* 248 U. S. 453; *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189. Of these cases, only *Louisville & Nashville R. Co.* v. *Garrett* gave any attention whatsoever to jurisdictional considerations, and in that case there was no direct challenge to this Court's jurisdiction of the whole case under the three-judge statute on the ground that non-constitutional as well as constitutional claims were made. But there is an even more fundamental reason for discounting these pre-1925 cases as authority regarding the jurisdictional problem in the present case. As *Garrett* and these other cases were decided prior to the 1925 Jurisdictional Act, which drastically shrunk this Court's jurisdiction on appeal, they arose at a time when the scope of direct appellate jurisdiction here over decisions of ordinary one-judge District Courts was much broader than it now is, and in fact applied under § 238 of the Judicial Code to all constitutional cases, including cases like the present one involving federal statutory grounds for relief in addition to constitutional grounds. See *Spreckels Sugar Refining Co.* v. *McClain,* 192 U. S. 397, 407–408; *Macfadden* v. *United States,* 213 U. S. 288. Thus the results in these pre-1925 cases, permitting the same scope of direct appeal to this Court in three-judge cases as § 238 then permitted in one-judge cases, were not as obviously out of harmony with the scheme of the federal judicial system in their day as I believe is the decision which the Court makes today.

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itself as bound by that case." *United States* v. *More,* 3 Cranch 159, 172. See also Mr. Chief Justice Marshall in *Durousseau* v. *United States,* 6 Cranch 307, and Mr. Justice Brandeis dissenting in *King Mfg. Co.* v. *Augusta,* 277 U. S. 100, 135, n. 21: "It is well settled that the exercise of jurisdiction under such circumstances [where counsel did not question our jurisdiction] is not to be deemed a precedent when the question is finally brought before us for determination." [2] I therefore approach the question of our jurisdiction in the present case as open, calling for a thorough canvass of the relevant jurisdictional factors. The Court does not undertake such a canvass, but relies instead upon the cases cited and upon what it deems explicit statutory language and plainly manifested congressional intent. Consideration of what are to me the relevant factors leads me to dissent from the Court's conclusion that we have direct appellate jurisdiction in this case.

Appellants' complaint seeks injunction against the operation of § 792 of the California Agricultural Code on the grounds that it is in conflict with the Federal Agricultural Marketing Agreement Act of 1937, 7 U. S. C. § 601 *et seq.,* and the Commerce and Equal Protection Clauses of the United States Constitution. The complaint requested the convening of a three-judge District Court to adjudicate these claims. A three-judge court was convened and, after hearing, it entered a judgment dismissing the action on the ground that no justiciable controversy existed. 169 F. Supp. 774. A direct appeal was taken to this Court pursuant to 28 U. S. C. § 1253. The Court now holds that three judges were required to adjudicate appel-

[2] The Court's Rules 15, par. 1 (c)(1) and 23, par. 1 (c) emphasize the doctrine that a *sub silentio* exercise of jurisdiction is not controlling as precedent: "Only the questions set forth in the jurisdictional statement [or petition] or fairly comprised therein will be considered by the court."

lants' claims below and that we therefore have jurisdiction to decide this appeal on its merits.

The statute governing our direct appellate jurisdiction from decisions of three-judge District Courts is 28 U. S. C. § 1253:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Whether the present case was a "proceeding required . . . to be heard and determined by a district court of three judges," and therefore within our direct appellate jurisdiction, depends upon the meaning to be given to 28 U. S. C. § 2281:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

I start with the proposition, as I understand the Court to do, that whether a case is one directly appealable here under 28 U. S. C. § 1253 depends upon the complaint, and not upon the result in the District Court. If three judges are required to hear the claims which are made, then we have direct appellate jurisdiction to review their decision, even though it be on non-constitutional grounds. If three

judges are not required in view of the complaint, and the case is determinable by a single judge, we have no jurisdiction by way of direct appeal under § 1253, even though the decision be a constitutional one.

In this case the complaint did not attack the California statute solely on the ground of its conflict with the Commerce and Equal Protection Clauses of the Constitution. It also attacked it because of its asserted conflict with the Federal Agricultural Marketing Agreement Act of 1937, a claim which in the first instance requires construction of both the Federal Act and the California statute, and which for purposes relevant to our issue is not a constitutional claim. *Ex parte Buder,* 271 U. S. 461. The question thus presented is whether three judges are to be required, with a consequent direct appeal to this Court, merely because a constitutional claim is made, although it is joined with claims that may dispose of the case on essentially statutory and perchance local statutory grounds. The Court decides that three judges are required in such a case. I would hold that there are required to be three judges and a direct appeal to this Court only when the exclusive ground of attack upon a state statute is direct and immediate collision with the Constitution, thus seeking a constitutional decision in order that relief be granted.

Neither my position nor the Court's is entirely satisfactory. My view would leave it open for a single district judge to enjoin a state statute on the ground of its unconstitutionality if the complaint also contains non-constitutional grounds for relief. As the Court points out, such a result would conflict with the superficial literal sense of 28 U. S. C. § 2281 that an "injunction restraining the enforcement . . . of any State statute . . . shall not be granted by any district court . . . upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of

three judges . . . ." The effect of the Court's decision, on the other hand, is to require the convening of a three-judge court, with the corollary right of direct appeal of its decision to this Court, in cases where, as a consequence of the presence of a substantial non-constitutional ground for relief, the constitutionality of a state statute will play no part in the decision, either in the District Court or in this Court. There can be expected to be many such cases. For an example of one of them see *Herkness* v. *Irion,* 278 U. S. 92. It can fairly be stated, and with this I understand the Court fully to agree, that in devising the three-judge District Court scheme relating to state legislation Congress was concerned with providing appropriate safeguards against the invalidation of state legislation on constitutional grounds. I am therefore put to a choice between holding this three-judge procedure applicable to a large class of non-constitutional cases, where the unusual demands which that procedure makes upon the federal judicial system were never thought justifiable by Congress, and departing from the strictly literal sense of § 2281 in order to restrict the scope of this three-judge procedure with a view to preventing its operation outside of its proper constitutional sphere. I am led to choose the latter by considerations which are to me controlling, namely, considerations bearing on the efficient operation of the federal judicial system. For I do not find myself compelled to disregard these considerations either by ironclad statutory language or by any unambiguous evidence of congressional purpose to the contrary.

What jurisdictional result in a case like this is most likely to comport best with the operation of the federal judicial system is to be determined with regard to two general and conflicting considerations, both of which are directly relevant to a construction of the provisions respecting three-judge District Courts in the context of the present situation. On the one hand is the policy

which gave rise to the creation of the three-judge requirement in these cases: protection against the improvident invalidation of state regulatory legislation was sought to be achieved by resting the fate of such legislation in the first instance in the hands of three judges, one of whom must be a circuit judge (or, originally, a Justice of this Court), rather than in a single district judge. See Pogue, State Determination of State Law, 41 Harv. L. Rev. 623; Hutcheson, A Case for Three Judges, 47 Harv. L. Rev. 795. And direct appeal to this Court was provided, instead of the usual route from District Court to Court of Appeals, not only to avoid the incongruity of three judges reviewing three judges, but also to hasten ultimate determination of the validity of the legislation and to avoid the delay and waste of time during which the operation of legislation eventually held to be valid might be restrained on constitutional grounds by injunction.

Were only these considerations claiming judgment in construing inert language it would plainly follow, as the Court has concluded, that three judges are required to hear the complaint in this case, for constitutional claims are made and it is not precluded that injunctive relief may be granted on an obvious conflict with specific constitutional provisions. But so to rule here is in my view to fail to give due regard to countervailing considerations of far-reaching consequences to the federal judicial system, affecting the functioning of district and circuit courts, as well as of this Court. Specifically, the convening of a three-judge trial court makes for dislocation of the normal structure and functioning of the lower federal courts, particularly in the vast non-metropolitan regions; and direct review of District Court judgments by this Court not only expands this Court's obligatory jurisdiction but contradicts the dominant principle of having this Court review decisions only after they have gone through

two judicial sieves, or, in the case of federal regulatory legislation, through the administrative tribunal and a Court of Appeals. Also, where issues of local law have to be adjudicated before reaching questions under the United States Constitution, the desirability of having the appropriate Court of Appeals adjudicate such local issues becomes operative.

I deem regard for these demands which the three-judge requirement makes upon the federal judiciary to be the jurisdictional consideration of principal importance in a case such as this where a claim is seriously urged which necessarily involves, certainly in the first instance, construction of local or federal statutes, thus making potentially available a non-constitutional ground on which the case may be disposed of. It is more important that the ordinary operation of our judicial system not be needlessly disrupted by such a case than it is to insure that every case which may turn out to be constitutional be heard by three judges. I am led therefore to construe strictly the statutes providing the three-judge procedure relevant to this case so as to permit their invocation only when the claim is solely constitutional, thus tending to insure that the three-judge procedure will not be extended to non-constitutional cases not within its proper sphere.

My adherence to such confining construction of the necessity both for convening three judges and for this Court to be the first appellate tribunal is consistent with the approach this Court has taken when it has in the past refused to apply this legislation. See *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. 317; *Smith* v. *Wilson*, 273 U. S. 388; *Ex parte Collins*, 277 U. S. 565; *Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386; *Ex parte Williams*, 277 U. S. 267; *Ex parte Public National Bank*, 278 U. S. 101; *Rorick* v. *Board of Commissioners*, 307 U. S. 208; *Ex parte Bransford*, 310 U. S. 354; *Wilentz* v. *Sovereign Camp*, 306 U. S. 573; *Phillips* v. *United States*, 312 U. S.

246; *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368. As we stressed in *Phillips* v. *United States, supra,* these cases approach this three-judge statute as a procedural technicality and not as the embodiment of a more or less broadly phrased social policy the enforcement of which requires a generous regard for some underlying social purpose. In *Stainback* v. *Mo Hock Ke Lok Po, supra,* we continued to refer to "the long-established rule of strict construction" of this provision for three judges, 336 U. S., at 378, and refused to find it applicable to the Territory of Hawaii. These cases recognize what the Court today in my view does not—that in giving scope to the three-judge requirement due regard should be given to the consequences to the effective functioning of the federal judiciary as a totality, especially to the fact that an expansive construction of the three-judge requirement increases the scope of this Court's direct review and thereby is at cross purposes with the Act of February 13, 1925, 43 Stat. 936, the primary aim of which was to keep our appellate docket within narrow confines. See *Moore* v. *Fidelity & Deposit Co.,* 272 U. S. 317, 321.

As against the result to which I am led by these important considerations bearing on the proper functioning of the federal judicial system, which I do not understand the Court to dispute, I cannot be persuaded, as apparently the Court is, by arguments stemming from "the explicit language," the literal sense, of 28 U. S. C. § 2281. Jurisdictional provisions are not to be read in isolation with mutilating literalness, but as harmonizing parts of the comprehensive, reticulated judicial system. For an instance of this Court's express refusal to give the surface literal meaning to a jurisdictional provision on the ground that to do so would not be consistent with the "sense of the thing" and would confer upon this Court a jurisdiction beyond what "naturally and properly belongs to it,"

see *American Security & Trust Co.* v. *Commissioners,* 224 U. S. 491, 495. And see *Ex parte Collins,* 277 U. S. 565, 568, where "[d]espite the generality of the language" of this three-judge provision, it was held that a suit was not one to restrain the operation of a state statute when "the defendants are local officers and the suit involves matters of interest only to the particular municipality or district involved." Reliance upon literalism in construing a jurisdictional statute constitutes slavish adherence to words, as though they were symbols having single, absolute meanings, and reflects indifference to the significance of jurisdictional legislation as a vehicle for judicial administration.

Nor am I persuaded that I must decide contrary to what are to me the considerations of proper judicial administration by what seems chiefly to have persuaded the Court, namely, that § 2281 "plainly . . . indicate[s] a congressional intention to require an application for an injunction to be heard and determined by a court of three judges in *any* case in which the injunction may be granted on grounds of federal unconstitutionality." (Pp. 76–77 of the Court's opinion.) I can find no such plain congressional intention with regard to the problem presented by the present case. When the three-judge statute was first passed by Congress in 1910 it applied only to applications for interlocutory injunctions. Jurisdiction remained in a single judge to hear an application for a final injunction against the operation of a state statute on grounds of unconstitutionality, and a single judge had the power to grant such an injunction. Thus it is impossible to attribute to Congress at that time an intention that *any* case involving an injunction of a state statute on constitutional grounds be heard and determined by three judges. The concern was only with improvident interlocutory relief. And in 1925, when the three-judge statute was extended to include applications for final as well as inter-

locutory relief, the only evident concern of Congress was, as the Court agrees, "to end the anomalous situation in which a single judge might reconsider and decide questions already passed upon by three judges on the application for an interlocutory injunction." *Stratton* v. *St. Louis Southwestern R. Co.*, 282 U. S. 10, 14. It is, of course, common knowledge that Congress' central concern in enacting the Jurisdictional Act of 1925 was to restrict the obligatory appellate jurisdiction of this Court. Thus, although the result of the 1910 and 1925 Acts is language which on its face appears to prohibit one judge from ever enjoining a state statute on constitutional grounds, I do not think it fair to say that there was ever a deliberate accompanying purpose in Congress to achieve such a sweeping inflexible result. In the absence of any manifestations of such a purpose, I do not see why we should attribute to Congress, as the Court does, an intention to achieve a result which to me is plainly out of harmony with the best operation of the federal judicial system.[3]

And if we are to look to our prior decisions for guidance with regard to the proper approach to statutes conferring upon this Court direct appellate jurisdiction over decisions in constitutional cases, I find much more relevant than the decisions relied upon by the Court, which reached the Court's result without consideration of the jurisdictional problems now presented, our decisions in *Ex parte Buder,* 271 U. S. 461, and in *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50 (*Lemke I*). *Buder* arose under the

[3] It is interesting to note that while the Judicial Code also contains a provision requiring three judges to hear cases seeking injunctions against federal statutes on constitutional grounds (28 U. S. C. § 2282), Congress has left no room for doubt that in litigation attacking federal statutes if in fact (where the United States or one of its agents is a party) a federal statute is declared unconstitutional, the case is to be directly reviewed here. 28 U. S. C. § 1252 so provides.

three-judge statute involved in the present case, and *Lemke I* arose under § 238 of the old Judicial Code which, no less literally than the statute in the present case, gave this Court direct appellate jurisdiction in cases in which a state law was "claimed to be in contravention of the Constitution of the United States." In both of these cases the jurisdictional problem was expressly considered, and the jurisdictional legislation was read so as not to require this Court's direct appellate jurisdiction in cases where non-constitutional claims were made, even though constitutional factors were also implicated and decision might ultimately have turned on constitutional grounds.

Legislating is for Congress. Applying what Congress has enacted requires oftener than not construction. That is a judicial function. This is particularly true of judiciary legislation which is mainly concerned with the distribution of judicial power through deployment of the judicial force and the effective exercise of appellate review. It is also true to state that Congress seldom concerns itself with this Court's decisions construing judiciary legislation unless some dramatic result arouses its interest. We do not have to go further for an illustration of this generalization than to notice the indifference of Congress, in the sense that no legislative changes have been proposed one way or the other, with regard to the Act involved in this case, or the Criminal Appeals Act of 1907. Because these things are true I am convinced that it would in no wise show a disregard for any legislative purpose in the enactment of the three-judge device, or for any kind of legislative attitude toward the series of cases in which this Court has since then applied that legislation, if now upon full consideration we were to construe this legislation in light of the demands of the federal system as a totality to restrict it to what was plainly the central concern of Congress, to wit, to those cases where state legislation is

challenged *simpliciter* as directly offensive to some specific provision of the Constitution and where the claim is not entangled with other claims, usually turning upon the construction of local or federal statutes, which necessarily must be passed upon before the constitutional question is reached. I therefore dissent from the decision of the Court that we have jurisdiction in this case.

Syllabus.

FEDERAL POWER COMMISSION *v.* TUSCARORA INDIAN NATION.

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

No. 63. Argued December 7, 1959.—Decided March 7, 1960.*

Under § 21 of the Federal Power Act, certain lands purchased and owned in fee simple by the Tuscarora Indian Nation and lying adjacent to a natural power site on the Niagara River may be taken for the storage reservoir of a hydroelectric power project, upon payment of just compensation, by the Power Authority of the State of New York under a license issued to it by the Federal Power Commission as directed by Congress in the Act of August 21, 1957, 71 Stat. 401. Pp. 100–124.

(1) Inasmuch as the lands here involved are owned in fee simple by the Tuscarora Indian Nation and no "interest" in them is "owned by the United States," they are not within a "reservation," as that term is defined in § 3 (2) of the Federal Power Act, and, therefore, a Commission finding under § 4 (e) "that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired" is not necessary to the issuance of a license embracing the lands in question. Pp. 110–115.

(2) By the broad general terms of § 21 of the Federal Power Act, Congress has authorized the Federal Power Commission's licensees to take lands owned by Indians, as well as those of all other citizens, when needed for a licensed project, upon payment of just compensation; the lands in question are not subject to any treaty between the United States and the Tuscarora Indian Nation; and 25 U. S. C. § 177, forbidding a transfer of lands from Indians unless made by a treaty or convention entered into pursuant to the Constitution, does not apply to the United States itself nor prohibit it or its licensees under the Federal Power Act from taking such lands in the manner provided by § 21, upon payment of just compensation. Pp. 115–124.

105 U. S. App. D. C. 146, 265 F. 2d 338, reversed.

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*Together with No. 66, *Power Authority of the State of New York* v. *Tuscarora Indian Nation*, also on certiorari to the same Court.

Solicitor General Rankin argued the cause for petitioner in No. 63. With him on the brief were *Assistant Attorney General Doub, Samuel D. Slade, Lionel Kestenbaum, Willard W. Gatchell, John C. Mason, Leonard D. Eesley* and *Joseph B. Hobbs.*

Thomas F. Moore, Jr. argued the cause for petitioner in No. 66. With him on the brief were *Samuel I. Rosenman, Frederic P. Lee* and *John R. Davison.*

Arthur Lazarus, Jr. argued the causes for respondent. With him on the brief was *Eugene Gressman.*

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

The ultimate question presented by these cases is whether certain lands, purchased and owned in fee simple by the Tuscarora Indian Nation and lying adjacent to a natural power site on the Niagara River near the town of Lewiston, New York, may be taken for the storage reservoir of a hydroelectric power project, upon the payment of just compensation, by the Power Authority of the State of New York under a license issued to it by the Federal Power Commission as directed by Congress in Public Law 85–159, approved August 21, 1957, 71 Stat. 401.

The Niagara River, an international boundary stream and a navigable waterway of the United States, flows from Lake Erie to Lake Ontario, a distance of 36 miles. Its mean flow is about 200,000 cubic feet per second. The river drops about 165 feet at Niagara Falls and an additional 140 feet in the rapids immediately above and below the falls. The "head" created by these great falls, combined with the large and steady flow of the river, makes the Lewiston power site, located below the rapids, an extremely favorable one for hydroelectric development.

For the purpose of avoiding "continuing waste of a great natural resource and to make it possible for the United States of America and Canada to develop, for the benefit of their respective peoples, equal shares of the waters of the Niagara River available for power purposes," the United States and Canada entered into the Treaty of February 27, 1950,[1] providing for a flow of 100,000 cubic feet per second over Niagara Falls during certain specified daytime and evening hours of the tourist season (April 1 to October 31) and of 50,000 cubic feet per second at other times, and authorizing the equal division by the United States and Canada of all excess waters for power purposes.[2]

In consenting to the 1950 Treaty, the Senate imposed the condition that "no project for redevelopment of the United States' share of such waters shall be undertaken until it be specifically authorized by Act of Congress." 1 U. S. T. 694, 699. To that end, a study was made and reported to Congress in 1951 by the United States Army Corps of Engineers respecting the most feasible plans for utilizing all of the waters available to the United States under the 1950 Treaty, and detailed plans embodying other studies were prepared and submitted to Congress prior to June 7, 1956, by the Bureau of Power of the Federal Power Commission, the Power Authority of New

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[1] 1 U. S. T. 694.

[2] The excess flow of water available for power purposes under the 1950 Treaty was estimated to fluctuate between 44,000 and 210,000 cubic feet per second, depending on the flow, the time of year, and the time of day. S. Rep. No. 539, 85th Cong., 1st Sess., p. 4.

The 1950 Treaty superseded the Boundary Waters Treaty of January 11, 1909 (Treaty Series 548, 36 Stat. 2448) which limited diversions of water by Canada to 36,000, and by the United States to 20,000, cubic feet per second. Beginning in 1921, the waters available to the United States under that treaty were utilized by Niagara Mohawk Power Corporation in its Schoellkopf hydroelectric plant, under a federal license expiring in 1971. The rated capacity of that plant was 360,000 kilowatts.

York, and the Niagara Mohawk Power Corporation.[3] To enable utilization of all of the United States' share of the Niagara waters by avoiding waste of the nighttime and week-end flow that would not be needed at those times for the generation of power, all of the studies and plans provided for a pumping-generating plant to lift those waters at those times into a reservoir, and for a storage reservoir to contain them until released for use—through the pumping-generating plant, when its motors (operating in reverse) would serve as generators—during the daytime hours when the demand for power would be highest and the diversion of waters from the river would be most restricted by the treaty. Estimates of dependable capacity of the several recommended projects varied from 1,240,000 to 1,723,000 kilowatts, and estimates of the needed reservoir capacity varied from 22,000 acre-feet covering 850 acres to 41,000 acre-feet covering 1,700 acres. The variations in these estimates were largely due to differing assumptions as to the length of the daily period of peak demand.

Although there was "no controversy as to the most desirable engineering plan of development," [4] there was serious disagreement in Congress over whether the project should be publicly or privately developed and over marketing preferences and other matters of policy. That disagreement continued through eight sessions of Committee Hearings, during which more than 30 proposed bills were considered, in the Eighty-first to Eighty-fifth Congresses,[5] and delayed congressional authorization of the project for seven years.

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[3] S. Rep. No. 539, 85th Cong., 1st Sess., pp. 5–6.

[4] *Ibid.*

[5] Hearings were held before the Senate Committee on Public Works, or its Subcommittee, in the Eighty-second, Eighty-third and Eighty-fourth Congresses, and in the first session of the Eighty-fifth Congress; before the House Committee on Public Works in the first

On June 7, 1956, a rock slide destroyed the Schoellkopf plant.[6] This created a critical shortage of electric power in the Niagara community. It also required expansion of the plans for the Niagara project if the 20,000 cubic feet per second of water that had been reserved for the Schoellkopf plant was to be utilized. Accordingly, the Power Authority of New York prepared and submitted to Congress a major revision of the project plans. Those revised plans, designed to utilize all of the Niagara waters available to the United States under the 1950 Treaty, provided for an installed capacity of 2,190,000 kilowatts, of which 1,800,000 kilowatts would be dependable power for 17 hours per day, necessitating a storage reservoir of 60,000 acre-feet capacity covering about 2,800 acres.[7]

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sessions of the Eighty-first and Eighty-second Congresses, and in the first and second sessions of the Eighty-fourth Congress. Joint hearings were held by the House Committee and a Subcommittee of the Senate Committee in the Eighty-third Congress, first session. Reports on these bills were S. Rep. No. 2501, 83d Cong., 2d Sess.; H. R. Rep. No. 713, 83d Cong., 1st Sess.; S. Rep. No. 1408, 84th Cong., 2d Sess.; H. R. Rep. No. 2635, 84th Cong., 2d Sess. The Committee Reports on the bill which was finally enacted were S. Rep. No. 539, 85th Cong., 1st Sess.; H. R. Rep. No. 862, 85th Cong., 1st Sess.

[6] See note 2.

[7] The Report of the Senate Committee on Public Works of June 27, 1957, reporting out the bill that was finally adopted, contained the following statement:

"The proposals by the Power Authority of the State of New York at present contemplate a project with a total installed capacity of 2,190,000 kilowatts. Of this 1,800,000 will constitute firm power on a 17-hour-day basis. They anticipate that in order to achieve this amount of firm capacity pump-storage and pumping-generating facilities will be required." S. Rep. No. 539, 85th Cong., 1st Sess., p. 5.

The Report of the House Committee on Public Works of July 23, 1957, contained the following statement:

"As a result of the [Schoellkopf] disaster, the redevelopment project will be enlarged so as to develop the water formerly utilized in the destroyed plant. The proposal now contemplates a project

Confronted with the destruction of the Schoellkopf plant and the consequent critical need for electric power in the Niagara community, Congress speedily composed its differences in the manner and terms prescribed in Public Law 85–159, approved August 21, 1957. 71 Stat. 401. By § 1(a) of that Act, Congress "expressly authorized and directed" the Federal Power Commission "to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement." By § 1 (b) of the Act, the Federal Power Commission was directed to "include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act," seven conditions which are of only collateral importance here.[8] The concluding section of the Act, § 2, provides: "The license issued under the terms

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with a total installed capacity of 2,190,000 kilowatts. Of this 1,800,000 will constitute firm power on a 17-hour-day basis. It is anticipated that in order to achieve this amount of firm capacity, pump-storage and pumping-generating facilities will be required." H. R. Rep. No. 862, 85th Cong., 1st Sess., p. 7.

[8] Those seven conditions resolved the previously disputed issues which had so long delayed congressional authorization of the project. By those conditions, at least 50% of the project power must be made available to public bodies and nonprofit cooperatives "at the lowest rates reasonably possible," and 20% of that amount must be made available for use in neighboring States. Niagara Mohawk Power Corporation was given the right to purchase 445,000 kilowatts for a designated period to supply, and "restore low power costs to," the customers of its Schoellkopf plant, in exchange for relinquishment of its federal license. The Power Authority of New York was authorized to construct independent transmission lines to reach its preference customers and to control the resale rates of distributors purchasing power from it. The project was required to bear the United States' share of the cost of remedial works in the river, and, within a designated maximum sum, the cost of a scenic drive and a park.

of this Act shall be granted in conformance with Rules of Practice and Procedure of the Federal Power Commission, but in the event of any conflict, the provisions of this Act shall govern in respect of the project herein authorized."

Thereafter, the Power Authority of the State of New York, a municipal corporation created under the laws of that State to develop the St. Lawrence and Niagara power projects, applied to the Federal Power Commission for the project license which Congress had thus directed the Commission to issue to it. Its application embraced the project plans that it had submitted to the Eighty-fifth Congress shortly before its approval of Public Law 85–159.[9] The project was scheduled to be completed in 1963 at an estimated cost of $720,000,000.

Hearings were scheduled by the Commission, of which due notice was given to all interested parties, including the Tuscarora Indian Nation, inasmuch as the application contemplated the taking of some of its lands for the reservoir. The Tuscarora Indian Nation intervened and objected to the taking of any of its lands upon the ground "that the applicant lacks authority to acquire them." At the hearings, it was shown that the Tuscarora lands needed for the reservoir—then thought to be about 1,000 acres—are part of a separate tract of 4,329 acres purchased in fee simple by the Tuscarora Indian Nation, with the assistance of Henry Dearborn, then Secretary of War, from the Holland Land Company on November 21, 1804, with the

[9] The plans embraced by the application for the license consisted, in general, of (1) the main generating plant on the east bank of the river, (2) a pumping-generating plant, located a short distance east of the main generating plant, (3) a storage reservoir, adjacent to the pumping-generating plant, having a usable storage capacity of 60,000 acre-feet, and covering about 2,800 acres, (4) a water intake structure on the east bank of the river about three miles above the falls, and (5) a water conveyance system extending from the intake to a forebay at the pumping-generating plant, and from the latter to a forebay at the main generating plant.

proceeds derived from the contemporaneous sale of their lands in North Carolina—from which they had removed in about the year 1775 to reside with the Oneidas in central New York.[10]

After concluding the hearings, the Commission, on January 30, 1958, issued its order granting the license. It found that a reservoir having a usable storage capacity of 60,000 acre-feet "is required to properly utilize the water resources involved." Although the Commission found that the Indian lands "are almost entirely unde-

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[10] Because the proceeds of the sale of the Tuscaroras' North Carolina lands ($15,000) were payable in three equal annual installments and were to be used, so far as necessary, for the payment of the purchase price of the New York lands ($13,752.80), which was also payable in three substantially equal annual installments, the latter lands were conveyed on November 21, 1804, by deed of the Holland Land Company (which acknowledged receipt of the first installment of the purchase price, and reserved a lien to secure the two unpaid installments of the purchase price) to Henry Dearborn "in Trust" for the "Tuscarora Nation of Indians and their Assigns forever . . . the said Henry Dearborn and his Heirs [to] grant and convey the same in Fee Simple or otherwise to such person or persons as the said Tuscarora Nation of Indians shall at any time hereafter direct and appoint." After collection of the remaining installments of the purchase price of the Tuscaroras' North Carolina lands and, in turn, remitting to the Holland Land Company so much thereof as was necessary to pay the balance of the purchase price for the New York lands, Henry Dearborn conveyed the New York lands to the "Tuscarora Nation of Indians and their Successors and Assigns for ever," in fee simple free and clear of encumbrances, on January 2, 1809. The Tuscarora Indian Nation has ever since continued to own those lands under that conveyance.

In addition to the 4,329 acres purchased from the Holland Land Company in 1804, the Tuscaroras' reservation embraces two other contiguous tracts containing 1,920 acres. The first, a tract of 640 acres, was ceded to the Tuscaroras by the Holland Land Company in June 1798. The second, a tract of 1,280 acres, was ceded to them by the Holland Land Company in 1799. Those tracts are not involved in this case.

veloped except for agricultural use," it did not pass upon the Tuscaroras' objection to the taking of their lands because it then assumed that "other lands are available for reservoir use if the Applicant is unable to acquire the Indian lands." But the Commission did direct the licensee to revise its exhibit covering the reservoir, to more definitely show the area and acreage involved, and to resubmit it to the Commission for approval within a stated time.

In its application for rehearing, the Tuscarora Indian Nation contended, among other things, that the portion of its lands sought to be taken for the reservoir was part of a "reservation," as defined in § 3 (2), and as used in § 4 (e), of the Federal Power Act,[11] and therefore could not lawfully be taken for reservoir purposes in the absence of a finding by the Commission "that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." By its order of March 21, 1958, denying that application for rehearing, the Commission found that "[t]he best location of the reservoir would require approximately 1,000 acres of land owned by Intervener," and it held that the Indian lands involved "are not part of a 'reservation' referred to in Section 4 (e) as defined in Section 3 (2) of the [Federal Power] Act and the finding suggested by Intervener is not required." On May 5, 1958, the Commission issued its order approving the licensee's revised exhibit which precisely delineated the location, area, and acreage to be embraced by the reservoir—which included 1,383 acres of the Tuscaroras' lands.

On May 16, 1958, the Tuscarora Indian Nation filed a petition for review in the Court of Appeals for the District of Columbia Circuit challenging the license issued by the Commission on January 30, 1958, insofar as it

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[11] As amended, 49 Stat. 838, 16 U. S. C. §§ 796 (2) and 797 (e).

would authorize the taking of Tuscarora lands.[12] By its opinion and interim judgment of November 14, 1958, the Court of Appeals held that the Tuscarora lands sought to be taken for the reservoir constitute a part of a "reser-

[12] Meanwhile, on April 15, 1958, the Power Authority of New York commenced so-called "appropriation" proceedings under § 30 of the New York State Highway Law, McKinney's Consol. Laws, c. 25, and also under Art. 5, Tit. 1, of the New York Public Authorities Law, McKinney's Consol. Laws, c. 43–A, to condemn the 1,383 acres of Tuscarora lands for reservoir use.

On April 18, 1958, the Tuscarora Indian Nation filed a complaint in the United States District Court for the Southern District of New York against the Power Authority and the Superintendent of Public Works of New York, seeking (1) a declaratory judgment that the Power Authority had no right or power to take any of its lands without the express and specific consent of the United States, and (2) a permanent injunction against the appropriation or condemnation of any of its lands. The court issued a temporary restraining order. The action, being a "local" one, was then transferred to the District Court for the Western District of New York. After hearing, that court on June 24, 1958, denied the relief prayed, dissolved the restraining order, and dismissed the complaint on the merits. *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, 164 F. Supp. 107.

On appeal, the Second Circuit affirmed in part and reversed in part. It held that the Power Authority was authorized under Public Law 58–159 and the Federal Power Act and by the Commission's license thereunder of January 30, 1958, to take the part of the Tuscarora lands needed for the reservoir, but that they could be taken only by a condemnation action in a state or federal court in the district where the property is located under and in the manner provided by § 21 of the Federal Power Act (16 U. S. C. § 814), and not by "appropriation" proceedings under the New York laws referred to. *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, 257 F. 2d 885. The Tuscarora Indian Nation's petition to this Court for a writ of certiorari was denied on October 13, 1958. 358 U. S. 841. The Superintendent of Public Works of New York, a respondent in the Second Circuit proceedings, has appealed to this Court from so much of the judgment as denied a right to acquire the Tuscarora lands by appropriation proceedings under the New York laws, and that appeal is now pending here. (No. 4, Oct. Term, 1959.)

vation" within the meaning of §§ 3 (2) and 4 (e) of the Federal Power Act, and that the Commission may not include those lands in the license in the absence of a § 4 (e) finding that their taking "will not interfere or be inconsistent with the purpose for which such reservation was created or acquired," and the court remanded the case to the Commission that it might "explore the possibility of making that finding." 105 U. S. App. D. C. 146, 265 F. 2d 338.

Upon remand, the Commission held extensive hearings, exploring not only the matter of the making of the finding held necessary by the Court of Appeals but also the possibility of locating the reservoir on other lands. In its order of February 2, 1959, the Commission found that the use of other lands for the reservoir would result in great delay, severe community disruption, and unreasonable expense; that a reservoir with usable storage capacity of 60,000 acre-feet is required to utilize all of the United States' share of the water of the Niagara River, as required by Public Law 85–159; that removal of the reservoir from the Tuscarora lands by reducing the area of the reservoir would reduce the usable storage capacity from 60,000 acre-feet to 30,000 acre-feet and result in a loss of about 300,000 kilowatts of dependable capacity. But it concluded that, although other lands contiguous to their reservation might be acquired by the Tuscaroras,[13]

[13] In making the statement referred to in the text the Commission was doubtless alluding to the fact that in May 1958, the Power Authority offered the Tuscaroras $1,500,000 for the 1,383 acres, or in excess of $1,000 per acre, plus payment for, or removal to or replacing on other lands, the 37 houses located on these 1,383 acres and offered to construct for them a community center building, involving a total expenditure of about $2,400,000, which offer, the Commission says, has never been withdrawn.

The Tuscarora Indian Nation tells us in its brief that:

"What the Government unfortunately fails to point out is that the Power Authority's 'offer' was and still is an empty gesture since, as

the taking of the 1,383 acres of Tuscarora lands for the reservoir "would interfere and would be inconsistent with the purpose for which the reservation was created or acquired." That order was transmitted to the Court of Appeals which, on March 24, 1959, after considering various motions of the parties, entered its final judgment approving the license except insofar as it would authorize the taking of Tuscarora lands for the reservoir, and remanded the case to the Commission with instructions to amend the license "to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes." 105 U. S. App. D. C., at 152, 265 F. 2d, at 344.

Because of conflict between the views of the court below and those of the Second Circuit, and of the general importance of the questions involved, we granted certiorari. 360 U. S. 915.

The parties have urged upon us a number of contentions, but we think these cases turn upon the answers to two questions, namely, (1) whether the Tuscarora lands covered by the Commission's license are part of a "reservation" as defined and used in the Federal Power Act, 16 U. S. C. § 791a *et seq.*, and, if not, (2) whether those lands may be condemned by the licensee, under the eminent domain powers conferred by § 21 of the Federal Power Act, 16 U. S. C. § 814. We now turn to a consideration of those questions in the order stated.

I.

A Commission finding that "the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired" is required by § 4 (e)

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the court below and the Court of Appeals for the Second Circuit both ruled, the Tuscarora Nation is prohibited by law from selling its lands without the consent of the United States expressed in an act of Congress. 25 U. S. C. §§ 177, 233."

of the Federal Power Act, 16 U. S. C. § 797 (e), only if the lands involved are within a "reservation" in the sense of that term as defined and used in that Act. That by generally accepted standards and common understanding these Tuscarora lands may be part of a "reservation" is not at all decisive of whether they are such within the meaning of the Federal Power Act. Congress was free and competent artificially to define the term "reservations" for the purposes it prescribed in that Act. And we are bound to give effect to its definition of that term, for it would be idle for Congress to define the sense in which it used it "if we were free in despite of it to choose a meaning for ourselves." *Fox* v. *Standard Oil Co.,* 294 U. S. 87, 96. By § 3 (2) of the Federal Power Act, 16 U. S. C. § 796 (2), Congress has provided:

> "SEC. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:
>
> . . . . .
>
> "(2) 'reservations' means national forests, tribal lands embraced within Indian reservations, military reservations, and *other* lands and interests in lands *owned by the United States,* and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purpose; but shall not include national monuments or national parks." (Emphasis added.)

The plain words of this definition seem rather clearly to show that Congress intended the term "reservations," wherever used in the Act, to embrace only "lands and interests in lands owned by the United States."

Turning to the definition's legislative history, we find that it, too, strongly indicates that such was the congressional intention. In the original draft bill of the Federal

Water Power Act of 1920, as proposed by the Administration and passed by the House in the Sixty-fifth and Sixty-sixth Congresses, the term was defined as follows:

> " 'Reservations' means lands and interest in lands owned by the United States and withdrawn, reserved, or withheld from private appropriation and disposal under the public-land laws, and lands and interest in lands acquired and held for any public purpose." [14]

It is difficult to perceive how congressional intention could be more clearly and definitely expressed. However, after the bill reached the Senate it inserted the words "national monuments, national parks, national forests, tribal lands embraced within Indian reservations, military reservations, *and other*" (emphasis added) at the beginning of the definition.[15] When the bill was returned to the House it was explained that the Senate's "amendment recasts the House definition of 'reservations.' " [16] The bill as enacted contained the definition as thus recast. It remains in that form, except for the deletion of the words "national monuments, national parks," which was occasioned by the Act of March 3, 1921 (41 Stat. 1353), negating Commission authority to license any project works within "national monuments or national parks," and those words were finally deleted from the definition by amendment in 1935. 49 Stat. 838. It seems entirely clear that no change in substance was intended or effected by the Senate's amendment, and that its "recasting" only specified, as illustrative, some of the "reservations" on "lands and interests in lands owned by the United States."

Further evidence that Congress intended to limit "reservations," for the "purposes of this Act" (§ 3), to those

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[14] See H. R. Rep. No. 715, 65th Cong., 2d Sess., p. 22; S. Rep. No. 180, 66th Cong., 1st Sess., p. 10.

[15] See S. Rep. No. 180, 66th Cong., 1st Sess., p. 10; 59 Cong. Rec. 1103.

[16] See H. R. Rep. No. 910, 66th Cong., 2d Sess., p. 7.

located on "lands owned by the United States" or in which it owns an interest is furnished by its use of the term in the context of § 4 (e) of the Act. By that section Congress, after authorizing the Commission to license projects in streams or other bodies of water over which it has jurisdiction under the *Commerce Clause* of the Constitution (Art. I, § 8, cl. 3), authorized the Commission to license projects "upon any part of the public lands and reservations of the United States." Congress must be deemed to have known, as this Court held in *Federal Power Comm'n* v. *Oregon,* 349 U. S. 435, 443, that the licensing power, "in relation to public lands and reservations of the United States springs from the Property Clause" of the Constitution—namely, the ". . . Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." Art. IV, § 3, cl. 2. In thus acting under the Property Clause of the Constitution, Congress must have intended to deal only with "the Territory or other Property belonging to the United States." *Ibid.*

Moreover, the Federal Power Act's plan of compensating for lands taken or used for licensed projects is explicable only if the term "reservations" is confined, as Congress evidently intended, to those located on "lands owned by the United States" or in which it owns a proprietary interest. By § 21, 16 U. S. C. § 814, licensees are authorized to *acquire* "the lands or property of others necessary to the" licensed project "by the exercise of the right of eminent domain" in the federal or state courts, and, of course, upon the payment of just compensation. But, despite its general and all-inclusive terms, § 21 does not apply to nor authorize condemnation of lands or interests in lands owned by the United States, because § 10 (e) of the Act, 16 U. S. C. § 803 (e), expressly provides that "the licensee shall pay to the United States reasonable annual charges . . . for recompensating *it* for

the *use, occupancy, and enjoyment* of *its* lands or other property" (emphasis added) devoted to the licensed project. It therefore appears to be unmistakably clear that by the language of the first proviso of that section saying, in pertinent part, "That when licenses are issued involving the use of Government dams or other structures owned by the United States or *tribal lands embraced within Indian reservations* (these italicized words being lifted straight from the § 3 (2) definition of 'reservations') the Commission shall . . . fix a reasonable annual charge for the use thereof . . . ," Congress intended to treat and treated only with structures, lands and interests in lands owned by the United States, for, as stated, the section expressly requires the "reasonable annual charges" to be paid to the *United States* for the use, occupancy, and enjoyment of *"its lands or other property."* (Emphasis added.)

This analysis of the plain words and legislative history of the Act's definition of "reservations" and of the plan and provisions of the Act leaves us with no doubt that Congress, "for purposes of this Act" (§ 3 (2)), intended to and did confine "reservations," including "tribal lands embraced within Indian reservations" (§ 3 (2)), to those located on lands "owned by the United States" (§ 3 (2)), or in which it owns a proprietary interest.

The Court of Appeals did not find to the contrary. Indeed, it found that the Act's definition of "reservations" includes only those located on lands in which the United States "has an interest." But it thought that the national paternal relationship to the Indians and the Government's concern to protect them against improper alienation of their lands gave the United States the requisite "interest" in the lands here involved, and that the result "must be the same as if the phrase 'owned by the United States, [etc.]' were not construed as a limitation upon the term 'tribal lands [etc.].'" 105 U. S. App.

D. C., at 150, 265 F. 2d, at 342. We do not agree. The national "interest" in Indian welfare and protection "is not to be expressed in terms of property . . . ." *Heckman* v. *United States,* 224 U. S. 413, 437. The national "paternal interest" in the welfare and protection of Indians is not the "interests in lands *owned* by the United States" required, as an element of "reservations," by § 3 (2) of the Federal Power Act. (Emphasis added.)

Inasmuch as the lands involved are owned in fee simple by the Tuscarora Indian Nation and no "interest" in them is "owned by the United States," we hold that they are not within a "reservation" as that term is defined and used in the Federal Power Act, and that a Commission finding under § 4 (e) of that Act "that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired" is not necessary to the issuance of a license embracing the Tuscarora lands needed for the project.

II.

We pass now to the question whether the portion of the Tuscarora lands here involved may be condemned by the licensee under the provisions and eminent domain powers of § 21 of the Federal Power Act. Petitioners contend that § 21 is a broad general statute authorizing condemnation of "the lands or property of others necessary to the construction, maintenance, or operation of any" licensed project, and that lands owned by Indians in fee simple, not being excluded, may be taken by the licensee under the federal eminent domain powers delegated to it by that section. Parrying this contention, the Tuscarora Indian Nation argues that § 21, being only a general Act of Congress, does not apply to Indians or their lands.

The Tuscarora Indian Nation heavily relies upon *Elk* v. *Wilkins,* 112 U. S. 94. It is true that in that case the

Court, dealing with the question whether a native-born American Indian was made a citizen of the United States by the Fourteenth Amendment of the Constitution, said: "Under the Constitution of the United States, as originally established . . . General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them." 112 U. S., at 99–100. However that may have been, it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests. In *Superintendent of Five Civilized Tribes* v. *Commissioner,* 295 U. S. 418, the funds of a restricted Creek Indian were held and invested for him by the Superintendent, and a question arose as to whether income from the investment was subject to federal income taxes. In an earlier case, *Blackbird* v. *Commissioner,* 38 F. 2d 976, the Tenth Circuit had held such income to be exempt from federal income taxation. But in this case the Board of Tax Appeals sustained the tax, the Tenth Circuit affirmed, and the Superintendent brought the case here. This Court observed that in the *Blackbird* case the Tenth Circuit had said that to hold a general act of Congress to be applicable to restricted Indians "would be contrary to the almost unbroken policy of Congress in dealing with its Indian wards and their affairs. Whenever they and their interests have been the subject affected by legislation they have been named and their interests specifically dealt with." That is precisely the argument now made here by the Tuscarora Indian Nation. But this Court, in affirming the judgment, said:

> "This does not harmonize with what we said in *Choteau* v. *Burnet* (1931), 283 U. S. 691, 693, 696:
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> " 'The language of [the Internal Revenue Act of 1918] subjects the income of "every individual" to tax. Section 213 (a) includes income "from any

source whatever." The intent of Congress was to levy the tax with respect to all residents of the United States and upon all sorts of income. The Act does not expressly exempt the sort of income here involved, nor a person having petitioner's status respecting such income, and we are not referred to any other statute which does. . . . The intent to exclude must be definitely expressed, where, as here, the language of the Act laying the tax is broad enough to include the subject matter.'

"The court below properly declined to follow its quoted pronouncement in Blackbird's case. The terms of the 1928 Revenue Act are very broad, and nothing there indicates that Indians are to be excepted. See *Irwin* v. *Gavit,* 268 U. S. 161; *Heiner* v. *Colonial Trust Co.,* 275 U. S. 232; *Helvering* v. *Stockholms Enskilda Bank,* 293 U. S. 84; *Pitman* v. *Commissioner,* 64 F. (2d) 740. The purpose is sufficiently clear." 295 U. S., at 419–420.

In *Oklahoma Tax Comm'n* v. *United States,* 319 U. S. 598, this Court, in holding that the estate of a restricted Oklahoma Indian was subject to state inheritance and estate taxes under general state statutes, said:

"The language of the statutes does not except either Indians or any other persons from their scope. [319 U. S., at 600.] If Congress intends to prevent the State of Oklahoma from levying a general nondiscriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences." 319 U. S., at 607.

See, *e. g., Shaw* v. *Gibson-Zahniser Oil Corporation,* 276 U. S. 575, 581–582; *United States* v. *Ransom,* 263 U. S. 691; *Kennedy* v. *Becker,* 241 U. S. 556, 563–564; *Choate* v. *Trapp,* 224 U. S. 665, 673.

The Federal Power Act constitutes a complete and comprehensive plan for the development and improvement of navigation and for the development, transmission and utilization of electric power in any of the streams or other bodies of water over which Congress has jurisdiction under its commerce powers, and upon the public lands and reservations of the United States under its property powers. See § 4 (e). It neither overlooks nor excludes Indians or lands owned or occupied by them. Instead, as has been shown, the Act specifically defines and treats with lands occupied by Indians—"tribal lands embraced within Indian reservations." See §§ 3 (2) and 10 (e). The Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians. The Court of Appeals recognized that this is so. 105 U. S. App. D. C., at 151, 265 F. 2d, at 343. Section 21 of the Act, by broad general terms, authorizes the licensee to condemn "the lands or property of others necessary to the construction, maintenance, or operation of any" licensed project. That section does not exclude lands or property owned by Indians, and, upon the authority of the cases cited, we must hold that it applies to these lands owned in fee simple by the Tuscarora Indian Nation.

The Tuscarora Indian Nation insists that even if its lands are embraced by the terms of § 21 of the Federal Power Act, they still may not be taken for public use "without the express consent of Congress referring specifically to those lands," because of the provisions of 25 U. S. C. § 177.[17] That section, in pertinent part, provides:

> "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any

[17] The Tuscaroras also rely upon 25 U. S. C. § 233, which confers, subject to qualifications, jurisdiction upon the courts of New York over civil actions between Indians and also between them and other

> Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. . . ."

The obvious purpose of that statute is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress, and to enable the Government, acting as *parens patriae* for the Indians, to vacate any disposition of their lands made without its consent. See, *e. g., United States* v. *Hellard,* 322 U. S. 363; *United States* v. *Candelaria,* 271 U. S. 432, 441–442; *Henkel* v. *United States,* 237 U. S. 43, 51; *United States* v. *Sandoval,* 231 U. S. 28, 46–48. But there is no such requirement with respect to conveyances to or condemnations by the United States or its licensees; "nor is it conceivable that it is necessary, for the Indians are subject only to the same rule of law as are others in the State . . . ." *United States* v. *Oklahoma Gas Co.,* 318 U. S. 206, 211.

As to the Tuscaroras' contention that § 177 prohibits the taking of any of their lands for the reservoir "without the express and specific consent of Congress," one thing is certain. It is certain that if § 177 is applicable to alienations effected by condemnation proceedings under § 21 of the Federal Power Act, the mere "expressed consent" of Congress would be vain and idle. For § 177 at the very least contemplates *the assent of the Indian nation or tribe.* And inasmuch as the Tuscarora Indian Nation withholds such consent and refuses to convey to the licensee any of its lands, it follows that the mere consent of Congress, however express and specific, would avail

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persons, and contains a pertinent proviso "That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York."

nothing. Therefore, if § 177 is applicable to alienations effected by condemnation under § 21 of the Federal Power Act, the result would be that the Tuscarora lands, however imperative for the project, could not be taken at all.

But § 177 is not applicable to the sovereign United States nor, hence, to its licensees to whom Congress has delegated federal eminent domain powers under § 21 of the Federal Power Act. The law is now well settled that:

> "A general statute imposing restrictions does not impose them upon the Government itself without a clear expression or implication to that effect." *United States* v. *Wittek,* 337 U. S. 346, 358–359.

In *United States* v. *United Mine Workers of America,* 330 U. S. 258, 272–273, the Court said:

> "There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect."

See, *e. g., Leiter Minerals, Inc.,* v. *United States,* 352 U. S. 220, 224–225; *United States* v. *Wyoming,* 331 U. S. 440, 449; *United States* v. *Stevenson,* 215 U. S. 190; *United States* v. *American Bell Telephone Co.,* 159 U. S. 548, 553–555; *Lewis* v. *United States,* 92 U. S. 618, 622; *United States* v. *Herron,* 20 Wall. 251, 263; *Dollar Savings Bank* v. *United States,* 19 Wall. 227, 239.

This Court has several times applied, in combination, the rules (1) that general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary, and (2) that general statutes imposing restrictions do not apply to the Government itself without a clear expression to that effect. It did so in *Henkel* v. *United States,* 237 U. S. 43 (sustaining the right of the United States to take Indian lands for reservoir purposes under the general Reclamation Act of June 17, 1902, 32 Stat. 388), in *Spalding* v. *Chandler,* 160 U. S.

394 (sustaining the power of the Government to convey a strip of land through a tract owned by an Indian tribe to one Chandler for the use of the State of Michigan in constructing a canal, even though the conveyance was in derogation of a treaty with the Indian tribe), and in *Cherokee Nation* v. *Southern Kansas R. Co.,* 135 U. S. 641. There, this Court sustained the right of a licensee of the Government to take so much of the undescribed fee lands of an Indian tribe as was necessary for the licensed project, though in derogation of the terms of a treaty between the United States and the Indian tribe,[18] saying:

> "It would be very strange if the national government, in the execution of its rightful authority, could exer-

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[18] The Tuscarora Indian Nation argues that its lands in question should be regarded as subject to and protected from condemnation by the Treaty of Fort Stanwix of October 22, 1784 (7 Stat. 15), the unratified Treaty of Fort Harmar of January 9, 1789 (7 Stat. 33), and the Treaty of Canandaigua of November 11, 1794 (7 Stat. 44). But the record shows that the first two of these treaties related to other lands and, principally at least, to other Indian nations, and that the last treaty mentioned, though covering the lands in question, was with another Indian nation (the Senecas) which, pursuant to the Treaty of Big Tree of September 15, 1797 (7 Stat. 601) and with the approbation of the United States, sold its interest in these lands to Robert Morris and thus freed them from the effects of the Treaty of Canandaigua of 1794. Robert Morris, in turn, conveyed these lands to the Holland Land Company and it, in turn, conveyed the part in question to the Tuscarora Indian Nation, and its title rests upon that conveyance, free of any treaty.

It appears from the record that, as earlier stated (see note 10), the Tuscaroras, save for a few of them who remained on their lands "on the Roanoke" in North Carolina, moved from their North Carolina lands to reside with the Oneidas in central New York—at a point about 200 miles east of the lands now owned by the Tuscaroras in Niagara County, New York—in 1775. The Tuscaroras had no proprietary interest in the Oneidas' lands in central New York but were there as "guests" of the Oneidas or as "tenants at will or by suffer-

cise the power of eminent domain in the several States, and could not exercise the same power in a Territory occupied by an Indian nation or tribe, the members of which were wards of the United States, and directly subject to its political control. The lands in the Cherokee territory, like the lands held by private owners everywhere within the geographical limits of the United States, are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it; provided only, that they are not taken without just compensation being made to the owner." 135 U. S., at 656–657.

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ance." Hough, Census of the State of New York, 1857, p. 510; New York Senate Document No. 24, 1846, p. 68. They came to be recognized, however, as members of the Five Nations which thereafter became known as the Six Nations (the others being the Oneidas, the Mohawks, the Onondagas, the Cayugas and the Senecas). The Senecas occupied a vast area in western New York, including the lands here in question. A few Tuscaroras fought with the Senecas on the side of the British and after their defeat at the battle of Elmira in 1779, they went to reside with the Senecas in the vicinity of Fort Niagara in about 1780. Other Tuscaroras then moved to that place. Just when they did so is not known with certainty and it appears that the most that can be said is that they were there prior to 1797. The Tuscaroras had the same kind of tenure, *i. e.*, guests or tenants at will or by sufferance, with the Senecas as they had earlier had with the Oneidas in central New York. One of their chiefs described their situation as "squatters upon the territory of another distinct nation."

By the Treaty of Fort Stanwix of 1784 (7 Stat. 15) and the unratified Treaty of Fort Harmar of 1789 (7 Stat. 33) with the Six Nations, the United States promised to hold the Oneidas and the Tuscaroras secure in the lands upon which they then lived—which were the lands in central New York about 200 miles east of the lands in question. By the same treaties the United States promised to secure to the Six Nations a tract of land in western New York in the vicinity of the Niagara River. By the Treaty of Canandaigua of 1794 (7 Stat. 44) between the United States and the Six Nations, which superseded the prior treaties (except, by Article VI, the United States remained

See also *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 565; *Missouri, Kansas & Texas R. Co.* v. *Roberts,* 152 U. S. 114, 117–118; *Beecher* v. *Wetherby,* 95 U. S. 517; *Kohl* v. *United States,* 91 U. S. 367.

In the light of these authorities we must hold that Congress, by the broad general terms of § 21 of the Federal Power Act, has authorized the Federal Power Commission's licensees to take lands owned by Indians, as well as those of all other citizens, when needed for a licensed project, upon the payment of just compensation; that the lands in question are not subject to any treaty between the United States and the Tuscaroras (see notes 10 and 18); and that 25 U. S. C. § 177 does not apply to the United States itself nor prohibit it, or its licensees under the Federal Power Act, from taking such lands in

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bound to pay the Tuscaroras $4,500 per year for the purchase of clothing), it was recognized that the Senecas alone had possessory rights to the western New York area here involved and, as a result of that treaty, a large tract of western New York lands, including the lands now owned by the Tuscaroras, was secured to the Senecas.

Under the 1786 Hartford Compact between New York and Massachusetts, New York was recognized to have sovereignty over those lands and Massachusetts to own the underlying fee to those lands and the right to purchase the Senecas' interest in them. In 1794, Massachusetts sold the fee and the right to purchase the Senecas' right to occupy these western New York lands, including the lands now owned by the Tuscaroras, to Robert Morris, who, in turn, sold those lands and rights to the Holland Land Company with the covenant that he would buy out the Senecas' rights of occupancy for and on behalf of the Holland Land Company. And at the Treaty of Big Tree of 1797 (7 Stat. 601), Morris, with the approbation of the United States, purchased the Senecas' rights of occupancy in the lands here in question for the Holland Land Company. Thus the lands in question were entirely freed from the effects of all then existing treaties with the Indians, and the Tuscaroras' title to their present lands derives, as earlier stated, from the Holland Land Company (see note 10 for further details) and has never since been subject to any treaty between the United States and the Tuscaroras.

the manner provided by § 21, upon the payment of just compensation.

All members of this Court—no one more than any other—adhere to the concept that agreements are made to be performed—no less by the Government than by others—but the federal eminent domain powers conferred by Congress upon the Commission's licensee, by § 21 of the Federal Power Act, to take such of the lands of the Tuscaroras as are needed for the Niagara project do not breach the faith of the United States, or any treaty or other contractual agreement of the United States with the Tuscarora Indian Nation in respect to these lands for the conclusive reason that there is none.

Reversed.

MR. JUSTICE BRENNAN concurs in the result.

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

The Court holds that the Federal Power Act [1] authorizes the taking of 22% (1,383 acres) of the single tract which the Tuscarora Indian Nation has owned and occupied as its homeland for 150 years.[2] Admittedly this

[1] 41 Stat. 1063, as amended, 16 U. S. C. §§ 791a–828c.

[2] While the petitioners have argued that Congress authorized this taking in the 1957 Niagara Power Act, 71 Stat. 401, 16 U. S. C. §§ 836–836a, the Court does not accept this argument. Neither do I. There is absolutely no evidence that Congress was in any way aware that these Tuscarora lands would be required by the Niagara Power Project. The petitioners have also argued that Congress impliedly authorized this taking in the 1957 Act because in fact the Tuscarora lands are indispensable to the Niagara Power Project. But the record shows that the reservation lands are not indispensable. The Federal Power Commission first found that "other lands are available." 19 F. P. C. 186, 188. And see 105 U. S. App. D. C. 146, 151, 265 F. 2d 338, 343. On remand the Commission refused to find that the Indian lands were indispensable, although it did find that use of other

taking of so large a part of the lands will interfere with the purpose for which this Indian reservation was created—a permanent home for the Tuscaroras. I not only believe that the Federal Power Act does not authorize this taking, but that the Act positively prohibits it. Moreover, I think the taking also violates the Nation's long-established policy of recognizing and preserving Indian reservations for tribal use, and that it constitutes a breach of Indian treaties recognized by Congress since at least 1794.

Whether the Federal Power Act permits this condemnation depends, in part, upon whether the Tuscarora Reservation is a "reservation" within the meaning of the Act. For if it is, § 4 (e) forbids the taking of any part of the lands except after a finding by the Federal Power Commission that the taking "will not interfere or be inconsistent with the purpose for which such reservation was created or acquired . . . ." [3] There is no such finding here. In fact, the Commission found that the inundation of so great a part of the Tuscarora Reservation by the waters

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lands would be much more expensive. 21 F. P. C. 146. And see 21 F. P. C. 273, 275. That other lands are more expensive is hardly proof that the Tuscarora lands are indispensable to this $700,000,000 project.

[3] Section 4 (e) contains the general grant of power for the Federal Power Commission to issue licenses for federal power projects. The part that is of crucial significance here reads:

"[L]icenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation . . . ."

Title 16 U. S. C. § 797 (e), enacted as § 4 (d) in the Federal Water Power Act of 1920, 41 Stat. 1063, was re-enacted in the 1935 amendments, 49 Stat. 838, as § 4 (e) and is referred to as such throughout.

of the proposed reservoir "will interfere and will be inconsistent with the purpose for which such reservation was created or acquired." 21 F. P. C. 146, 148. If these Tuscarora homelands are "tribal lands embraced within" an Indian reservation as used in § 3 (2) [4] they constitute a "reservation" for purposes of § 4 (e), and therefore the taking here is unauthorized because the requisite finding could not be made.

I believe the plain meaning of the words used in the Act, taken alone, and their meaning in the light of the historical background against which they must be viewed, require the conclusion that these lands are a "reservation" entitled to the protections of § 4 (e) of the Act. "Reservation," as used in § 4 (e), is defined by § 3 (2), which provides:

> " 'reservations' means national forests, *tribal lands embraced within Indian reservations,* military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks . . . ." (Emphasis supplied.)

The phrase "tribal lands embraced within Indian reservations" surely includes these Tuscarora lands. They are tribal lands. They are embraced within the Tuscarora Indian Nation's reservation. The lands have been called a reservation for more than 150 years. They have been so described in treaties, Acts of Congress, court decisions, Indian agency reports, books, articles,

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[4] Section 3, 16 U. S. C. § 796, is the general definitions section of the Federal Power Act, and was first enacted in the Federal Water Power Act of 1920, 41 Stat. 1063. Section 3 (2) defines the term "reservations."

and maps. In fact, so far as I can ascertain, they have never been called anything else, anywhere or at any time—until today. Even the Court of Appeals and the Federal Power Commission, and the briefs and record in this Court, quite naturally refer to this 10-square-mile tract of land as an Indian reservation. The Court itself seems to accept the fact that the Tuscarora Nation lives on a reservation according to (in its words) the "generally accepted standards and common understanding" of that term.

The Court, however, decides that in the Federal Power Act Congress departed from the meaning universally given the phrase "tribal lands embraced within Indian reservations" and defined the phrase, the Court says, "artificially." The Court believes that the words "other lands . . . owned by the United States," which follow, were intended by Congress to limit the phrase to include only those reservations to which the United States has technical legal title. By the Court's "artificial" interpretation, the phrase turns out to mean "tribal lands embraced within Indian reservations—except when 'the lands involved are owned in fee simple by the [Indians].' " [5]

Creating such a wholly artificial and limited definition, so new and disruptive, imposes a heavy burden of justification upon the one who asserts it. We are told that many tribes own their reservation lands. The well-known Pueblos of New Mexico own some 700,000 acres of land in fee. All such reservation lands are put in jeopardy by the Court's strained interpretation. The Court suggests no plausible reason, or any reason at all for that matter, why Congress should or would have sought artificially to place those Indians who hold legal title to their reserva-

[5] The Court's opinion states: "Inasmuch as the lands involved are owned in fee simple by the Tuscarora Indian Nation . . . we hold that they are not within a 'reservation' . . . ."

tion lands in such a less-favored position.[6] The fact that the Tuscarora Nation holds technical legal title is fortuitous and an accidental circumstance probably attributable to the Indian land policy prevailing at the early date this reservation was established. Their lands, like all other Indian tribal lands, can be sold, leased or subjected to easements only with the consent of the United States Government. Congress and government agencies have always treated the Tuscarora Reservation the same as all others,[7] and there is no reason even to suspect that Congress wanted to treat it differently when it passed the Federal Power Act.

It is necessary to add no more than a word about the legislative history of this section which the Court relies on. The Court points out that the House version of the 1920 Federal Water Power Act (now called the Federal Power Act) defined "reservations" as meaning only "lands and interests in lands owned by the United States." In this definition of "reservations" the Senate inserted new words which included the present phrase "tribal lands embraced within Indian reservations." If the only

[6] In *United States* v. *Candelaria*, 271 U. S. 432, 440, and *United States* v. *Sandoval*, 231 U. S. 28, 39, this Court has held that the Pueblos' fee simple ownership of their lands has no effect whatsoever on the United States' rights and responsibilities towards these Indians and their lands. See *The New York Indians*, 5 Wall. 761, 767, for a similar holding as to Seneca Indian lands in New York governed by the same treaty under which the Tuscaroras assert their rights in this case. And see also *United States* v. *Hellard*, 322 U. S. 363, 366 ("The governmental interest . . . is as clear as it would be if the fee were in the United States"); *Minnesota* v. *United States*, 305 U. S. 382; *Heckman* v. *United States*, 224 U. S. 413.

[7] See, *e. g.*, Report of the Commissioner of Indian Affairs, H. R. Exec. Doc. No. 1, Pt. 5, Vol. I, 45th Cong., 2d Sess. 397, 558–564 (1877). See also 64 Stat. 845, 25 U. S. C. § 233, which specifically subjects all New York tribes to Rev. Stat. § 2116 (1875), 25 U. S. C. § 177, which bans alienation of their lands without the consent of Congress. And see generally notes 6, *supra*, 9, 11, 16, 17, 20, *infra*.

Indian lands Congress sought to cover by this section were those to which the United States had title, the Senate addition served no purpose. For the House bill covered all "lands . . . owned by the United States." The only reason for the Senate additions, it seems to me, was to cover lands, like those of the Tuscarora Nation here, title to which was *not* in the United States Government.

The Court also undertakes to support its "artificial" definition of "tribal lands embraced within Indian reservations" by saying that the Congress knew, by a prior decision of this Court, that it was acting under Art. IV, § 3, cl. 2, of the Constitution, which gives Congress power, as the Court says, "to deal only with 'the Territory or other Property belonging to the United States.' " In the first place I do not understand how the Court can say with such assurance that the Congress was acting only under that clause, as there is no evidence whatsoever that Congress expressed itself on this matter. Moreover, it seems far more likely to me that in this phrase regulating Indian tribes Congress was acting under Art. I, § 8, cl. 3, which empowers Congress "To regulate Commerce with . . . the Indian Tribes."

Even accepting for a moment the Court's "artificial" definition, I think the United States owns a sufficient "interest" in these Tuscarora homelands to make them a "reservation" within the meaning of the Act. Section 3 (2) does not merely require a finding in order to take "tribal lands embraced within Indian reservations"; the same finding is required in order to take "other . . . interests in lands owned by the United States" whether tribal or not. Or, again accepting the Court's conception, if the phrase "tribal lands embraced within Indian reservations" must be modified by the words which follow, "lands . . . owned by the United States," it must also be modified by the words "interests in lands owned by the United States," which also follow. Read this way, the

section defines "reservations" as tribal lands in which the United States owns "interests." Thus again a finding under § 4 (e) is required even under the Court's own technical approach if the United States owns "interests" in the lands. I think it does.

Certainly the words Congress used, "interests in lands," are not surplusage; they have some meaning and were intended to accomplish some purpose of their own. The United States undoubtedly controls (has "interests in") many lands in this country that it does not own in fee simple. This is surely true as to all Indian tribal lands, even though the Indians own the fee simple title.[8] Such lands cannot be sold or leased without the consent of the United States Government. The Secretary of the Interior took this position about this very reservation in 1912 when the Tuscaroras desired to lease a part of their lands to private individuals for limestone quarrying.[9] And, of course, the long-accepted concept of a guardian-ward relationship between the United States and its Indians, with all the requirements of fair dealing and protection that this involves, means that the Indians are not free to treat their lands as wholly their own.[10] Anyone doubting the

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[8] The Court of Appeals held the United States had an adequate § 3 (2) "interest in" the Tuscarora Reservation to require a § 4 (e) finding. 105 U. S. App. D. C. 146, 150, 265 F. 2d 338, 342. See notes 6, *supra*, and 16, *infra*.

[9] See 51 Cong. Rec. 11659–11660, 14561–14562. And see note 16, *infra*.

[10] See, *e. g.*, *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641, 657; *Elk* v. *Wilkins*, 112 U. S. 94, 99; *Ex parte Crow Dog*, 109 U. S. 556, 569; *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17. See also *United States* v. *Candelaria*, 271 U. S. 432, 442, where this Court pointed out that the same concept had applied under Spanish and Mexican law. And see also *United States* v. *Kagama*, 118 U. S. 375, 384 ("duty of protection"), and Chief Justice Marshall's leading opinion in *Johnson* v. *M'Intosh*, 8 Wheat. 543, 591 ("Indians [are] to be protected . . . in the possession of their lands").

extent of ownership interest in these lands by the United States would have that doubt rapidly removed should he take a deed from the Tuscarora Nation without the consent of the Government.[11] I cannot agree, therefore, that this all but technical fee ownership which the United States has in these lands is inadequate to constitute the kind of "interests in lands owned by the United States" which requires a § 4 (e) finding before condemnation.

After the Court concludes that because of its interpretation of the definition of "reservations" in § 3 (2) a finding is not required by § 4 (e) to take the Tuscarora lands, it goes on to find the necessary congressional authorization to take these lands in the general condemnation provisions of § 21. 16 U. S. C. § 814. I believe that this is an incorrect interpretation of the general power to condemn under § 21, both because Congress specifically provided for the taking of all Indian reservation lands it wanted taken in other sections of the same Act, and because a taking under § 21 is contrary to the manner in which Congress has traditionally gone about the taking of Indian lands—such as Congress here carefully prescribed in § 4 (e). Congress has been consistent in generally exercising this power to take Indian lands only in accord with prior treaties, only when the Indians themselves consent to be moved, and only by Acts which either specifically refer to Indians or by their terms must include Indian lands. None of these conditions is satisfied here if § 21 is to be relied upon. The specific and detailed provisions of § 10 (e), 16 U. S. C. § 803 (e), upon which the Court relies, only emphasize to me the kind of care

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[11] In *United States* v. *Candelaria*, 271 U. S. 432, for example, this Court held that the United States could set aside a deed from the Pueblos of lands to which the Indians had fee simple title, even though the issue in the case had been settled by otherwise applicable principles of *res judicata* in prior litigation to which the Indians, but not the United States, had been a party. See note 9, *supra*.

Congress always takes to protect the just claims of Indians to reservations like this one.

The cases which the Court cites in its opinion do not justify the broad meaning read into § 21. Many of those cases deal with taxation—federal and state. The fact that Indians are sometimes taxed like other citizens does not even remotely indicate that Congress has weakened in any way its policy to preserve "tribal lands embraced within Indian reservations." Moreover, cases dealing with individuals who are not Indians are not applicable to tribal reservations. For example, *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575, cited by the Court, did not involve tribal lands. That case only held that a State may tax the production of an oil company even though it was derived from oil company lands leased from an Indian. The owner there was an individual Indian, not a tribe, and the lands were not and never had been a part of an Indian reservation, but rather had been purchased for this single Indian with the royalties he obtained from his own original restricted allotted lands. In *Henkel* v. *United States*, 237 U. S. 43, which involved the taking of Indian lands for the vast western reclamation project, the Court not only found that it had been "well known to Congress" that Indian lands would have to be taken, 237 U. S., at 50, but the treaty with the Indians involved in that case contained a specific consent by the Indians to such a taking. 29 Stat. 356, quoted 237 U. S., at 48–49. There was no provision even resembling this in the Treaty of 1794 with the Tuscaroras. Other cases relied on by the Court, such as *Spalding* v. *Chandler*, 160 U. S. 394, and *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641, all involved statutes that made it clear that Congress was well aware it was authorizing the taking of Indians' lands—unlike the history of § 21 of the Federal Power Act and the 1957 Niagara Power Act, 71 Stat. 401, 16 U. S. C. §§ 836–836a, involved here.

All that I have said so far relates to what the Court calls the "plain words" of the statute. I interpret these "plain words" differently than the Court. But there are other more fundamental and decisive reasons why I disagree with the Court's interpretation of the Federal Power Act as it relates to Indians. The provisions in § 4 (e) which protect Indian reservations against destruction by condemnation cannot be properly construed unless considered as a part of a body of Indian laws built up throughout this Nation's history, and extending back even to the Articles of Confederation. It is necessary to summarize briefly a part of that history.

The experience of the Tuscarora Nation illustrates this history as well as that of any Indian tribe.[12] When this country was discovered the Tuscaroras lived and owned their homelands in the area that later became North Carolina. Early settlers wanted their lands. The Tuscaroras did not want to give them up. Numerous conflicts arose because of this clash of desires. Finally, about 1710, there was a war between the Tuscaroras and the colonists in North and South Carolina. The Indians were routed. A majority of their warriors were killed. Hundreds of their men, women and children were captured and sold into slavery. Nearly all of the remainder

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[12] For general discussions of the Tuscaroras' history see Hodge (editor), Handbook of American Indians (1910), Pt. 2, 842–853, Smithsonian Institution Bureau of American Ethnology, Bulletin 30, H. R. Doc. No. 926, Part 2, 59th Cong., 1st Sess.; Cohen, Handbook of Federal Indian Law (1941), 423; Morgan, League of the Iroquois (1904), I, 23, 42, 93, II, 77, 187, 305; Cusick, Ancient History of the Six Nations (1848), 31–35; H. R. Doc. No. 1590, 63d Cong., 3d Sess. 7, 11–15 (1915); H. R. Exec. Doc. No. 1, Pt. 5, Vol. I, 45th Cong., 2d Sess. 562–563 (1877). And see statements in *New York Indians* v. *United States*, 30 Ct. Cl. 413 (1895); *Tuscarora Nation of Indians* v. *Power Authority of New York*, 164 F. Supp. 107 (D. C. W. D. N. Y. 1958); *People ex rel. Cusick* v. *Daly*, 212 N. Y. 183, 190, 105 N. E. 1048, 1050 (1914).

of the tribe fled. They found a home in distant New York with the Iroquois Confederation of Nations. With their acceptance into the Confederation about 1720 it became known as the Six Nations. Historical accounts indicate that about 1780 those Tuscaroras who had supported America in the Revolution were compelled to leave their first residence in New York because of the hostility of Indians who had fought with the British against the Colonies.[13] They migrated to the Village of Lewiston, New York, near Niagara Falls and settled in that area as their new home. They have remained there ever since—nearly 180 years. When their legal right to this land came into question about 1800 the Seneca Indians and the Holland Land Company both "thought their claim so just" [14] that they gave the Tuscarora Nation deeds to three square miles of the area they had been occupying for about 20 years. With the assistance of Presidents Washington and Jefferson and the Congress, the Tuscaroras were able, through the Secretary of War, to sell their vast North Carolina lands for $15,000. With this money, held by the Secretary of War as trustee, additional lands adjoining those received from the Seneca Indians and the Holland Land Company were obtained for the Tuscarora Nation and the title held in trust by the Secretary of War from 1804 to 1809. The Secretary supervised the payments to the Holland Land Company, from which the additional 4,329 acres were obtained, and when payments were completed he conveyed these lands to the Tuscarora Nation.[15] The 1,383 acres of the Tusca-

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[13] See Handbook of American Indians, *op. cit., supra,* note 12, at 848; Wilson, Apologies to the Iroquois (1960), 135.

[14] Letter from Theophile Cazenove to Joseph Ellicott, May 10, 1798, 1 Bingham (editor), Holland Land Company's Papers: Reports of Joseph Ellicott (Buffalo Hist. Soc. Pub. Vol. 32, 1937) 21, 23.

[15] In addition to the general histories cited, note 12, *supra,* this particular transaction is described in various letters and speeches

rora Reservation involved today is a part of this purchase. Despite all this and the Government's continuing guardianship over these Indians and their lands throughout the years the Court attempts to justify this taking on the single ground that the Indians, not the United States Government, now own the fee simple title to this property.

In 1838 the Government made a treaty with the Tuscaroras under which they were to be removed to other parts of the United States.[16] The removal was to be carried

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of the Tuscaroras and the Secretary of War. See Letters Sent by the Secretary of War Relating to Indian Affairs (National Archives, Record Group 75, Interior Branch), Vol. A, 18–19, 22–23, 113–114, 117–119, 147–148, 402, 425–426, 438–439, Vol. B, 29, 274, 421; 6 Buffalo Hist. Soc. Pub. 221; and letter from Erastus Granger to Secretary of War Henry Dearborn, July 20, 1804, in Buffalo Hist. Soc. manuscript files. The deeds are recorded in the Niagara County Clerk's Office, Lockport, New York, Nov. 21, 1804, Liber B, pp. 2–7; Jan. 2, 1809, Liber A, p. 5. "[I]n 1804 Congress authorized the Secretary of War to purchase additional land for these Indians." From a Department of Interior letter, H. R. Doc. No. 1590, 63d Cong., 3d Sess. 7. And see the Court's note 10, and *Fellows* v. *Blacksmith*, 19 How. 366.

[16] Treaty of January 15, 1838, 7 Stat. 550, 554 (Article 14, "Special Provisions for the Tuscaroras").

The interest of the government in Indian lands was a part of the law of Spain, Mexico, Great Britain and other European powers during pre-Colonial days. *United States* v. *Candelaria*, 271 U. S. 432, 442; *United States* v. *Kagama*, 118 U. S. 375, 381; *Worcester* v. *Georgia*, 6 Pet. 515, 551–552; *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17–18. The original Articles of Confederation provided for congressional control of Indian affairs in Article 9. A similar provision is in the Commerce Clause of the present Constitution. One of the first Acts of the new Congress was the so-called Non-Intercourse Act of July 22, 1790, 1 Stat. 137, which provided, in § 4, "That no sale of lands made by any Indians . . . shall be valid . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." The similar provision is presently found in 25 U. S. C. § 177, as modified by Rev. Stat. § 2079, 25 U. S. C. § 71.

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out under the authority of a Congressional Act of 1830, 4 Stat. 411, which provided a program for removing the Indians from the Eastern United States to the West. Section 3 of that Act provided authority "for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guaranty to them, and their heirs or successors, the country so exchanged with them . . . ." The same Act also provided "That nothing in this act contained shall be construed as authorizing or directing the violation of any existing treaty between the United States and any of the Indian tribes." *Id.*, § 7.

The Tuscarora Nation then had such a treaty with the United States, which had been in existence since 1794 and is still recognized by Congress today.[17] The treaty

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[17] Treaty of November 11, 1794, 7 Stat. 44. Article VI of that Treaty provides:

"[B]ecause the United States desire, with humanity and kindness, to contribute to their comfortable support . . . the United States will add the sum of three thousand dollars to the one thousand five hundred dollars, heretofore allowed them by an article ratified by the President [April 23, 1792]; making in the whole, four thousand five hundred dollars; which shall be expended yearly forever, in purchasing cloathing, [etc.]. . . ."

Every Congress until the 81st indicated that their $4,500 annual appropriation rested upon "article 6, treaty of November 11, 1794." *E. g.*, 62 Stat. 1120, 80th Cong., 2d Sess. Subsequent Congresses simply appropriated a total amount for Indian treaty obligations including "treaties with Senecas and Six Nations of New York . . . ." *E. g.*, 63 Stat. 774, 81st Cong., 1st Sess. In 1951 the 82d Cong., 1st Sess., appropriated simply "such amounts as may be necessary after June 30, 1951" for this purpose. 65 Stat. 254. At the hearings it was explained that this provision "would have the effect of being permanent law insofar as making the funds available without having to be included in each annual appropriation act. . . . [I]t is a treaty obligation and has always been paid by the Government in full. . . . These treaties have been in existence for many, many years." Director D. Otis Beasley, Division of Budget and Finance, Department

was made with all the Six Nations, at a time when the Tuscarora Nation had been a member for over 70 years, and one of their representatives signed the treaty.[18] In Article III of the Treaty the United States Government made this solemn promise:

> "Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase."

This article of the 1794 Treaty substantially repeated the promise given the Tuscaroras in the prior 1784 Treaty, 7 Stat. 15, made before our Constitution was adopted, that "The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled."

Of course it is true that in 1794, when the Treaty was signed, the Tuscarora Nation did not yet have the technical legal title to that part of the reservation which the Government was later able to obtain for it. But the solemn pledge of the United States to its wards is not to be construed like a money-lender's mortgage. Up to this

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of the Interior, Hearings on Interior Department Appropriations for 1952 before the Subcommittee on Interior Department of the House Committee on Appropriations, 82d Cong., 1st Sess., Pt. 2, 1747, 1764.

[18] "Kanatsoyh, alias Nicholas Kusik," signed the 1794 Treaty as a Tuscarora, but is not so identified there. However, he also signed the Treaties of December 2, 1794, 7 Stat. 47, and January 15, 1838, 7 Stat. 550, for the Tuscarora Nation and is listed there as a "Tuscarora." It has never even been hinted, until the Court's note 18 today, that the Tuscarora Nation is for some reason not included in this November 11, 1794, Six Nations' Treaty.

time it has always been the established rule that this Court would give treaties with the Indians an enlarged interpretation; one that would assure them beyond all doubt that this Government does not engage in sharp practices with its wards.[19] This very principle of interpretation was applied in the case of *The New York Indians,* 5 Wall. 761, 768, where the Court said, about *this* treaty:

> "It has already been shown that the United States have acknowledged the reservations to be the property of the Seneca nation—that they will never claim them nor disturb this nation in their free use and enjoyment, and that they shall remain theirs until they choose to sell them. These are the guarantees given by the United States, and which her faith is pledged to uphold."

After the Treaty of 1838 was signed, in which the Tuscaroras agreed to go west, they decided not to do so, and the Government respected their objections and left them with their land. They have, since that time, held it as other Indians have throughout the Nation. This has been in accord with the settled general policy to preserve such reservations against any kind of taking,

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[19] *The Kansas Indians,* 5 Wall. 737, 760 ("enlarged rules of construction are adopted in reference to Indian treaties"); *Worcester* v. *Georgia,* 6 Pet. 515, 582 ("The language used in treaties with the Indians should never be construed to their prejudice. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction") (concurring opinion); *Tulee* v. *Washington,* 315 U. S. 681, 684–685 ("in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people"). And see *Spalding* v. *Chandler,* 160 U. S. 394, 405; *Elk* v. *Wilkins,* 112 U. S. 94, 100; *Ex parte Crow Dog,* 109 U. S. 556, 572; *United States* v. *Rogers,* 4 How. 567, 572.

whether by private citizens or government, that might result in depriving Indian tribes of their homelands against their will.[20] President Jackson, in 1835, explained the purpose of the removal and reservation program as

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[20] The origins of this policy extend into pre-Colonial British history. As Chief Justice Marshall said in *Worcester* v. *Georgia*, 6 Pet. 515, 547, in speaking of the Indian land policy,

"The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them."

Chief Justice Marshall quoted at the same place similar language from a speech made to the American Indians by the British Superintendent of Indian affairs in 1763. This principle has been consistently recognized by this Government and this Court. *Spalding* v. *Chandler*, 160 U. S. 394, 403; *United States* v. *Forty-three Gallons of Whiskey*, 93 U. S. 188, 197; *The New York Indians*, 5 Wall. 761, 768; *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17; *Johnson* v. *M'Intosh*, 8 Wheat. 543. And see 48 Stat. 987, 25 U. S. C. § 476; 25 U. S. C. §§ 311–328 and 25 CFR § 161.3 (a).

The age and scope of this doctrine of guardianship and fairness to the Indians is well illustrated in a statement made by President Washington, December 29, 1790, responding to an address by the chiefs and councilors of the Seneca Nation:

"I am not uninformed, that the Six Nations have been led into some difficulties, with respect to the sale of their lands, since the peace. But I must inform you that these evils arose before the present Government of the United States was established, when the separate States, and individuals under their authority, undertook to treat with the Indian tribes respecting the sale of their lands. But the case is now entirely altered; the General Government, only, has the power to treat with the Indian nations, and any treaty formed, and held without its authority, will not be binding.

"Here, then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights." 4 American State Papers (Indian Affairs, Vol. I, 1832) 142; 31 Washington, Writings (United States George Washington Bicentennial Comm'n ed. 1939) 179, 180.

meaning that, "The pledge of the United States has been given by Congress that the country destined for the residence of this people shall be forever 'secured and guaranteed to them.' " [21] This policy was so well settled that when the Missouri compromise bill was being discussed in Congress in 1854 Texas Senator Sam Houston used this picturesque language to describe the Government's promise to the Indians:

> "As long as water flows, or grass grows upon the earth, or the sun rises to show your pathway, or you kindle your camp fires, so long shall you be protected by this Government, and never again removed from your present habitations." [22]

It was to carry out these sacred promises made to protect the security of Indian reservations that Congress adopted § 4 (e) which forbids the taking of an Indian reservation for a power project if it will "interfere . . . with the purpose for which such reservation was created or acquired . . . ." But no such finding was made or could be made here.

There can be no doubt as to the importance of this power project. It will be one of the largest in this country and probably will have cost over $700,000,000 when it is completed. It is true that it will undoubtedly cost more to build a proper reservoir without the Tuscarora lands, and that there has already been some delay by reason of this controversy. The use of lands other than those of the tribe will cause the abandonment of more homes and the removal of more people. If the decision in this case depended exclusively upon cost and inconvenience, the Authority undoubtedly would have

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[21] Seventh Annual Message, Dec. 7, 1835, 3 Richardson, Messages and Papers of the Presidents 1789–1897, 147, 172.

[22] Cong. Globe, 33d Cong., 1st Sess., App. 202. See 1 Morison and Commager, The Growth of the American Republic (1950), 621.

been justified in using the Tuscarora lands. But the Federal Power Act requires far more than that to justify breaking up this Indian reservation.

These Indians have a way of life which this Government has seen fit to protect, if not actually to encourage. Cogent arguments can be made that it would be better for all concerned if Indians were to abandon their old customs and habits, and become incorporated in the communities where they reside. The fact remains, however, that they have *not* done this and that they have continued their tribal life with trust in a promise of security from this Government.

Of course, Congress has power to change this traditional policy when it sees fit. But when such changes have been made Congress has ordinarily been scrupulously careful to see that new conditions leave the Indians satisfied. Until Congress has a chance to express itself far more clearly than it has here the Tuscaroras are entitled to keep their reservation. It would be far better to let the Power Authority present the matter to Congress and request its consent to take these lands. It is not too late for it to do so now. If, as has been argued here, Congress has already impliedly authorized the taking, there can be no reason why it would not pass a measure at once confirming its authorization. It has been known to pass a Joint Resolution in one day where this Court interpreted an Act in a way it did not like. See *Commissioner* v. *Estate of Church,* 335 U. S. 632, 639–640. Such action would simply put this question of authorization back into the hands of the Legislative Department of the Government where the Constitution wisely reposed it.[23]

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[23] See, *e. g., United States* v. *Hellard,* 322 U. S. 363, 367 ("the power of Congress over Indian affairs is plenary"); *United States* v. *Sandoval,* 231 U. S. 28, 45–46; *Tiger* v. *Western Investment Co.,* 221 U. S. 286, 315 ("It is for that body [Congress], and not the courts"); *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 565 ("Plenary authority over

It may be hard for us to understand why these Indians cling so tenaciously to their lands and traditional tribal way of life.[24] The record does not leave the impression that the lands of their reservation are the most fertile, the landscape the most beautiful or their homes the most splendid specimens of architecture. But this is their home—their ancestral home. There, they, their children, and their forebears were born. They, too, have their memories and their loves. Some things are worth more than money and the costs of a new enterprise.

There may be instances in which Congress has broken faith with the Indians, although examples of such action have not been pointed out to us. Whether it has done so before now or not, however, I am not convinced that it has done so here. I regret that this Court is to be the governmental agency that breaks faith with this dependent people. Great nations, like great men, should keep their word.

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the tribal relations of the Indians has been exercised by Congress from the beginning . . . not . . . the judicial department of the government"); *United States* v. *Rogers*, 4 How. 567, 572.

[24] "As we understand the position of the tribe, they do not complain so much of a possible lease or license for the use of the lands as they complain of a possible permanent loss of part of their homelands." Letter from Under Secretary of the Interior Bennett to Federal Power Commission Chairman Kuykendall, December 19, 1958, relating to the taking of these Tuscarora lands for the Niagara Power Project.

SUBLETT *v.* ADAMS, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

No. 406, Misc.—Decided March 7, 1960.

Petitioner applied to a State Supreme Court for writ of habeas corpus, charging that his confinement was in violation of the Due Process Clause of the Fourteenth Amendment. That Court refused the writ without either a hearing or a response from the State. *Held:* The facts alleged entitle petitioner to a hearing under *Herman* v. *Claudy*, 350 U. S. 116. Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

W. W. Barron, Attorney General of West Virginia, and *Fred H. Caplan,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion to proceed *in forma pauperis* and the petition for writ of certiorari are granted. Petitioner filed a petition for a writ of habeas corpus in the Supreme Court of Appeals of West Virginia. Petitioner charged that he was being held in prison without lawful authority and in violation of due process of law under the Fourteenth Amendment. The West Virginia Supreme Court of Appeals refused the writ without either a hearing or a response from the State.

We hold that the facts alleged are such as to entitle petitioner to a hearing under *Herman* v. *Claudy,* 350 U. S. 116. The judgment is vacated and the case remanded to the Supreme Court of Appeals of West Virginia for proceedings not inconsistent with this opinion.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

CORSO *v.* SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, EXECUTOR.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 652.—Decided March 7, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 171 Cal. App. 2d 816, 342 P. 2d 56.

Appellant *pro se.*

Henry F. Walker for appellee.

PER CURIAM.

The motion to dismiss is 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.

FLORA *v.* UNITED STATES.

ON REHEARING.

No. 492, October Term, 1957. Argued May 20, 1958.—Decided June 16, 1958.—Rehearing granted June 22, 1959.—Reargued November 12, 1959.—Decided March 21, 1960.

Under 28 U. S. C. § 1346 (a)(1), a Federal District Court does not have jurisdiction of an action by a taxpayer for refund of a part payment made by him on an assessment for an alleged deficiency in his income tax. The taxpayer must pay the full amount of the assessment before he may challenge its validity in an action under § 1346 (a)(1). *Flora* v. *United States*, 357 U. S. 63, reaffirmed. Pp. 146–177.

(a) The language of § 1346 (a)(1) can more readily be construed to require payment of the full tax before suit than to permit suit for recovery of a part payment. Pp. 148–151.

(b) The legislative history of § 1346 (a)(1) is barren of any clue to the congressional intent on this issue; but that section is a jurisdictional provision which is a keystone in a carefully articulated and quite complicated structure of tax laws; since enactment of its precursor in 1921 Congress has several times acted upon the assumption that § 1346 (a)(1) requires full payment before suit; and any evidence of a contrary intent is too weak and insubstantial to justify destroying the existing harmony of the tax statutes. Pp. 151–158.

(c) In establishing the Board of Tax Appeals (now the Tax Court), Congress acted upon the assumption that full payment of the tax assessed was a condition precedent for bringing suit for refund in a District Court, and it chose to establish the Board as a different forum where the validity of an assessment could be litigated without prior payment in full. Pp. 158–163.

(d) To permit such a suit in a District Court would be inconsistent with the purpose of § 405 of the Revenue Act of 1935, which amended the Declaratory Judgment Act so as to except disputes "with respect to Federal taxes." Pp. 164–165.

(e) To permit such a suit in a District Court would generate the very problems which Congress believed it had solved by § 7422 (e) of the Internal Revenue Code of 1954. Pp. 165–167.

(f) A different conclusion is not required by the administrative practice prior to 1940 nor by a few inconsequential exceptions to

the otherwise uniform belief prior to 1940 that full payment had to precede suit in a District Court for refund. Pp. 167–175.

(g) Requiring taxpayers to pay assessments in full before suing in a District Court will not necessarily subject them to undue hardships, since they may appeal to the Tax Court without first paying anything. Pp. 175–177.

246 F. 2d 929, affirmed.

Randolph W. Thrower reargued the cause for petitioner. With him on the brief on reargument were *A. G. McClintock, William A. Sutherland* and *George L. Cohen.*

Assistant Attorney General Rice reargued the cause for the United States. With him on the brief on reargument were *Solicitor General Rankin, Harry Baum* and *Marvin W. Weinstein.*

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

The question presented is whether a Federal District Court has jurisdiction under 28 U. S. C. § 1346 (a)(1) of a suit by a taxpayer for the refund of income tax payments which did not discharge the entire amount of his assessment.

This is our second consideration of the case. In the 1957 Term, we decided that full payment of the assessment is a jurisdictional prerequisite to suit, 357 U. S. 63. Subsequently the Court granted a petition for rehearing. 360 U. S. 922. The case has been exhaustively briefed and ably argued. After giving the problem our most careful attention, we have concluded that our original disposition of the case was correct.

Under such circumstances, normally a brief epilogue to the prior opinion would be sufficient to account for our decision. However, because petitioner in reargument has placed somewhat greater emphasis upon certain contentions than he had previously, and because our dissenting colleagues have elaborated upon the reasons for their

disagreement, we deem it advisable to set forth our reasoning in some detail, even though this necessitates repeating much of what we have already said.

The Facts.

The relevant facts are undisputed and uncomplicated. This litigation had its source in a dispute between petitioner and the Commissioner of Internal Revenue concerning the proper characterization of certain losses which petitioner suffered during 1950. Petitioner reported them as ordinary losses, but the Commissioner treated them as capital losses and levied a deficiency assessment in the amount of $28,908.60, including interest. Petitioner paid $5,058.54 and then filed with the Commissioner a claim for refund of that amount. After the claim was disallowed, petitioner sued for refund in a District Court. The Government moved to dismiss, and the judge decided that the petitioner "should not maintain" the action because he had not paid the full amount of the assessment. But since there was a conflict among the Courts of Appeals on this jurisdictional question, and since the Tenth Circuit had not yet passed upon it, the judge believed it desirable to determine the merits of the claim. He thereupon concluded that the losses were capital in nature and entered judgment in favor of the Government. 142 F. Supp. 602. The Court of Appeals for the Tenth Circuit agreed with the district judge upon the jurisdictional issue, and consequently remanded with directions to vacate the judgment and dismiss the complaint. 246 F. 2d 929. We granted certiorari because the Courts of Appeals were in conflict with respect to a question which is of considerable importance in the administration of the tax laws.[1]

[1] The decision of the Court of Appeals in *Flora* conflicted with *Bushmiaer* v. *United States,* 230 F. 2d 146 (C. A. 8th Cir.). Cf. *Coates* v. *United States,* 111 F. 2d 609 (C. A. 2d Cir.); *Sirian Lamp*

The Statute.

The question raised in this case has not only raised a conflict in the federal decisions, but has also in recent years provoked controversy among legal commentators.[2] In view of this divergence of expert opinion, it would be surprising if the words of the statute inexorably dictated but a single reasonable conclusion. Nevertheless, one of the arguments which has been most strenuously urged is that the plain language of the statute precludes, or at the very least strongly militates against, a decision that full payment of the income tax assessment is a jurisdictional condition precedent to maintenance of a refund suit in a District Court. If this were true, presumably we could but recite the statute and enter judgment for petitioner—though we might be pardoned some perplexity as to how such a simple matter could have caused so much confusion. Regrettably, this facile an approach will not serve.

Section 1346 (a)(1) provides that the District Courts shall have jurisdiction, concurrent with the Court of Claims, of

> "(1) Any civil action against the United States for the recovery of *any internal-revenue tax* alleged to have been erroneously or illegally assessed or collected, or *any penalty* claimed to have been collected

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Co. v. *Manning*, 123 F. 2d 776 (C. A. 3d Cir.); *Suhr* v. *United States*, 18 F. 2d 81 (C. A. 3d Cir.), *semble*.

[2] As will appear later, prior to 1940 the general view was that full payment was a jurisdictional prerequisite. But a substantial difference of opinion arose after 1940, when the Court of Appeals for the Second Circuit decided *Coates* v. *United States*, 111 F. 2d 609, against the Government. See Riordan, Must You Pay Full Tax Assessment Before Suing in the District Court? 8 J. Tax. 179; Beaman, When Not to Go to the Tax Court: Advantages and Procedures in Going to the District Court, 7 J. Tax. 356; Rudick and Wender, Federal Income Taxation, 32 N. Y. U. L. Rev. 751, 777–778; Note, 44 Calif. L. Rev. 956; Note, 2 How. L. J. 290.

> without authority or *any sum* alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws . . . ." (Emphasis added.)

It is clear enough that the phrase "any internal-revenue tax" can readily be construed to refer to payment of the entire amount of an assessment. Such an interpretation is suggested by the nature of the income tax, which is "*A* tax . . . imposed for each taxable year," with the "amount of *the* tax" determined in accordance with prescribed schedules.[3] (Emphasis added.) But it is argued that this reading of the statute is foreclosed by the presence in § 1346 (a)(1) of the phrase "any sum." This contention appears to be based upon the notion that "any sum" is a catchall which confers jurisdiction to adjudicate suits for refund of part of a tax. A catchall the phrase surely is; but to say this is not to define what it catches. The sweeping role which petitioner assigns these words is based upon a conjunctive reading of "any internal-revenue tax," "any penalty," and "any sum." But we believe that the statute more readily lends itself to the disjunctive reading which is suggested by the connective "or." That is, "any sum," instead of being related to "any internal-revenue tax" and "any penalty," may refer to amounts which are neither taxes nor penalties. Under this interpretation, the function of the phrase is to permit suit for recovery of items which might not be designated as either "taxes" or "penalties" by Congress or the courts. One obvious example of such a "sum" is interest. And it is significant that many old tax statutes described the amount which was to be assessed under certain circumstances as a "sum" to be added to the tax, simply as a

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[3] See I. R. C. (1954), §§ 1 (a), 1 (b)(1), 68A Stat. 5, 6. The same general pattern has existed for many years. See, *e. g.*, §§ 116, 117, of the Act of June 30, 1864, c. 173, 13 Stat. 281–282.

"sum," as a "percentum," or as "costs." [4] Such a rendition of the statute, which is supported by precedent,[5] frees the phrase "any internal-revenue tax" from the qualifications imposed upon it by petitioner and permits it to be given what we regard as its more natural reading—the full tax. Moreover, this construction, under which each phrase is assigned a distinct meaning, imputes to Congress a surer grammatical touch than does the alternative interpretation, under which the "any sum" phrase completely assimilates the other two. Surely a much clearer statute could have been written to authorize suits for refund of any part of a tax merely by use of the phrase "a tax or any portion thereof," or simply "any sum paid under the internal revenue laws." This Court naturally does not review congressional enactments as a panel of grammarians; but neither do we regard ordinary principles of English prose as irrelevant to a construction of those enactments. Cf. *Commissioner* v. *Acker,* 361 U. S. 87.

We conclude that the language of § 1346 (a)(1) can be more readily construed to require payment of the full tax before suit than to permit suit for recovery of a part

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[4] Revenue Act of 1924, c. 234, § 275 (a), 43 Stat. 298; Revenue Act of 1918, c. 18, § 250 (e), 40 Stat. 1084; Act of June 6, 1872, c. 315, § 21, 17 Stat. 246; Act of June 30, 1864, c. 173, § 119, 13 Stat. 283. See also *Helvering* v. *Mitchell,* 303 U. S. 391, 405.

[5] Lower courts have given this construction to the same three phrases in certain claim-for-refund and limitations provisions in prior tax statutes. *United States* v. *Magoon,* 77 F. 2d 804; *Union Trust Co.* v. *United States,* 5 F. Supp. 259, 261 ("The natural definition of 'tax' comprehends one 'assessment' or one tax in the entire amount of liability"), aff'd, 70 F. 2d 629, 630 ("We agree with the District Court that 'tax,' 'penalty,' and 'sum' refer to distinct categories of illegal collections and 'tax' includes the entire tax liability as assessed by the Commissioner"); *United States* v. *Clarke,* 69 F. 2d 748; *Hills* v. *United States,* 50 F. 2d 302, 55 F. 2d 1001 (Ct. Cl.); cf. *Blair* v. *Birkenstock,* 271 U. S. 348.

payment. But, as we recognized in the prior opinion, the statutory language is not absolutely controlling, and consequently resort must be had to whatever other materials might be relevant.[6]

LEGISLATIVE HISTORY AND HISTORICAL BACKGROUND.

Although frequently the legislative history of a statute is the most fruitful source of instruction as to its proper interpretation, in this case that history is barren of any clue to congressional intent.

The precursor of § 1346 (a)(1) was § 1310 (c) of the Revenue Act of 1921,[7] in which the language with which we are here concerned appeared for the first time in a jurisdictional statute. Section 1310 (c) had an overt purpose unrelated to the question whether full payment of an assessed tax was a jurisdictional prerequisite to a suit for refund. Prior to 1921, tax refund suits against the United States could be maintained in the District Courts under the authority of the Tucker Act, which had been passed in 1887.[8] Where the claim exceeded $10,000, however, such a suit could not be brought, and in such a situation the taxpayer's remedy in District Court was against the Collector.

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[6] In the prior opinion we stated that, were it not for certain countervailing considerations, the statutory language "might . . . be termed a clear authorization" to sue for the refund of part payment of an assessment. 357 U. S., at 65. It is quite obvious that we did not regard the language as clear enough to preclude deciding the case on other grounds. Moreover, it could at that time be assumed that the terms of the statute favored the taxpayer, because eight members of the Court considered the extrinsic evidence alone sufficient to decide the case against him. Although we are still of that opinion, we now state our views with regard to the bare words of the statute because the argument that these words are decisively against the Government has been urged so strenuously.

[7] 42 Stat. 311.

[8] 24 Stat. 505, as amended, 28 U. S. C. §§ 1346, 1491. See *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28.

But because the Collector had to be sued personally, no District Court action was available if he was deceased.[9] The 1921 provision, which was an amendment to the Tucker Act, was explicitly designed to permit taxpayers to sue the United States in the District Courts for sums exceeding $10,000 where the Collector had died.[10]

The ancestry of the language of § 1346 (a)(1) is no more enlightening than is the legislative history of the 1921 provision. This language, which, as we have stated, appeared in substantially its present form in the 1921 amendment, was apparently taken from R. S. § 3226 (1878). But § 3226 was not a jurisdictional statute at all; it simply specified that suits for recovery of taxes, penalties, or sums could not be maintained until after a claim for refund had been submitted to the Commissioner.[11]

Thus there is presented a vexing situation—statutory language which is inconclusive and legislative history which is irrelevant. This, of course, does not necessarily mean that § 1346 (a)(1) expresses no congressional intent with respect to the issue before the Court; but it does make that intent uncommonly difficult to divine.

It is argued, however, that the puzzle may be solved through consideration of the historical basis of a suit to recover a tax illegally assessed. The argument proceeds as follows: A suit to recover taxes could, before the Tucker

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[9] *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1.

[10] See H. R. Conf. Rep. No. 486, 67th Cong., 1st Sess. 57; remarks of Senator Jones, 61 Cong. Rec. 7506–7507. Another amendment was added in 1925 giving the right to bring refund suits against the United States where the Collector was out of office. 43 Stat. 972. And in 1954, both the $10,000 limitation and the limitation with respect to the Collector being dead or out of office were eliminated. 68 Stat. 589.

[11] The text of R. S. § 3226 is set forth in note 16, *infra*, together with a more detailed account of the origin and development of the pertinent statutory language. The successor of R. S. § 3226 is I. R. C. (1954), § 7422 (a), 68A Stat. 876.

Act, be brought only against the Collector. Such a suit was based upon the common-law count of assumpsit for money had and received, and the nature of that count requires the inference that a suit for recovery of part payment of a tax could have been maintained. Neither the Tucker Act nor the 1921 amendment indicates an intent to change the nature of the refund action in any pertinent respect. Consequently, there is no warrant for importing into § 1346 (a)(1) a full-payment requirement.

For reasons which will appear later, we believe that the conclusion would not follow even if the premises were clearly sound. But in addition we have substantial doubt about the validity of the premises. As we have already indicated, the language of the 1921 amendment does in fact tend to indicate a congressional purpose to require full payment as a jurisdictional prerequisite to suit for refund. Moreover, we are not satisfied that the suit against the Collector was identical to the common-law action of assumpsit for money had and received. One difficulty is that, because of the Act of February 26, 1845, c. 22, 5 Stat. 727, which restored the right of action against the Collector after this Court had held that it had been implicitly eliminated by other legislation,[12] the Court no longer regarded the suit as a common-law action, but rather as a statutory remedy which "in its nature [was] a remedy against the Government." *Curtis's Administratrix* v. *Fiedler*, 2 Black 461, 479. On the other hand, it is true that none of the statutes relating to this type of suit clearly indicate a congressional intention to require full payment of the assessed tax before suit.[13] Nevertheless, the opinion of this Court in *Cheatham* v. *United States*, 92 U. S. 85, prevents us from accepting the

[12] See *Cary* v. *Curtis*, 3 How. 236.

[13] *E. g.*, Act of Feb. 26, 1845, c. 22, 5 Stat. 727; Act of Mar. 3, 1863, c. 74, 12 Stat. 729; Act of June 30, 1864, c. 173, § 44, 13 Stat. 239–240.

analogy between the statutory action against the Collector and the common-law count. In this 1875 opinion, the Court described the remedies available to taxpayers as follows:

> "So also, in the internal-revenue department, the statute which we have copied allows appeals from the assessor to the commissioner of internal revenue; and, if dissatisfied with his decision, *on paying the tax* the party can sue the collector; and, if the money was wrongfully exacted, the courts will give him relief by a judgment, which the United States pledges herself to pay.
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> . . . . .
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> ". . . While a free course of remonstrance and appeal is allowed within the departments before the money is finally exacted, the general government has wisely made *the payment of the tax claimed,* whether of customs or of internal revenue, a condition precedent to a resort to the courts by the party against whom the tax is assessed. . . . If the compliance with this condition [that appeal must be made to the Commissioner and suit brought within six months of his decision] requires the party aggrieved to pay the money, he must do it. He cannot, after the decision is rendered against him, protract the time within which he can contest that decision in the courts by his own delay in paying the money. It is essential to the honor and orderly conduct of the government that its taxes should be promptly paid, and drawbacks speedily adjusted; and the rule prescribed in this class of cases is neither arbitrary nor unreasonable. . . .
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> "The objecting party can take his appeal. He can, if the decision is delayed beyond twelve months,

> rest his case on that decision; or he can *pay the amount claimed,* and commence his suit at any time within that period. So, after the decision, he can pay at once, and commence suit within the six months . . . ." 92 U. S., at 88–89. (Emphasis added.)

Reargument has not changed our view that this language reflects an understanding that full payment of the tax was a prerequisite to suit. Of course, as stated in our prior opinion, the *Cheatham* statement is dictum; but we reiterate that it appears to us to be "carefully considered dictum." 357 U. S., at 68. Equally important is the fact that the Court was construing the claim-for-refund statute from which, as amended, the language of § 1346 (a)(1) was presumably taken.[14] Thus it seems that in *Cheatham* the Supreme Court interpreted this language not only to specify which claims for refund must first be presented for administrative reconsideration, but also to constitute an additional qualification upon the statutory right to sue the Collector. It is true that the version of the provision involved in *Cheatham* contained only the phrase "any tax." But the phrases "any penalty" and "any sum" were added well before the decision in *Cheatham;*[15] the history of these amendments makes it quite clear that they were not designed to effect any change relevant to the *Cheatham* rule;[16] language in

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[14] See note 16, *infra.*

[15] *Cheatham* was decided in O. T. 1875, while the phrases in question were added to the statute on June 6, 1872. See note 16, *infra,* for a discussion of the statute involved in *Cheatham* and its amendment.

[16] Section 19 of the Act of July 13, 1866, c. 184, 14 Stat. 152, was involved in *Cheatham.* That section provided:

"SEC. 19. . . . [N]o suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally

opinions of this Court after *Cheatham* is consistent with the *Cheatham* statement; [17] and in any event, as we have indicated, we can see nothing in these additional words which would negate the full-payment requirement.

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assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue . . . ."

The phrases "any penalty" and "any sum" were first introduced into the statute in § 44 of the Act of June 6, 1872, c. 315, 17 Stat. 257–258, which read as follows:

"SEC. 44. That all suits and proceedings for the recovery of *any internal tax* alleged to have been erroneously assessed or collected, *or any penalty* claimed to have been collected without authority, *or for any sum* which it is alleged was excessive, or in any manner wrongfully collected, shall be brought within two years next after the cause of action accrued and not after; and all claims for the refunding of *any internal tax or penalty* shall be presented to the commissioner of internal revenue within two years next after the cause of action accrued and not after . . . ." (Emphasis added.)

A careful reading of this statute discloses the absurd result which would flow from construing the addition of the "any sum" language to affect the full-payment rule, which, under this argument, would be based upon the "any tax" phrase in the 1866 statute. That is, since the "any sum" phrase occurs only in the statute of limitations portion of the 1872 statute, and not in the claim-for-refund provision, a person would be able to bring a suit for part payment without filing a claim for refund.

There were no material changes in R. S. § 3226, which provided:

"SEC. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of . . . Internal Revenue . . . ."

It is no doubt true, as petitioner says, that these various amendments were designed to require submission of all litigable claims to the Commissioner; but, as we have explained, this indicates no more than an intent to cover taxes, penalties, and sums which might, strictly speaking, be neither taxes nor penalties.

[17] *Kings County Savings Institution* v. *Blair*, 116 U. S. 200, 205 (1886) ("No claim for the refunding of taxes can be made according

If this were all the material relevant to a construction of § 1346 (a)(1), determination of the issue at bar would be inordinately difficult. Favoring petitioner would be the theory that, in the early nineteenth century, a suit for recovery of part payment of an assessment could be maintained against the Collector, together with the absence of any conclusive evidence that Congress has ever intended to inaugurate a new rule; favoring respondent would be the *Cheatham* statement and the language of the 1921 statute. There are, however, additional factors which are dispositive.

We are not here concerned with a single sentence in an isolated statute, but rather with a jurisdictional provision which is a keystone in a carefully articulated and quite complicated structure of tax laws. From these related statutes, all of which were passed after 1921, it is apparent that Congress has several times acted upon the assumption that § 1346 (a)(1) requires full payment before suit. Of course, if the clear purpose of Congress at any time had been to permit suit to recover a part payment, this subsequent legislation would have to be disregarded. But, as we have stated, the evidence pertaining to this intent

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to law and the regulations until after the taxes have been paid. . . . [N]o suit can be maintained for taxes illegally collected unless a claim therefor has been made within the time prescribed by the law"); *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 609 (1895) (dissenting opinion) ("The same authorities [including the *Cheatham* case] have established the rule that the proper course, in a case of illegal taxation, is to pay the tax under protest or with notice of suit, and then bring an action against the officer who collected it"); *Bailey* v. *George*, 259 U. S. 16, 20 (1922) ("They might have paid the amount assessed under protest and then brought suit against the Collector . . . ."). This view of *Cheatham* also corresponds to that of the Court of Appeals in this case. 246 F. 2d, at 930. See also *Bushmiaer* v. *United States*, 230 F. 2d 146, 152–155 (dissenting opinion).

is extremely weak, and we are convinced that it is entirely too insubstantial to justify destroying the existing harmony of the tax statutes. The laws which we consider especially pertinent are the statute establishing the Board of Tax Appeals (now the Tax Court), the Declaratory Judgment Act, and § 7422 (e) of the Internal Revenue Code of 1954.

The Board of Tax Appeals.

The Board of Tax Appeals was established by Congress in 1924 to permit taxpayers to secure a determination of tax liability before payment of the deficiency.[18] The Government argues that the Congress which passed this 1924 legislation thought full payment of the tax assessed was a condition for bringing suit in a District Court; that Congress believed this sometimes caused hardship; and that Congress set up the Board to alleviate that hardship. Petitioner denies this, and contends that Congress' sole purpose was to enable taxpayers to prevent the Government from collecting taxes by exercise of its power of distraint.[19]

We believe that the legislative history surrounding both the creation of the Board and the subsequent revisions of the basic statute supports the Government. The House Committee Report, for example, explained the purpose of the bill as follows:

> "The committee recommends the establishment of a Board of Tax Appeals to which a taxpayer may appeal *prior to the payment* of an additional assessment of income, excess-profits, war-profits, or estate taxes. *Although a taxpayer may, after payment of*

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[18] 43 Stat. 336.

[19] I. R. C. (1954), § 6331, 68A Stat. 783. The Government has possessed the power of distraint for almost 170 years. See Act of Mar. 3, 1791, c. 15, § 23, 1 Stat. 204.

> *his tax, bring suit for the recovery thereof* and thus secure a judicial determination on the questions involved, he can not, in view of section 3224 of the Revised Statutes, which prohibits suits to enjoin the collection of taxes, secure such a determination prior to the payment of the tax. The right of appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous and which may have, since its receipt, been either wiped out by subsequent losses, invested in nonliquid assets, or spent, sometimes forces taxpayers into bankruptcy, and often causes great financial hardship and sacrifice. These results are not remedied by permitting the taxpayer *to sue for the recovery of the tax after this payment.* He is entitled to an appeal and to a determination of his liability for the tax prior to its payment." [20] (Emphasis added.)

Moreover, throughout the congressional debates are to be found frequent expressions of the principle that payment of the full tax was a precondition to suit: "pay his tax . . . then . . . file a claim for refund"; "pay the tax and then sue"; "a review in the courts after payment of the tax"; "he may still seek court review, but he must first pay the tax assessed"; "in order to go to court he must pay his assessment"; "he must pay it [his assess-

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[20] H. R. Rep. No. 179, 68th Cong., 1st Sess. 7. The Senate Committee on Finance filed a similar report. S. Rep. No. 398, 68th Cong., 1st Sess. 8.

The reference to R. S. § 3224 in the House Report clearly was meant simply to demonstrate that a determination prior to payment by way of an injunction suit was not possible because of the statutory bar to such a suit. This anti-injunction provision has been law for many decades. See Act of Mar. 2, 1867, c. 169, § 10, 14 Stat. 475. It is now § 7421 of the Internal Revenue Code of 1954, 68A Stat. 876.

ment] before he can have a trial in court"; "pay the taxes adjudicated against him, and then commence a suit in a court"; "pay the tax . . . [t]hen . . . sue to get it back"; "paying his tax and bringing his suit"; "first pay his tax and then sue to get it back"; "take his case to the district court—conditioned, of course, upon his paying the assessment." [21]

Petitioner's argument falls under the weight of this evidence. It is true, of course, that the Board of Tax Appeals procedure has the effect of staying collection,[22] and it may well be that Congress so provided in order to alleviate hardships caused by the long-standing bar against suits to enjoin the collection of taxes. But it is a considerable leap to the further conclusion that amelioration of the hardship of prelitigation payment as a jurisdictional requirement was not another important

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[21] See 65 Cong. Rec. 2621, 2684, 8110; 67 Cong. Rec. 525, 1144, 3529, 3755.

As we have indicated, some of these remarks were made during debates over proposed changes in the Board of Tax Appeals legislation during the middle of the 1920's, but they all reflect Congress' understanding of the pre-1924 procedure and of the changes which were made by establishment of the Board. For example, shortly after the Board legislation was passed, Congress considered and rejected a proposal to make appeal to the Board and then to a Circuit Court of Appeals the taxpayer's sole remedy. In the course of the debate, a number of Senators discussed at length the taxpayer's right to bring a refund action in court. Some of the cited quotations are taken from that debate. The following remark of Senator Fletcher is also illuminating:

"Mr. FLETCHER. . . . I think the most important right that is preserved here . . . is the right to go into the district court by the taxpayer upon the payment of the tax. *I do not think that we ought to allow him to do that unless he does pay the tax; but when he pays the tax his right to go into the district court is preserved.*" 67 Cong. Rec. 3529. (Emphasis added.)

See also the materials quoted in note 24, *infra*.

[22] See I. R. C. (1954), § 6213 (a), 68A Stat. 771. For the pertinent 1924 legislation, see Revenue Act of 1924, c. 234, § 274, 43 Stat. 297.

motivation for Congress' action.[23] To reconcile the legislative history with this conclusion seems to require the presumption that all the Congressmen who spoke of payment of the assessment before suit as a hardship understood—without saying—that suit could be brought for whatever part of the assessment had been paid, but believed that, as a practical matter, hardship would nonetheless arise because the Government would require payment of the balance of the tax by exercising its power of distraint. But if this was in fact the view of these legislators, it is indeed extraordinary that they did not say so.[24]

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[23] In *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 721, this Court expressed the view that the Board "was created by Congress to provide taxpayers an opportunity to secure an independent review . . . in advance of their paying the tax found by the Commissioner to be due. Before the Act of 1924 the taxpayer could only contest the Commissioner's determination of the amount of the tax after its payment."

[24] There are a few interchanges among Senators which might be construed to indicate that they were thinking in terms of preventing distraint, but the same passages demonstrate even more clearly that these Senators also intended to eliminate the necessity of full payment as a prerequisite to suit. For example, the following debate occurred when Senator Reed, who was a member of the Committee on Finance, proposed an amendment which would have permitted a taxpayer to refuse to pay the deficiency even after the Board had ruled against him and which would have required the Government to sue in a District Court.

"Mr. REED of Missouri. . . .

. . . . . .

"The practice, as I understand it, has been to require the taxpayer to pay in the amount of the increased assessment, and then to allow him to get it back if he can. In addition to this, distraints frequently have been issued seizing the property of the citizen . . . .

. . . . . .

"Mr. SWANSON. What are the processes by which a citizen who has overpaid can get back his money under the existing law?

"Mr. REED of Missouri. As I understand it, he pays his tax. Then he makes an application for a return of it. That is heard

Moreover, if Congress' only concern was to prevent distraint, it is somewhat difficult to understand why Congress did not simply authorize injunction suits. It is interesting to note in this connection that bills to permit the same type of prepayment litigation in the District Courts as is

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through the long, troublesome processes which exist . . . . When the Treasury is satisfied . . . the taxpayer can go into court at that time. In the meantime, however, he has had to pay his money.

. . . . . .

"Mr. SWANSON. Does the Senator mean that if there is a dispute, the tax is not assessed permanently against him until the board reaches its final decision?

"Mr. SMOOT. Until the board of appeals finally passes upon it, and after that if he wants to go to court he can do so, but in order to go to court he must pay his assessment.

"Mr. REED of Missouri. He must pay it before he can have a trial in court.

. . . . . .

"Mr. WALSH of Montana. Mr. President, the hardships . . . in connection with the collection of these taxes is a very real one. . . . At least two or three instances have come under my notice, and my assistance has been asked in cases where the assessing officers have . . . assessed against the [taxpayer] delinquent taxes of such an amount that he found it impossible to pay in advance and secure redress through the ordinary proceeding in a court of law, simply because it would bankrupt him to endeavor to raise the money. He was therefore obliged to suffer a distraint. . . .

. . . . . .

". . . After the board of review determines the matter, it seems to me, that is as far as the Government ought to be interrupted in the matter of the collection of its revenues. Then the taxpayer would be obliged to pay the tax and take his ordinary action at law to recover whatever he claims was exacted of him illegally." 65 Cong. Rec. 8109–8114.

A somewhat similar exchange occurred during the 1926 debate over a proposal to prohibit refund suits where an appeal had been taken to the Board.

"Mr. REED of Missouri. . . . Now just one further question:

"Why is it that a taxpayer can not be given his day in court by direct action, without first requiring him to pay the tax that is assessed? I know I shall be met with the statement that it would

possible in the Tax Court have been introduced several times, but none has ever been adopted.[25]

In sum, even assuming that one purpose of Congress in establishing the Board was to permit taxpayers to avoid distraint, it seems evident that another purpose was to furnish a forum where full payment of the assessment would not be a condition precedent to suit. The result is a system in which there is one tribunal for prepayment litigation and another for post-payment litigation, with no room contemplated for a hybrid of the type proposed by petitioner.

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mean interminable delay to the Government; but it frequently happens that the tax that is assessed is ruinous, and that the taxpayer can not raise the money. . . .

. . . . . .

"In my own personal experience I have had two clients who were absolutely ruined by assessments that were unjust and that could not have stood up in a court of justice. . . . [A]nd it was no protection to them to say, 'Pay your taxes and then go into court,' because they did not have the money to pay the taxes and could not raise the money to pay the taxes and be out of the money two or three years.

. . . . . .

". . . I think the bill needs just one more amendment in this particular, and that is a provision that any citizen can go into court without paying any tax and resist the payment. In the meantime I agree that the Government for its own protection ought to be allowed, perhaps, in such a case as that to issue a distraint. But the idea that a man must first pay his money and then sue to get it back is anomaly in the law." 67 Cong. Rec. 3530–3533.

Senator Reed later proposed that the appeal from the Board be to the District Court instead of to the Circuit Court of Appeals, and Senator Wadsworth, a member of the Finance Committee, asked:

"Does the Senator not think that other provision in the bill which permits the taxpayer to take his case to the district court—conditioned, of course, upon his paying the assessment—meets the situation?" 67 Cong. Rec. 3755.

[25] S. 1569, 81st Cong., 1st Sess.; S. 384, 82d Cong., 1st Sess.; H. R. 150 and H. R. 246, 83d Cong., 1st Sess.

THE DECLARATORY JUDGMENT ACT.

The Federal Declaratory Judgment Act of 1934 [26] was amended by § 405 of the Revenue Act of 1935 expressly to except disputes "with respect to Federal taxes." [27] The Senate Report explained the purpose of the amendment as follows:

> "Your committee has added an amendment making it clear that the Federal Declaratory Judgments Act of June 14, 1934, has no application to Federal taxes. The application of the Declaratory Judgments Act to taxes would constitute a *radical departure* from the long-continued policy of Congress (as expressed in Rev. Stat. 3224 and other provisions) with respect to the determination, assessment, and collection of Federal taxes. Your committee believes that the orderly and prompt determination and collection of Federal taxes should not be interfered with by a procedure designed to facilitate the settlement of private controversies, and that existing procedure both in the Board of Tax Appeals and the courts affords ample remedies for the correction of tax errors." [28] (Emphasis added.)

It is clear enough that one "radical departure" which was averted by the amendment was the potential circumvention of the "pay first and litigate later" rule by way of suits for declaratory judgments in tax cases.[29] Peti-

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[26] 48 Stat. 955, as amended, 28 U. S. C. §§ 2201, 2202.

[27] 49 Stat. 1027.

[28] S. Rep. No. 1240, 74th Cong., 1st Sess. 11.

[29] "Should the Declaratory Judgment Act be held to apply to tax cases it will mean a complete reversal of our present scheme of taxation. The principle of 'pay first and litigate later' will be changed to 'litigate first and pay later.' This principle has never before been departed from." Wideman, Application of the Declaratory Judgment Act to Tax Suits, 13 Taxes 539, 540.

tioner would have us give this Court's imprimatur to precisely the same type of "radical departure," since a suit for recovery of but a part of an assessment would determine the legality of the balance by operation of the principle of collateral estoppel. With respect to this unpaid portion, the taxpayer would be securing what is in effect—even though not technically—a declaratory judgment. The frustration of congressional intent which petitioner asks us to endorse could hardly be more glaring, for he has conceded that his argument leads logically to the conclusion that payment of even $1 on a large assessment entitles the taxpayer to sue—a concession amply warranted by the obvious impracticality of any judicially created jurisdictional standard midway between *full* payment and *any* payment.

Section 7422 (e) of the 1954 Code.

One distinct possibility which would emerge from a decision in favor of petitioner would be that a taxpayer might be able to split his cause of action, bringing suit for refund of part of the tax in a Federal District Court and litigating in the Tax Court with respect to the remainder. In such a situation the first decision would, of course, control. Thus if for any reason a litigant would prefer a District Court adjudication,[30] he might sue for a small portion of the tax in that tribunal while at the same time protecting the balance from distraint by invoking the protection of the Tax Court procedure. On the other hand, different questions would arise if this device were not employed. For example, would the Government be required to file a compulsory counterclaim for the unpaid

[30] For some practitioners' views on the desirability of litigating tax cases in Federal District Courts, see Dockery, Refund Suits in District Courts, 31 Taxes 523; Yeatman, Tax Controversies, 10 Tex. B. J. 9.

balance in District Court under Rule 13 of the Federal Rules of Civil Procedure? If so, which party would have the burden of proof? [31]

Section 7422 (e) of the 1954 Internal Revenue Code makes it apparent that Congress has assumed these problems are nonexistent except in the rare case where the taxpayer brings suit in a District Court and the Commissioner then notifies him of an additional deficiency. Under § 7422 (e) such a claimant is given the option of pursuing his suit in the District Court or in the Tax Court, *but he cannot litigate in both.* Moreover, if he decides to remain in the District Court, the Government may—but seemingly is not required to—bring a counterclaim; and if it does, the taxpayer has the burden of proof.[32] If we

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[31] These problems have already occurred to the bar. See Riordan, Must You Pay Full Tax Assessment Before Suing in the District Court? 8 J. Tax. 179, 181.

[32] "§ 7422. CIVIL ACTIONS FOR REFUND.

. . . . . .

"(e) STAY OF PROCEEDINGS.—If the Secretary or his delegate prior to the hearing of a suit brought by a taxpayer in a district court or the Court of Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes) mails to the taxpayer a notice that a deficiency has been determined in respect of the tax which is the subject matter of taxpayer's suit, the proceedings in taxpayer's suit shall be stayed during the period of time in which the taxpayer may file a petition with the Tax Court for a redetermination of the asserted deficiency, and for 60 days thereafter. If the taxpayer files a petition with the Tax Court, the district court or the Court of Claims, as the case may be, shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund. If the taxpayer does not file a petition with the Tax Court for a redetermination of the asserted deficiency, the United States may counterclaim in the taxpayer's suit, or intervene in the event of a suit as described in subsection (c) (relating to suits against officers or employees of the United States), within the period of the stay of proceedings notwithstanding that the time for such pleading may have

were to overturn the assumption upon which Congress has acted, we would generate upon a broad scale the very problems Congress believed it had solved.[33]

These, then, are the basic reasons for our decision, and our views would be unaffected by the constancy or inconstancy of administrative practice. However, because the petition for rehearing in this case focused almost exclusively upon a single clause in the prior opinion—"there does not appear to be a single case before 1940 in which a taxpayer attempted a suit for refund of income taxes without paying the full amount the Government alleged to be due," 357 U. S., at 69—we feel obliged to comment upon the material introduced upon reargument. The

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otherwise expired. The taxpayer shall have the burden of proof with respect to the issues raised by such counterclaim or intervention of the United States except as to the issue of whether the taxpayer has been guilty of fraud with intent to evade tax. This subsection shall not apply to a suit by a taxpayer which, prior to the date of enactment of this title, is commenced, instituted, or pending in a district court or the Court of Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes)." 68A Stat. 877.

The possibility of dual jurisdiction in this type of situation was confirmed by cases such as *Camp* v. *United States,* 44 F. 2d 126, and *Ohio Steel Foundry Co.* v. *United States,* 69 Ct. Cl. 158, 38 F. 2d 144. See H. R. Rep. No. 1337, 83d Cong., 2d Sess. 109, A431; S. Rep. No. 1662, 83d Cong., 2d Sess. 148, 610.

[33] For additional evidence of recent congressional understanding of the jurisdictional requirement of § 1346 (a)(1), see the House Report which explained the 1954 amendment abolishing the $10,000 limitation on tax suits against the United States, 68 Stat. 589. After explaining the taxpayer's right to contest a deficiency in the Tax Court, the report states: "The taxpayer may, however, elect to pay his tax and thereafter bring suit to recover the amount claimed to have been illegally exacted." H. R. Rep. No. 659, 83d Cong., 1st Sess. 2.

reargument has, if anything, strengthened, rather than weakened, the substance of this statement, which was directed to the question whether there has been a consistent understanding of the "pay first and litigate later" principle by the interested government agencies and by the bar.

So far as appears, *Suhr* v. *United States,* 18 F. 2d 81, decided by the Third Circuit in 1927, is the earliest case in which a taxpayer in a refund action sought to contest an assessment without having paid the full amount then due.[34] In holding that the District Court had no jurisdiction of the action, the Court of Appeals said:

> "None of the various tax acts provide for recourse to the courts by a taxpayer until he has failed to get relief from the proper administrative body or has paid all the taxes assessed against him. The payment of a part does not confer jurisdiction upon the courts. . . . There is no provision for refund to the taxpayer of any excess payment of any installment or part of his tax, if the whole tax for the year has not been paid." *Id.,* at 83.

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[34] Petitioner cites two earlier cases in which the Government failed to raise the jurisdictional issue. *Bowers* v. *Kerbaugh-Empire Co.,* 271 U. S. 170 (1926); *Cook* v. *Tait,* 265 U. S. 47 (1924). The Government distinguishes these cases on the ground that, although the total tax for the year had not been paid, the full amount due at the time of suit had been paid. This situation occurred because under § 250 (a) of the Revenue Act of 1921, c. 136, 42 Stat. 264, the tax was paid in four installments, and the plaintiffs in *Cook* and *Bowers* apparently had paid the due installments. While we do not suggest that the statute will support this type of distinction, adoption of it by the Government or by the bar would not in any way impair the substantial consistency of the view that full payment has for many decades been a prerequisite to suit in District Court. An error as to the applicability of a principle to a unique factual situation does not mean that the principle itself has been rejected.

Although the statement by the court might have been dictum,[35] it was in accord with substantially contemporaneous statements by Secretary of the Treasury A. W. Mellon, by Under Secretary of the Treasury Garrard B. Winston, by the first Chairman of the Board of Tax Appeals, Charles D. Hamel, and by legal commentators.[36]

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[35] The ground for the decision may have been that the District Court had no jurisdiction because the taxpayer was contesting the legality of the balance of the assessment before the Board of Tax Appeals.

[36] In welcoming the members of the Board of Tax Appeals on July 16, 1924, Under Secretary Winston described the difficulties which had arisen in the past.

". . . Under the law a tax once assessed had to be paid by the taxpayer and then his remedy was to sue for its recovery. He must first find the cash for a liability for which he may not have provided. . . . The first interest of all of the people is, of course, that the Government continue to function, and to do this it must have the means of prompt collection of the necessary supplies to keep it going, that is, taxes. The method was, therefore, the determination by the Commissioner of the amount of tax due, its collection and suit to recover. . . . [T]he tax as assessed had to be paid and the taxpayer was left to his remedy in the courts. The payment of the tax was often a great hardship on the taxpayer, meaning in general that he had to raise the cash for an unexpected liability which might not be lawfully due." Treas. Dept. Press Release, July 16, 1924. See also remarks by Under Secretary Winston in addressing the Seventeenth Annual Conference of the National Tax Association in September 1924, Proceedings of Seventeenth National Conference 271.

In commenting upon the Board of Tax Appeals legislation, which contemplated leaving the taxpayer to his District Court remedy if the decision of the Board was adverse, Secretary of the Treasury Mellon stated: "The taxpayer, in the event that decision [of the Board] is against him, will have to pay the tax according to the assessment and have recourse to the courts . . . ." 67 Cong. Rec. 552.

On September 17, 1924, the first Chairman of the Board, Charles D. Hamel, read a paper before the Seventeenth Annual Conference

There is strong circumstantial evidence that this view of the jurisdiction of the courts was shared by the bar at least until 1940, when the Second Circuit Court of Appeals rejected the Government's position in *Coates* v. *United States,* 111 F. 2d 609. Out of the many thousands of refund cases litigated in the pre-1940 period—the Govern-

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of the National Tax Association on Taxation which contained the following remark: "Prior to the enactment of the Act of 1924 . . . [i]f the decision on the appeal [to the Commissioner] was in favor of the government, the taxpayer, only after payment of the tax, had the right to protest the correctness of the decision in the courts . . . ." Proceedings 277–278.

One of the clearest statements of the rule by a commentator is to be found in Bickford, Court Procedure in Federal Tax Cases (Rev. ed. 1929) 3, 7–8, 9, 119.

"There are, however, certain other conditions which must be complied with before a suit is maintainable under this section. Briefly stated, these are as follows:

"1. The tax must have been paid.

"2. After payment, the taxpayer must have filed with the Commissioner . . . a sufficient claim for the refund of the taxes sued for.

. . . . . .

"The first requirement is obvious. We have, in the preceding portions of this volume, found that a proceeding commenced in the Board of Tax Appeals is the only exception to the rule that no review by the courts is permissible at common law or under the statutes, until the tax has been paid and the Government assured of its revenue." *Id.*, at 119.

See also Hamel, The United States Board of Tax Appeals (1926), 10; Klein, Federal Income Taxation (1929), 1372, 1642, 1643; Mellon, Taxation: The People's Business (1924), 62–63; Ballantine, Federal Income Tax Procedure, Lectures on Taxation, Columbia University Symposium (1932), 179, 192–193; Caspers, Assessment of Additional Income Taxes for Prior Years, 1 Nat. Income Tax Mag. (Oct. 1923), 12; Graupner, The Operation of the Board of Tax Appeals, 3 Nat. Income Tax Mag. (1925), 295. But see Smith, National Taxes, Their Collection, and Rights and Remedies of the Taxpayer, 8 Geo. L. J. 1, 3 (Apr. 1920).

See also Beaman, When Not to Go to the Tax Court: Advantages and Procedures in Going to the District Court, 7 J. Tax. (1957), 356

ment reports that there have been approximately 40,000 such suits in the past 40 years—exhaustive research has uncovered only nine suits in which the issue was present, in six of which the Government contested jurisdiction on part-payment grounds.[37] The Government's failure to

("[T]he *Bushmiaer* case [permitting suit for part of the tax] . . . runs counter to a long tradition of administrative practice and interpretation . . . ."); Rudick and Wender, Federal Income Taxation, 32 N. Y. U. L. Rev. (1957), 751, 777–778 ("It is generally said that a taxpayer has two remedies if he disagrees with a determination of the Commissioner. He may pay the deficiency, file a claim for refund, and sue for the tax in the district court . . . . Alternatively, the taxpayer may petition the Tax Court for review of a deficiency prior to payment. The recent *Bushmiaer* case is a third alternative. . . . [T]he *Bushmiaer* case conflicts with more than thirty years of experience in the administration and collection of taxes."). (Footnote omitted.)

[37] Petitioner cites a number of cases in support of his argument that neither the bar nor the Government has ever assumed that full payment of the tax is a jurisdictional prerequisite to suit for recovery. The following factors rob these cases of the significance attributed to them by the petitioner:

(a) A number of them, although cited by petitioner in his petition for rehearing, were later conceded by him, after his examination of government files, not to be in point.

(b) A number of the cited cases involved excise taxes. The Government suggests—and we agree—that excise tax deficiencies may be divisible into a tax on each transaction or event, and therefore present an entirely different problem with respect to the full-payment rule.

(c) The cases arising after 1940 are insignificant. Once the Second Circuit Court of Appeals had ruled against the Government in *Coates*, taxpayers would naturally be much more inclined to sue before full payment, and the Government might well decide not to raise the objection in a particular case for reasons relating to litigation strategy.

(d) In some of the cases the only amount remaining unpaid at the time of suit was interest. As we have indicated, the statute lends itself to a construction which would permit suit for the tax after full payment thereof without payment of any part of the interest.

(e) In some of the cases the Government was not legally entitled to collect the unpaid tax at the time of suit, either because the tax

Footnote 37—Continued.

system at the time permitted installment payment (see note 34, *supra*), because the unpaid portion had not yet been assessed, or for some other reason. Although the statute may not support any distinction based on facts of this nature, it is quite understandable that a taxpayer might have predicated a suit upon the theory that the distinction was meaningful and that the Government might not have contested it, whether because it agreed or for tactical reasons.

In the light of these considerations, we regard the following pre-1941 cases as immaterial: *Baldwin* v. *Higgins*, 100 F. 2d 405 (C. A. 2d Cir. 1938) (petitioner concedes); *Sampson* v. *Welch*, 23 F. Supp. 271 (D. C. S. D. Cal. 1938) (same); *Charleston Lumber Co.* v. *United States*, 20 F. Supp. 83 (D. C. S. D. W. Va. 1937) (same); *Sterling* v. *Ham*, 3 F. Supp. 386 (D. C. Me. 1933) (same); *Farmers' Loan & Trust Co.* v. *Bowers*, 15 F. 2d 706 (D. C. S. D. N. Y. 1926), modified, 22 F. 2d 464 (1927), rev'd, 29 F. 2d 14 (C. A. 2d Cir. 1928) (same); *Heinemann Chemical Co.* v. *Heiner*, 36–4 CCH Fed. Tax Serv. ¶ 9302 (D. C. W. D. Pa. 1936), rev'd, 92 F. 2d 344 (C. A. 3d Cir. 1937) (only interest unpaid); *Welch* v. *Hassett*, 15 F. Supp. 692 (D. C. Mass. 1936), rev'd, 90 F. 2d 833 (C. A. 1st Cir. 1937), aff'd, 303 U. S. 303 (1938) (full assessment paid); *Leavitt* v. *Hendricksen*, 37–4 CCH Fed. Tax Serv. ¶ 9312 (D. C. W. D. Wash. 1937) (no unpaid assessment); *Bowers* v. *Kerbaugh-Empire Co.*, 271 U. S. 170 (1926) (all due installments paid); *Cook* v. *Tait*, 265 U. S. 47 (1924) (same).

Four pre-1941 cases remain. Of these, only two are clearly cases in which the jurisdictional issue was present and not raised by the Government. *Tsivoglou* v. *United States*, 31 F. 2d 706 (C. A. 1st Cir. 1929); *Thomas* v. *United States*, 85 Ct. Cl. 313, 18 F. Supp. 942 (1937). *McFadden* v. *United States*, 20 F. Supp. 625 (D. C. E. D. Pa. 1937), is in the "doubtful" category. There the Commissioner had granted the taxpayer an extension of time for payment of 80% of his assessment and the suit was for the remaining 20%, which had been paid. The relevant facts of the last case, *Peerless Paper Box Mfg. Co.* v. *Routzahn*, 22 F. 2d 459 (D. C. N. D. Ohio 1927), are so unclear that the case means nothing. The Government had applied an admitted 1918 overpayment to a 1917 deficiency, but the deficiency was greater than the overpayment. The taxpayer sued to recover this overpayment, and whether there had been full payment at the time of suit depends upon whether the suit is regarded as one for refund of 1917 or 1918 taxes.

Footnote 37—Continued.

Nor can we agree entirely with petitioner's evaluation of a second group of pre-1941 cases—those in which the issue allegedly was present and the Government did raise it but lost. Five of these cases involved primarily the troublesome concurrent jurisdiction problem that arose before passage of § 7422 (e) of the 1954 Code when a taxpayer both appealed to the Tax Court and brought suit in a Federal District Court. *Brampton Woolen Co.* v. *Field,* 55 F. 2d 325 (D. C. N. H. 1931), rev'd, 56 F. 2d 23 (C. A. 1st Cir. 1932), cert. denied, 287 U. S. 608; *Camp* v. *United States,* 44 F. 2d 126 (C. A. 4th Cir. 1930); *Emery* v. *United States,* 27 F. 2d 992 (D. C. W. D. Pa. 1928); *Old Colony R. Co.* v. *United States,* 27 F. 2d 994 (D. C. Mass. 1928); *Ohio Steel Foundry Co.* v. *United States,* 69 Ct. Cl. 158, 38 F. 2d 144 (1930). In all of these cases except *Camp*, it appears that the Government did raise the part-payment question. It is true that the contention did not prevail, but this is not very meaningful. In the first place, this question was quite subordinate to the major issue, concurrent jurisdiction. In the second place, the Government won in *Brampton* on another jurisdictional ground. And finally, in contrast to *Flora,* in both *Camp* and *Ohio Steel Foundry* the full assessment *had* been paid at the time suit was brought; it was only later that an additional deficiency was asserted by the Commissioner.

To these cases should be added *Riverside Hospital* v. *Larson,* 38–4 CCH Fed. Tax Serv. ¶ 9542 (D. C. S. D. Fla. 1938), where the Government raised the full-payment question and won, and *Suhr* v. *United States,* 14 F. 2d 227 (D. C. W. D. Pa. 1926), aff'd, 18 F. 2d 81 (C. A. 3d Cir. 1927), another concurrent jurisdiction case where the Government raised the issue and won, although the grounds for the decision are not entirely clear.

This, then, is how we see the pre-1941 situation: Of 14 cases originally cited as being cases in which the jurisdictional issue was present but not raised by the Government, five have been conceded by petitioner not to be in point; six, and possibly seven, are distinguishable for various reasons; and only two, or possibly three, remain. Of five cases cited as being cases in which the jurisdictional issue was raised by the Government, only one, *Coates* v. *United States,* 111 F. 2d 609 (C. A. 2d Cir. 1940), or at most three, really involved the *Flora* question. When to these are added *Riverside,* where the Government won, *Suhr,* where it may have won, and *Brampton Woolen Co.,* where it won in the Court of Appeals on another jurisdictional ground, the box score is as follows: two or three cases in which the

Footnote 37—Continued.

Government failed to raise the issue; one, or possibly three, cases in which the Government argued the question and lost; one case in which it argued the question and won; one case in which it argued the question and may have won; and one case in which it raised the issue and prevailed on another jurisdictional defense—a total of nine cases at most in which the issue was presented, out of which the Government contested jurisdiction in six. Of course, this calculation may not be precise; but, in view of the many thousands of tax refund suits which have been brought during the decades in question, it is an accurate enough approximation to reflect a general understanding of the jurisdictional significance of "pay first, litigate later."

It would be bootless to consider each of the post-1940 cases cited by petitioner or to list the multitude of cases cited by the Government in which the jurisdictional issue has been raised. As we have stated, we believe these cases have no significance whatsoever. However, perhaps it is worth noting that all but a handful of the cases which petitioner, in the petition for rehearing, asserted to be ones in which the Government failed to raise the jurisdictional issue would be immaterial even if they were pre-*Coates*. Thus, for example, petitioner has conceded error with respect to three cases. *Dickstein* v. *McDonald*, 149 F. Supp. 580 (D. C. M. D. Pa. 1957), aff'd, 255 F. 2d 640 (C. A. 3d Cir. 1958); *O'Connor* v. *United States*, 76 F. Supp. 962 (D. C. S. D. N. Y. 1948); *Terrell* v. *United States*, 64 F. Supp. 418 (D. C. E. D. La. 1946). A number of the cases involved excise taxes. *E. g.*, *Griffiths Dairy* v. *Squire*, 138 F. 2d 758 (C. A. 9th Cir. 1943); *Auricchio* v. *United States*, 49 F. Supp. 184 (D. C. E. D. N. Y. 1943). In some of the cases only interest remained unpaid. *Raymond* v. *United States*, 58–1 U. S. T. C. ¶ 9397 (D. C. E. D. Mich. 1958); *Hogg* v. *Allen*, 105 F. Supp. 12 (D. C. M. D. Ga. 1952). And some of the cases arose in the Third Circuit after a decision adverse to the Government in *Sirian Lamp Co.* v. *Manning*, 123 F. 2d 776 (C. A. 3d Cir. 1941). *Gallagher* v. *Smith*, 223 F. 2d 218 (1955); *Peters* v. *Smith*, 123 F. Supp. 711 (D. C. E. D. Pa. 1954), rev'd, 221 F. 2d 721 (1955). It might be noted also that *Jones* v. *Fox*, 162 F. Supp. 449 (D. C. Md. 1957), cited as a case in which the Government argued the jurisdictional question and lost, was an excise tax case in which the court distinguished our prior decision in *Flora* because of the divisibility of the excise tax. Another such decision during the pre-1941 period was *Friebele* v. *United States*, 20 F. Supp. 492 (D. C. N. J. 1937).

raise the issue in the other three is obviously entirely without significance. Considerations of litigation strategy may have been thought to militate against resting upon such a defense in those cases. Moreover, where only nine lawsuits involving a particular issue arise over a period of many decades, the policy of the Executive Department on that issue can hardly be expected to become familiar to every government attorney. But most important, the number of cases before 1940 in which the issue was present is simply so inconsequential that it reinforces the conclusion of the prior opinion with respect to the uniformity of the pre-1940 belief that full payment had to precede suit.

A word should also be said about the argument that requiring taxpayers to pay the full assessments before bringing suits will subject some of them to great hardship. This contention seems to ignore entirely the right of the taxpayer to appeal the deficiency to the Tax Court without paying a cent.[38] If he permits his time for filing such an appeal to expire, he can hardly complain that he has been unjustly treated, for he is in precisely the same position as any other person who is barred by a statute of limitations. On the other hand, the Government has a substantial interest in protecting the public purse, an interest which would be substantially impaired if a taxpayer could sue in a District Court without paying his tax in full. It is instructive to note that, as of June 30, 1959, tax cases pending in the Tax Court involved $920,046,748, and refund suits in other courts involved $446,673,640.[39]

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[38] Petitioner points out that the Tax Court has no jurisdiction over excise tax cases. See 9 Mertens, Law of Federal Income Taxation (Zimet Rev. 1958), § 50.08. But this fact provides no policy support for his position, since, as we have noted, excise tax assessments may be divisible into a tax on each transaction or event, so that the full-payment rule would probably require no more than payment of a small amount. See note 37, *supra*.

[39] Of this $446,673,640, District Court suits involved $222,177,920; Court of Claims suits, $220,247,436; and state court suits, $4,248,284.

It is quite true that the filing of an appeal to the Tax Court normally precludes the Government from requiring payment of the tax,[40] but a decision in petitioner's favor could be expected to throw a great portion of the Tax Court litigation into the District Courts.[41] Of course, the Government can collect the tax from a District Court suitor by exercising its power of distraint—if he does not split his cause of action—but we cannot believe that compelling resort to this extraordinary procedure is either wise or in accord with congressional intent. Our system of taxation is based upon voluntary assessment and payment, not upon distraint.[42] A full-payment requirement will promote the smooth functioning of this system; a part-payment rule would work at cross-purposes with it.[43]

In sum, if we were to accept petitioner's argument, we would sacrifice the harmony of our carefully structured twentieth century system of tax litigation, and all that

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[40] See note 22, *supra*.

[41] The practical effects which might result from acceptance of petitioner's argument are sketched in Lowitz, Federal Tax Refund Suits and Partial Payments, 9 The Decalogue J. 9, 10:

"Permitting refund suits after partial payment of the tax assessment would benefit many taxpayers. Such a law would be open to wide abuse and would probably seriously impair the government's ability to collect taxes. Many taxpayers, without legitimate grounds for contesting an assessment, would make a token payment and sue for refund, hoping at least to reduce the amount they would ultimately have to pay. In jurisdictions where the District Court is considered to be a 'taxpayer's court' most taxpayers would use that forum instead of the Tax Court. Conceivably such legislation could cause the chaotic tax collection situations which exist in some European countries, since there would be strong impetus to a policy of paying a little and trying to settle the balance."

[42] See *Helvering* v. *Mitchell*, 303 U. S. 391, 399; Treas. Regs. on Procedural Rules (1954 Code) § 601.103 (a).

[43] See Riordan, Must You Pay Full Tax Assessment Before Suing in the District Court? 8 J. Tax. 179, 181:

"1. If the Government is forced to use these remedies [distraint]

would be achieved would be a supposed harmony of § 1346 (a)(1) with what might have been the nineteenth century law had the issue ever been raised. Reargument has but fortified our view that § 1346 (a)(1), correctly construed, requires full payment of the assessment before an income tax refund suit can be maintained in a Federal District Court.

Affirmed.

MR. JUSTICE FRANKFURTER.

I should like to append a word to my Brother WHITTAKER'S opinion, with which I entirely agree.

While *Dobson* v. *Commissioner,* 320 U. S. 489, is no longer law, the opinion of the much lamented Mr. Justice Jackson, based as it was on his great experience in tax litigation, has not lost its force insofar as it laid bare the complexities and perplexities for judicial construction of tax legislation. For one not a specialist in this field to examine every tax question that comes before the Court independently would involve in most cases an inquiry into the course of tax legislation and litigation far beyond the facts of the immediate case. Such an inquiry entails weeks of study and reflection. Therefore, in construing a tax law it has been my rule to follow almost blindly accepted understanding of the meaning of tax legislation, when that is manifested by long-continued, uniform

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on a large scale, it will affect adversely taxpayers' willingness to perform under our voluntary assessment system.

"2. It will put the burden on the Government to seek out for seizure the property of every taxpayer who chooses to sue for the refund of a partial payment. Often, the Government will not be able to do this without extraordinary and costly effort and in some cases it may not be able to do it at all.

"3. The use of the drastic-collection remedies would often cause inconvenience and perhaps hardship to the creditors, debtors, employers, employees, banks and other persons doing business with the taxpayer."

practice, unless a statute leaves no admissible opening for administrative construction.

Therefore, when advised in connection with the disposition of this case after its first argument that "there does not appear to be a single case before 1940 in which a taxpayer attempted a suit for refund of income taxes without paying the full amount the Government alleged to be due," (357 U. S. 63, at 69), I deemed such a long-continued, unbroken practical construction of the statute controlling as to the meaning of the Revenue Act of 1921, now 28 U. S. C. § 1346 (a)(1). Once the basis which for me governed the disposition of the case was no longer available, I was thrown back to an independent inquiry of the course of tax legislation and litigation for more than a hundred years, for all of that was relevant to a true understanding of the problem presented by this case. This involved many weeks of study during what is called the summer vacation. Such a study led to the conclusion set forth in detail in the opinion of my Brother WHITTAKER.

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

A deep and abiding conviction that the Court today departs from the plain direction of Congress expressed in 28 U. S. C. § 1346 (a), defeats its beneficent purpose, and repudiates many soundly reasoned opinions of the federal courts on the question presented, compels me to express and explain my disagreement in detail.

In his income tax return for the year 1950, petitioner deducted in full, as ordinary in character, the losses he had suffered in commodity transactions in that year, but the Commissioner viewed those losses as capital in

character and proposed, by his 90-day letter, the assessment of a deficiency in the amount of $27,251.13, plus interest. Petitioner did not petition the Tax Court for a redetermination of the proposed deficiency and the Commissioner assessed it on March 27, 1953. In April and June 1953, petitioner paid to the Commissioner a total of $5,058.54 upon the assessment and timely thereafter filed a claim for refund of that sum. The claim was rejected on July 13, 1955, and, on August 3, 1956, petitioner brought this action against the United States in the District Court for Wyoming to recover the amount paid, alleging, *inter alia,* that said sum "has been illegally and unlawfully collected" from him, and he prayed judgment therefor with interest from the date of payment.

At the trial, the Government prevailed on the merits, 142 F. Supp. 602, but the Court of Appeals, without reaching the merits, remanded with directions to dismiss, holding that because the petitioner had not paid the entire amount of the assessment the District Court had no jurisdiction of the action. 246 F. 2d 929. We granted certiorari and, after hearing, affirmed the judgment of the Court of Appeals. 357 U. S. 63. On June 22, 1959, we granted a petition for rehearing and restored the case to the docket. 360 U. S. 922. It has since been rebriefed, reargued and again submitted.

The case is now presented in a very different posture than before, as certain vital contentions that were previously made are now conceded to have been erroneous.

The question presented is whether a Federal District Court has jurisdiction of an action by a taxpayer against the United States to recover payments made to the Commissioner upon, but which discharged less than the entire amount of, an illegal assessment.

The answer to that question depends upon whether the United States has waived its sovereign immunity to, and

has consented to, such a suit in a District Court. The applicable jurisdictional statute is 28 U. S. C. § 1346 (a). It provides:

> "The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> "(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority *or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.*" (Emphasis added.)

In its former opinion the Court recognized that the words of the statute might "be termed a clear authorization to sue for the refund of 'any sum,' " 357 U. S., at 65, but it concluded that Congress had left room in the statute for an implication that the waiver of immunity and grant of jurisdiction applied only to refund suits in which the entire amounts of assessments had been paid. Advocating the existence of that implication, the Government contended and urged that, from the time of the decision in *Cheatham* v. *United States*, 92 U. S. 85, in 1875 until the decision in *Coates* v. *United States,* 111 F. 2d 609 (C. A. 2d Cir.), in 1940, there was an unquestioned understanding and uniform practice that full payment of an assessment was a condition upon the right to sue for refund; and, finding what it then accepted as adequate support for that contention, the Court was persuaded that, since no subsequent statute had purported to change it, such unquestioned understanding so long and uniformly applied was still effective.

Support for that asserted unquestioned understanding and uniform practice was principally derived from two sources. First, statements in *Cheatham* v. *United States, supra,* were thought to have enunciated a full-payment

doctrine [1] which seemed never to have been directly questioned. Second, the contention was accepted that "there does not appear to be a single case before 1940 in which a taxpayer attempted a suit for refund of income taxes without paying the full amount the Government alleged to be due." 357 U. S., at 69.

The Government now concedes that the second contention was erroneous. There were, for example, two cases in this Court (*Cook* v. *Tait,* 265 U. S. 47 (1924); *Bowers* v. *Kerbaugh-Empire Co.,* 271 U. S. 170 (1926)) in which taxpayers had sued for refunds after having paid only

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[1] The language of *Cheatham* relied upon by this Court in its first opinion was the following:

"So also, in the internal-revenue department, the statute which we have copied allows appeals from the assessor to the commissioner of internal revenue; and, if dissatisfied with his decision, on paying the tax the party can sue the collector; and, if the money was wrongfully exacted, the courts will give him relief by a judgment, which the United States pledges herself to pay.

. . . . . .

". . . While a free course of remonstrance and appeal is allowed within the departments before the money is finally exacted, the general government has wisely made the payment of the tax claimed, whether of customs or of internal revenue, a condition precedent to a resort to the courts by the party against whom the tax is assessed. . . . If the compliance with this condition [that suit must be brought within six months of the Commissioner's decision] requires the party aggrieved to pay the money, he must do it. He cannot, after the decision is rendered against him, protract the time within which he can contest that decision in the courts by his own delay in paying the money. It is essential to the honor and orderly conduct of the government that its taxes should be promptly paid, and drawbacks speedily adjusted; and the rule prescribed in this class of cases is neither arbitrary nor unreasonable. . . .

"The objecting party can take his appeal. He can, if the decision is delayed beyond twelve months, rest his case on that decision; or he can pay the amount claimed, and commence his suit at any time within that period. So, after the decision, he can pay at once, and commence suit within the six months . . . ." 92 U. S., at 88–89.

portions (in one case $298.34 of an assessment of $1,193.38, in the other $5,198.77 of an assessment of $10,320.14) of the amounts assessed against them. It was not contended by the Government in either of those cases that there was any want of jurisdiction, and this Court considered and decided both upon the merits.[2] Petitioner has now cited many other tax refund cases, decided in the lower courts prior to 1940, in which taxpayers had paid, and sued to recover, less than the whole of assessments alleged to have been illegal, and in which cases the Government did not question jurisdiction.[3] The Government concedes that in

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[2] The Government now seeks to distinguish these two cases because they arose under the Revenue Act of 1921, Act of Nov. 23, 1921, c. 136, 42 Stat. 227, and because § 250 (a) of which permitted the taxpayer, at his option, to pay the tax in four trimonthly installments, rather than all at once. The taxpayers in both *Cook* v. *Tait* and *Bowers* v. *Kerbaugh-Empire Co.* did choose to pay in installments, and the Government points to the fact that, at the time the suits were brought, all installments due had been paid, although the full assessment had not. The Government therefore would seem to take the position that the whole tax need *not* be paid, so long as the taxpayer, when he initiates the suit, has paid "all that the taxpayer was at that time legally obligated to pay, and all (in the absence of a so-called jeopardy assessment) that the Commissioner was at that time legally empowered to collect." (It should be pointed out that in *Cook* v. *Tait* and *Bowers* v. *Kerbaugh-Empire Co.* installments fell due immediately after suit was begun, and before hearing or adjudication; these installments were not paid as they came due.) It seems almost unnecessary to say that the words of the jurisdictional statute simply will not support this fine distinction urged by the Government; nor is there the least support for it (there is, if anything, contradiction) in the material the Government cites to establish an understanding of the full-payment requirement.

[3] The lower courts' decisions cited by petitioner, that were rendered prior to 1940, in which taxpayers had paid, and sued to recover, less than the whole of assessments alleged to have been illegal, and in which the Government did not question jurisdiction, are: *Tsivoglou* v. *United States*, 31 F. 2d 706 (C. A. 1st Cir. 1929); *Heinemann Chemi-*

at least two of these (*Thomas* v. *United States,* 85 Ct. Cl. 313, 18 F. Supp. 942 (1937); *Tsivoglou* v. *United States,* 31 F. 2d 706 (C. A. 1st Cir. 1929), affirming 27 F. 2d 564 (D. C. Mass. 1928)) taxpayers had paid, and sued to

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cal Co. v. *Heiner,* 92 F. 2d 344 (C. A. 3d Cir. 1937); *Thomas* v. *United States,* 85 Ct. Cl. 313, 18 F. Supp. 942 (1937); *Peerless Paper Box Mfg. Co.* v. *Routzahn,* 22 F. 2d 459 (D. C. N. D. Ohio 1927); *Welch* v. *Hassett,* 15 F. Supp. 692 (D. C. Mass. 1936); *McFadden* v. *United States,* 20 F. Supp. 625 (D. C. E. D. Pa. 1937); *Leavitt* v. *Hendricksen,* 37–2 U. S. T. C., ¶ 9312 (D. C. W. D. Wash. 1937).

In justice to counsel for both parties it seems appropriate to observe—what every lawyer knows—that cases, such as these, in which there "lurked in the record" questions that were not raised or decided are not discoverable by any ordinary means of reference. Without doubt, this fact accounts for the failure of counsel to take account of or to cite, and of this Court to find, those cases on the first hearing.

Petitioner has cited a number of other cases, decided by the lower courts prior to and during 1940, that sought recovery of partial payments upon assessments, and in each of which the Government did challenge, but unsuccessfully, the jurisdiction of the courts, namely, *Coates* v. *United States,* 111 F. 2d 609 (C. A. 2d Cir. 1940); *Camp* v. *United States,* 44 F. 2d 126 (C. A. 4th Cir. 1930); *Ohio Steel Foundry Co.* v. *United States,* 69 Ct. Cl. 158, 38 F. 2d 144 (1930); *Emery* v. *United States,* 27 F. 2d 992 (D. C. W. D. Pa. 1928); *Old Colony R. Co.* v. *United States,* 27 F. 2d 994 (D. C. Mass. 1928).

Petitioner has also cited 22 similar cases, decided by the lower courts since 1940. In 17 of them (*Kavanagh* v. *First National Bank,* 139 F. 2d 309 (C. A. 6th Cir. 1943); *Griffiths Dairy, Inc.,* v. *Squire,* 138 F. 2d 758 (C. A. 9th Cir. 1943); *United States* v. *Pfister,* 205 F. 2d 538 (C. A. 8th Cir. 1953); *Gallagher* v. *Smith,* 223 F. 2d 218 (C. A. 3d Cir. 1955); *Perry* v. *Allen,* 239 F. 2d 107 (C. A. 5th Cir. 1956); *Auricchio* v. *United States,* 49 F. Supp. 184 (D. C. E. D. N. Y. 1943); *Professional Golf Co.* v. *Nashville Trust Co.,* 60 F. Supp. 398 (D. C. M. D. Tenn. 1945); *Jack Little Foundation* v. *Jones,* 102 F. Supp. 326 (D. C. W. D. Okla. 1951); *Hogg* v. *Allen,* 105 F. Supp. 12 (D. C. M. D. Ga. 1952); *Snyder* v. *Westover,* 107

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recover, less than the whole of deficiency assessments and that the Government did not question jurisdiction in either of them. Prior to the decision in the present case there were two decisions in the Courts of Appeals that fully treated with the precise question here presented. Both held that District Courts have jurisdiction over actions to recover partial payments upon assessments alleged to have been illegal. *Coates* v. *United States,* 111 F. 2d 609 (C. A. 2d Cir. 1940); *Bushmiaer* v. *United States,* 230 F. 2d 146 (C. A. 8th Cir. 1956).[4] Certainly, the cited cases and the Government's concession preclude

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F. Supp. 363 (D. C. S. D. Cal. 1952); *Wheeler* v. *Holland,* 120 F. Supp. 383 (D. C. N. D. Ga. 1954); *Peters* v. *Smith,* 123 F. Supp. 711 (D. C. E. D. Pa. 1954); *Zukin* v. *Riddell,* 55–2 U. S. T. C., ¶ 9688 (D. C. S. D. Cal. 1955); *Lewis* v. *Scofield,* 57–1 U. S. T. C., ¶ 9251 (D. C. W. D. Tex. 1956); *McFarland* v. *United States,* 57–2 U. S. T. C., ¶ 9733 (D. C. M. D. Tenn. 1957); *Raymond* v. *United States,* 58–1 U. S. T. C., ¶ 9397 (D. C. E. D. Mich. 1958); *Freeman* v. *United States,* 58–1 U. S. T. C., ¶ 9309 (D. C. S. D. Cal. 1958)) the Government did not question the jurisdiction of the courts, and in the other five cases (*Bushmiaer* v. *United States,* 230 F. 2d 146 (C. A. 8th Cir. 1956); *Sirian Lamp Co.* v. *Manning,* 123 F. 2d 776 (C. A. 3d Cir. 1941); *Jones* v. *Fox,* 57–2 U. S. T. C., ¶ 9876 (D. C. Md. 1957); *Hanchett* v. *Shaughnessy,* 126 F. Supp. 769 (D. C. N. D. N. Y. 1954); *Rogers* v. *United States,* 155 F. Supp. 409 (D. C. E. D. N. Y. 1957)) the Government did challenge the jurisdiction of the courts, but prevailed upon the point only in the last-mentioned case.

[4] *Sirian Lamp Co.* v. *Manning,* 123 F. 2d 776 (C. A. 3d Cir. 1941) was a suit against the Collector and, therefore, did not come under the jurisdictional provision here in issue, which is applicable only to suits against the United States. But it held expressly that a suit for refund may be maintained to recover a partial payment of an assessment. No one has suggested that the jurisdictional requirement of the amount of the assessed tax that must be paid as a prerequisite to a suit for refund is different when the suit is against the Collector, with regard to which suits there is no specific jurisdictional provision, rather than against the United States.

a conclusion that there ever was an unquestioned understanding and uniform practice that full payment of an assessed deficiency was a condition upon the jurisdiction of a District Court to entertain a suit for refund.

In the light of the foregoing, it is clear that nothing in *Cheatham* v. *United States, supra,* fairly may be said to hold that full payment of an illegally assessed deficiency is a condition upon the jurisdiction of a District Court to entertain a suit for refund. No such issue was involved in that case. There the assessment had been fully paid, and the only issue was whether a proper claim for refund was a condition precedent to the maintenance of a suit to recover the amount alleged to have been illegally collected. Not only were the statements there made respecting "payment of the tax" pure dictum, but even the language there used did not embrace, and certainly was not directed to, the question whether full payment of an assessment is a condition upon the jurisdiction of a District Court to entertain a suit for refund.

I pass, then, to an examination of the history of the present jurisdictional provision, § 1346 (a), and the scheme of the present tax law to determine whether there is any real support for the Government's contention that a proper reading of the language of § 1346 (a) requires an implied qualification to its obvious self-explanatory meaning, so that full payment of an assessment, alleged to have been illegal, is made a condition upon the jurisdiction of a District Court to entertain a suit for refund.

Judicial proceedings for refund of United States taxes in federal courts originated, without express statutory authority, by suits against Collectors (now District Directors), before the United States had made itself amenable to suit. *Elliott* v. *Swartwout,* 10 Pet. 137 (1836), recognized the existence of a right of action against a Collector of Customs for refund of duties

illegally assessed and paid under protest.[5] The doctrine of the action, based upon the common-law count of assumpsit for money had and received, was thus formulated: "[W]here money is illegally demanded and received by an agent, he cannot exonerate himself from personal responsibility by paying it over to his principal; if he has had notice not to pay it over." 10 Pet., at 158. As a result of that case, Collectors of Customs who collected monies, paid under protest, resorted to the practice of withholding such amounts from the Government as indemnity against loss should a refund suit against them be successful. See Plumb, Tax Refund Suits Against Collectors of Internal Revenue, 60 Harv. L. Rev. 685, 688–689. That practice led to abuses and facilitated peculation under the guise of self-protection. Because of the wholesale frauds of Swartwout, the New York Collector (see Swartwout, 18 Dictionary of American Biography (1936), 238–239), Congress, in 1839, expressly prohibited such withholdings by Customs Collectors pending the possibility, or the result, of litigation against them. Act of Mar. 3, 1839, c. 82, § 2, 5 Stat. 348. Six years later, in 1845, this Court held that this Act, by reducing the Collector to "the mere bearer of those sums [duties] to the Treasury," terminated the right of action against the Collector for refund, for, being deprived of the right to withhold payment to his principal, he was no longer under an implied promise to refund illegally collected duties to the taxpayer. *Cary* v. *Curtis*, 3 How. 236, 241 (1845).

This created the intolerable condition of denying to taxpayers any remedy whatever in the District Courts to recover amounts illegally assessed and collected, and—doubtless also influenced by the vigorous dissents of Mr.

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[5] See also *Bend* v. *Hoyt*, 13 Pet. 263, 267 (1839). *Elliott* v. *Swartwout* seems to have been the first case in this country expressly to recognize the right.

Justice Story and Mr. Justice McLean in that case—induced Congress to pass the Act of Feb. 26, 1845, c. 22, 5 Stat. 727,[6] which was the first statute expressly giving taxpayers the right to sue for refund of taxes illegally collected. That Act, in substance, provided that nothing contained in the Act of Mar. 3, 1839 (c. 82, § 2, 5 Stat. 348), should be construed to take away or impair the right of any person who had paid duties under protest to any Collector of Customs, which were not lawfully "payable in part or in whole," to maintain an action at law against the Collector to recover such amounts. It is evident that Congress, by that statute, was merely concerned to reverse the consequences of *Cary* v. *Curtis, supra,* and to restore the right of action against Collectors which had originally been sustained in *Elliott* v. *Swartwout, supra.* Neither the terms of that statute nor such knowledge as is available of its history[7] reveals any limiting purpose except that

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[6] The Act of Feb. 26, 1845, c. 22, 5 Stat. 727, in pertinent part, provides:

"[N]othing contained in [the Act of Mar. 3, 1839, c. 82, § 2] . . . shall take away, or be construed to take away or impair, the right of any person or persons who have paid or shall hereafter pay money, as and for duties, under protest, to any collector of the customs . . . which duties are not authorized or payable in part or in whole by law, to maintain any action at law against such collector . . . to ascertain and try the legality and validity of such demand and payment of duties . . . ; nor shall any action be maintained against any collector, to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof."

[7] The only statements with regard to the purpose of the bill in Congress which have been found are the remarks of Senators Huntington and Woodbury, Cong. Globe, 28th Cong., 2d Sess. 195 (1845). See also 5 Stat. 349, n. (a): "[Congress being in session when the decision of the court in the case of *Carey* v. *Curtis,* 3 Howard, 236, was made, the following act [the Act of Feb. 26, 1845] was passed.]"

the protest be made in writing before or at the time of the payment.

While that statute, the Act of Feb. 26, 1845, referred only to refunds of customs duties, this Court held in *City of Philadelphia* v. *The Collector*, 5 Wall. 720, 730–733 (1866), that taxpayers had the same right of action against Collectors to recover illegally collected internal revenue taxes.[8]

The United States was first made directly suable in District Courts for tax refunds by the Act of Mar. 3, 1887, c. 359, 24 Stat. 505, commonly known as the Tucker Act, which conferred jurisdiction on the District Courts over "All claims [against the United States, not exceeding $1,000] founded upon the Constitution of the United States or any law of Congress, . . . or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable." This jurisdictional grant

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[8] The Court recognized that internal revenue collectors, like customs collectors, were required to pay daily into the Treasury all sums collected under the internal revenue laws. Act of Mar. 3, 1865, c. 78, § 3, 13 Stat. 483. In refusing to reach the same result as had been reached in *Cary* v. *Curtis*, without an express saving statute such as the Act of Feb. 26, 1845, the Court relied upon the provisions in the internal revenue laws that the Commissioner shall pay all judgments for refunds recovered against Collectors. Act of Mar. 3, 1863, c. 74, § 31, 12 Stat. 729; Act of June 30, 1864, c. 173, § 44, 13 Stat. 239; Act of July 13, 1866, c. 184, § 9, 14 Stat. 101, 111. "Clear implication of the several provisions is, that a judgment against the collector in such a case [a refund suit] is in the nature of a recovery against the United States, and that the amount recovered is regarded as a proper charge against the revenue collected from that source." *City of Philadelphia* v. *The Collector*, 5 Wall., at 733.

was held, in *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28 (1915), to have included jurisdiction over suits for tax refunds, as claims "founded upon" the internal revenue laws. The general language of that Act, the Tucker Act, was most evidently not intended to, and did not, impose any new conditions upon the pre-existing right to sue (the Collector) for the refund of taxes illegally collected, save for a monetary limit of $1,000, which was increased to $10,000 in 1911.[9]

The gist of § 1346 (a),[10] with which we are now concerned, first appeared in the jurisdictional statute in 1921, as part of the Revenue Act of 1921, c. 136, § 1310 (c), 42 Stat. 311. The reason for its appearance is entirely unrelated to the question whether full payment of an assessment is a condition precedent to a suit for refund. Under the Tucker Act, as it stood in 1921, the United States could not be sued in a District Court for a tax refund of more than $10,000. Taxpayers with larger claims could pursue either their old remedy—which continued to be available and is today—against the Collector in the District Courts or their remedy against the United States in the Court of Claims. But, the right of suit against the Collector was impaired in 1921 by the decision in *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1 (1921). It held that such actions against the Collector were personal in character and not maintainable against his successor in office. Hence, if the Collector had died or ceased to be

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[9] Act of Mar. 3, 1911, c. 231, § 24, 36 Stat. 1093. The monetary limitation was entirely eliminated in 1954. Act of July 30, 1954, c. 648, § 1, 68 Stat. 589.

[10] The gist of § 1346 (a) provides: "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." 28 U. S. C. § 1346 (a).

in office, a taxpayer with a refund claim of more than $10,000 had no remedy in a District Court. The portion of the Revenue Act of 1921 that is now embodied in § 1346 (a) was an amendment of the Tucker Act and was designed to preserve to taxpayers with claims of more than $10,000 a District Court remedy, even where the Collector had died or was out of office, by suit against the United States. The legislative history makes this purpose plain.[11]

The relevant portion of the 1921 Amendment to the Tucker Act—part of the Revenue Act of 1921 (c. 136, § 1310 (c), 42 Stat. 311) [12]—was apparently taken from a provision in Revised Statutes § 3226 (1875) that "No suit shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of the Internal Revenue." [13] In that context it is clear that the language "any tax," "any penalty" or "any sum" had no reference to what payments were required to precede a suit for refund. Quite evidently, its function was only to describe, in broadest terms,

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[11] See 61 Cong. Rec. 7506–7507 (1921); H. R. Conf. Rep. No. 486, 67th Cong., 1st Sess. 57 (1921).

[12] See note 10.

[13] This language was in turn preceded by § 19 of the Revenue Act of July 13, 1866, c. 184, 14 Stat. 152, which did not include any reference to "penalties" or "sums": "[N]o suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue . . . ." It is important to note that this was the "claim for refund" statute in effect at the time of, and that was applicable to, *Cheatham* v. *United States, supra.* Quite unlike § 1346 (a), it made no reference to "any sum."

the claims for refund which were required to be submitted to the Commissioner before suit might be brought thereon. What reasonable basis is there for ascribing to Congress, by reason of its insertion of this language into the Tucker Act, an intent to require full payment of an illegal assessment as a condition upon the jurisdiction of a District Court to entertain a suit for refund? The change was a jurisdictional one in a jurisdictional statute, and the language, it is almost necessary to assume, was chosen because, in another statute, it referred to all of the actions which could be brought for refund of internal revenue taxes.

The Government heavily relies on statements made in Congress pertaining to the establishment in 1924 of the Board of Tax Appeals (since 1942 designated the Tax Court) and its reorganization in 1926. It asserts that these statements demonstrate a congressional understanding that the broad language in § 1346 (a) excludes jurisdiction of District Courts to entertain suits to recover only partial payments of assessments alleged to be illegal. It is true that those statements, some of which are reproduced in the margin,[14] are consistent with the Govern-

[14] "The committee [on Ways and Means] recommends the establishment of a Board of Tax Appeals to which a taxpayer may appeal prior to the payment of an additional assessment of income, excess-profits, war-profits, or estate taxes. Although a taxpayer may, after payment of his tax, bring suit for the recovery thereof and thus secure a judicial determination on the questions involved, he can not, in view of section 3224 of the Revised Statutes, which prohibits suits to enjoin the collection of taxes, secure such a determination prior to the payment of the tax. The right of appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous and which may have, since its receipt, been either wiped out by subsequent losses, invested in nonliquid assets, or spent, sometimes forces taxpayers into bankruptcy, and often causes great financial hardship

ment's interpretation of that section. But, as with the statements in *Cheatham* v. *United States, supra,* they are not directed to the question we have here and are too imprecise for the drawing of such a far-reaching inference, involving, as it does, the interpolation of a drastic quali-

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and sacrifice. These results are not remedied by permitting the taxpayer to sue for the recovery of the tax after this payment. He is entitled to an appeal and to a determination of his liability for the tax prior to its payment." H. R. Rep. No. 179, 68th Cong., 1st Sess. 7 (1924).

"Now, it is true that under the present law it is possible to get a judicial review, but it is very slow and expensive. In order to get a judicial review under the law as it exists to-day a man must pay his tax and pay it under protest; then he must file a claim for refund; then the Government has six months within which to accept or reject it; then after that he must begin an action in the courts." Remarks of Representative Young, 65 Cong. Rec. 2621 (1924).

"The practice, as I understand it, has been to require the taxpayer to pay in the amount of the increased assessment, and then to allow him to get it back if he can. In addition to this, distraints frequently have been issued seizing the property of the citizen, so that the man whose taxes may have been raised unjustly may find himself forced to raise a large sum of money at once or have his property seized." Remarks of Senator Reed of Missouri, 65 Cong. Rec. 8109 (1924).

"One of the chief arguments presented in the reports of the committees of both Houses [upon the creation of the Board of Tax Appeals] was to relieve the taxpayer of the hardship of being forced to go out and pay his tax before he could have a judicial consideration of the problems involved in his case. The taxpayer who was faced with, say, $100,000 of additional tax, and who was forced to pay that money, very frequently had his credit destroyed, and sometimes he was forced into bankruptcy in order to meet that payment. It was a real hardship. The man who had already paid the tax had gone through the suffering, had filed his claim for refund, and had his remedy. He has the remedy that he had prior to the creation of the board." Statement of Charles D. Hamel, first Chairman of the Board of Tax Appeals, Hearings before the House Committee on Ways and Means on the Revenue Revision, 1925, Oct. 19 to Nov. 3, 1925, pp. 922, 923.

fication into the otherwise plain, clear and unlimited provisions of the statute.

The Tax Court was created to alleviate hardships occasioned by the fact that the collection of assessments, however illegal, could not be enjoined. And the Government argues that the hardships which motivated Congress to establish the Tax Court would not have existed if a taxpayer could, as the petitioner did here, pay only part of a deficiency assessment and then, by way of a suit for refund, litigate the legality of the assessment in a District Court. But that procedure would not then, nor today, afford any sure relief to taxpayers from the hardships which troubled Congress in 1924, for it is undisputed that the institution of a suit for refund of a partial payment of an assessment does not stay the Commissioner's power of collection [15] by distraint or otherwise, and a taxpayer with the property or means to pay the balance of the assessment cannot avoid its payment, except through the Commissioner's acquiescence and failure to exercise his power of distraint.[16]

The Government argues, with some force, that our tax legislation as a whole contemplates the Tax Court as the forum for adjudication of deficiencies, and the District Courts and Court of Claims as the forums for adjudication of refund suits. This, in general, is true, and it is also true that to hold that full payment of assessments

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[15] "Except as provided in sections 6212 (a) and (c), and 6213 (a) [giving a right to petition the Tax Court], no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Int. Rev. Code, 1954, § 7421. Such a provision has been in the law since the Act of Mar. 2, 1867, c. 169, § 10, 14 Stat. 475.

[16] Indeed there does not seem to be any way of restraining the Commissioner from collecting the remainder of a deficiency even *after* the taxpayer who has paid part has *won* a suit for refund, the Commissioner thus forcing the taxpayer to bring another action for refund.

is not a condition upon the jurisdiction of District Courts to entertain suits for refund is to sanction what may be called a "hybrid" remedy in the District Courts, for the suit of the taxpayer who has paid only part of an assessment and has sued for refund will, under application of the principles of collateral estoppel, determine the legality of the remainder of the deficiency as well as his right to refund of the amount paid. But such dual determinations are possible under the present law [17] and it is difficult to conceive how they may create sufficient disharmony to justify such a strained interpretation of the plain words of § 1346 (a) as the Government's contention would require.[18]

Nor is the argument sound that to hold that full payment of an illegal assessment is not a condition upon the jurisdiction of District Courts to entertain suits for refund would unduly hamper the collection of taxes, by encouraging taxpayers to withhold payment of large portions of assessments while prosecuting litigation for the refund of the part already paid. Not only is it true that the institution of a suit for refund does not stay collection,[19] but, since the creation of the Tax Court, any taxpayer has a method of withholding payment, immune

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[17] See §§ 7422 (e) and 6512 of the Internal Revenue Code of 1954 giving, respectively, the District Courts and the Tax Court jurisdiction over suits involving both deficiencies and claims for refund.

[18] The Government suggests that if this Court permits the petitioner to maintain his action for refund it will, as a consequence, sanction the practice of a taxpayer making only "token payment," and then, by a suit for refund, adjudicating the legality of the entire assessment. We are not here concerned with such a totally different question. Petitioner's payment of $5,058.54 on an assessment of $27,251.13 certainly was not a "token payment"; nor could the suit to recover the amount paid be said to be one for a declaratory judgment—not permitted "with respect to Federal taxes"—under 28 U. S. C. § 2201.

[19] See note 15.

from distraint,[20] until the legality of the assessment is finally determined. Any delay in collection which might be caused by holding that full payment of an assessment is not a condition upon the jurisdiction of a District Court to entertain a suit for refund would be of the same order as the delay incident to adjudication by the Tax Court, and would not create so incongruous a result as to justify giving an otherwise clear and unlimited statute a strained and unnatural meaning.

Petitioner, on the other hand, suggests that if it be held that full payment of illegal assessments is a condition upon the jurisdiction of District Courts in refund suits, not only will the words of § 1346 (a) be disregarded, but great hardships upon taxpayers will result, and that such an intention should not lightly be implied. Where a taxpayer has paid, upon a normal or a "jeopardy" assessment, either voluntarily or under compulsion of distraint, a part only of an illegal assessment and is unable to pay the balance within the two-year period of limitations,[21] he would be deprived of any means of establishing the invalidity of the assessment and of recovering the amount illegally collected from him, unless it be held, as it seems to me Congress plainly provided in § 1346 (a), that full payment is not a condition upon the jurisdiction of District Courts to entertain suits for refund.[22] Likewise, tax-

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[20] Except for the provision made for a "jeopardy assessment." Int. Rev. Code, 1954, § 6861.

[21] See Int. Rev. Code, 1954, §§ 6511, 6532, 26 U. S. C. §§ 6511, 6532.

[22] The grossly unfair and, to me, shockingly inequitable result of today's holding may be laid bare by assuming a commonplace set of facts: Two brothers, doing business as partners—one having a 60% and the other a 40% interest in the partnership—failed in their business which was then liquidated in bankruptcy. Thereafter, based upon the partnership's transactions, the Commissioner proposed deficiency assessments in income taxes—one against the major partner of $6,000 and another against the minor one of $4,000. Be-

payers who pay assessments in installments would be without remedy to recover early installments that were wrongfully collected should the period of limitations run before the last installment is paid.

No one has suggested that Congress could not constitutionally confer jurisdiction upon District Courts to entertain suits against the United States to recover sums

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ing without funds to employ counsel to prepare, file in Washington, and prosecute a petition for redetermination in the Tax Court, none was filed by either of the taxpayers, and the Commissioner made the assessments as proposed. One year later, their father died intestate, and thereupon the family homestead vested equally in his two sons (the taxpayers) under the State's laws of descent. The tax liens were, of course, instantly impressed upon their respective interests, and, under warrants of distraint, the Commissioner sold the homestead. It brought a total of $8,500 ($4,250 for the interest of each of the taxpayers). This, of course, satisfied the assessment and accrued interest against the minor partner, but left unpaid about $2,000 of the assessment and accrued interest against the major partner. Both filed claims for refund, which were denied. The taxpayers then filed separate suits, presenting identical issues, in the same Federal District Court to recover the taxes and interest thus collected by the Commissioner. The cases were consolidated for trial. The Court found that the assessments were illegal and the taxes wrongfully collected. The proceeds of the sale of the minor taxpayer's interest being sufficient to discharge the illegal assessment and accrued interest against him, the court rendered judgment in his favor for the sum thus wrongfully collected. But, inasmuch as the proceeds of the sale were not sufficient to discharge the illegal assessment against the major partner, and he was financially unable to pay the balance of it, the Court held that it lacked jurisdiction to allow his recovery of the $4,250 thus found to have been wrongfully collected from him under the internal revenue laws. Is this fair? Is it not shocking? More to the point, is not that result plainly proscribed by Congress' words in § 1346 (a) that: *"The district courts shall have original jurisdiction . . . of . . . Any civil action against the United States for the recovery of . . . any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws"?* (Emphasis added.)

wrongfully collected under, but which did not discharge the whole of, illegal assessments. Nor can it be denied that Congress has provided in § 1346 (a) that:

> "The district courts shall have original jurisdiction . . . of . . . Any civil action against the United States *for the recovery of . . . any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.*" (Emphasis added.)

English words more clearly expressive of the grant of jurisdiction to Federal District Courts over such cases than those used by Congress do not readily occur to me.

It must, therefore, be concluded that there is no sound reason for implying into § 1346 (a) a limitation that full payment of an illegal assessment is a condition upon the jurisdiction of a District Court to entertain a suit for refund. Inasmuch as no contradiction or absurdity is created by so doing, I think it is our duty to rely upon the words of § 1346 (a) rather than upon unarticulated implications or exceptions. Particularly is this so in dealing with legislation in an area such as internal revenue, where countless rules and exceptions are the subjects of frequent revisions and precise refinements.

By § 1346 (a) Congress expressed its purpose to waive sovereign immunity to suits, and to grant jurisdiction to District Courts over suits, to recover "any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." Surely these words do not limit the waiver of immunity or the grant of jurisdiction to actions in which the entire amounts of illegal assessments have been paid. Even if the words "any internal-revenue tax" or "any penalty," when read in isolation and most restrictively, could be thought to contemplate only the entire amount of an illegal assess-

ment, the concluding phrase—"or any sum alleged to have been excessive or in any manner wrongfully collected"—leaves no room or basis for any such construction of the statute as a whole. Judged by its text and its history in relation to other provisions of the tax laws, as must be done, I cannot doubt that Congress plainly expressed its intention to waive sovereign immunity to suits, and to grant jurisdiction to District Courts over suits, against the United States to recover "any sum" alleged to have been wrongfully collected. Petitioner's complaint here alleged that the $5,058.54 which he had paid to the Commissioner upon the questioned assessment "has been illegally and unlawfully collected" from him. The complaint, therefore, stated a cause of action within the jurisdiction of the District Court.

But the Court does not so see it. The majority now hold, despite the statute, that full payment of an illegal assessment *is* a condition upon the jurisdiction of a District Court to entertain a suit for refund. It, therefore, seems appropriate, in order eventually to avoid the harsh injustice of permitting the Government unlawfully to collect and retain taxes that are not owing, to express the hope that Congress will try again.

THOMPSON *v.* CITY OF LOUISVILLE ET AL.

CERTIORARI TO THE POLICE COURT OF LOUISVILLE, KENTUCKY.

No. 59. Argued January 11–12, 1960.—Decided March 21, 1960.

On the record in this case, petitioner's conviction in a City Police Court for the two offenses of "loitering" and "disorderly conduct" was so totally devoid of evidentiary support as to be invalid under the Due Process Clause of the Fourteenth Amendment. Pp. 199–206.

Reversed.

Louis Lusky argued the cause for petitioner. With him on the brief were *Marvin H. Morse, Harold Leventhal* and *Eugene Gressman.*

Herman E. Frick argued the cause for respondents. With him on the brief were *Jo M. Ferguson,* Attorney General of Kentucky, *David B. Sebree,* Assistant Attorney General, and *William E. Berry.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner was found guilty in the Police Court of Louisville, Kentucky, of two offenses—loitering and disorderly conduct. The ultimate question presented to us is whether the charges against petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment. Decision of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all.

The facts as shown by the record are short and simple. Petitioner, a long-time resident of the Louisville area, went into the Liberty End Cafe about 6:20 on Saturday evening, January 24, 1959. In addition to selling food the cafe was licensed to sell beer to the public and

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some 12 to 30 patrons were present during the time petitioner was there. When petitioner had been in the cafe about half an hour, two Louisville police officers came in on a "routine check." Upon seeing petitioner "out there on the floor dancing by himself," one of the officers, according to his testimony, went up to the manager who was sitting on a stool nearby and asked him how long petitioner had been in there and if he had bought anything. The officer testified that upon being told by the manager that petitioner had been there "a little over a half-hour and that he had not bought anything," he accosted Thompson and "asked him what was his reason for being in there and he said he was waiting on a bus." The officer then informed petitioner that he was under arrest and took him outside. This was the arrest for loitering. After going outside, the officer testified, petitioner "was very argumentative—he argued with us back and forth and so then we placed a disorderly conduct charge on him." Admittedly the disorderly conduct conviction rests solely on this one sentence description of petitioner's conduct after he left the cafe.

The foregoing evidence includes all that the city offered against him, except a record purportedly showing a total of 54 previous arrests of petitioner. Before putting on his defense, petitioner moved for a dismissal of the charges against him on the ground that a judgment of conviction on this record would deprive him of property and liberty [1] without due process of law under the Fourteenth Amendment in that (1) there was no evidence to support findings of guilt and (2) the two arrests and prosecutions were reprisals against him because petitioner had employed counsel and demanded a judicial hearing to

[1] Upon conviction and sentence under §§ 85–8, 85–12 and 85–13 of the ordinances of the City of Louisville, petitioner would be subject to imprisonment, fine or confinement in the workhouse upon default of payment of a fine.

defend himself against prior and allegedly baseless charges by the police.[2] This motion was denied.

Petitioner then put in evidence on his own behalf, none of which in any way strengthened the city's case. He testified that he bought, and one of the cafe employees served him, a dish of macaroni and a glass of beer and that he remained in the cafe waiting for a bus to go home.[3] Further evidence showed without dispute that at the time of his arrest petitioner gave the officers his home address; that he had money with him, and a bus schedule showing that a bus to his home would stop within half a block of the cafe at about 7:30; that he owned two unimproved lots of land; that in addition to work he had done for others, he had regularly worked one day or more a week for the same family for 30 years; that he paid no rent in the home where he lived and that his meager income was sufficient to meet his needs. The cafe manager testified that petitioner had frequently patronized the cafe, and that he had never told petitioner that he was unwelcome there. The manager further testified that on this very occasion he saw petitioner "standing there in the middle

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[2] Petitioner added that the effect of convictions here would be to deny him redress for the prior alleged arbitrary and unlawful arrests. This was based on the fact that, under Kentucky law, conviction bars suits for malicious prosecution and even for false imprisonment. Thus, petitioner says, he is subject to arbitrary and continued arrests neither reviewable by regular appellate procedures nor subject to challenge in independent civil actions.

[3] The officer's previous testimony that petitioner had bought no food or drink is seriously undermined, if not contradicted, by the manager's testimony at trial. There the manager stated that the officer "asked me *I had* [*sic*] sold him any thing to eat and I said no and he said any beer and I said no . . . ." (Emphasis supplied.) And the manager acknowledged that petitioner might have bought something and been served by a waiter or waitress without the manager noticing it. Whether there was a purchase or not, however, is of no significance to the issue here.

of the floor and patting his foot," and that he did not at any time during petitioner's stay there object to anything he was doing. There is no evidence that anyone else in the cafe objected to petitioner's shuffling his feet in rhythm with the music of the jukebox or that his conduct was boisterous or offensive to anyone present. At the close of his evidence, petitioner repeated his motion for dismissal of the charges on the ground that a conviction on the foregoing evidence would deprive him of liberty and property without due process under the Fourteenth Amendment. The court denied the motion, convicted him of both offenses, and fined him $10 on each charge. A motion for new trial, on the same grounds, also was denied, which exhausted petitioner's remedies in the police court.

Since police court fines of less than $20 on a single charge are not appealable or otherwise reviewable in any other Kentucky court,[4] petitioner asked the police court to stay the judgments so that he might have an opportunity to apply for certiorari to this Court (before his case became moot) [5] to review the due process contentions he raised. The police court suspended judgment for 24 hours during which time petitioner sought a longer stay from the Kentucky Circuit Court. That court, after examining the police court's judgments and transcript, granted a stay concluding that "there appears to be merit" in the contention that "there is no evidence upon which

[4] Ky. Rev. Stat. § 26.080; and see § 26.010. Both the Jefferson Circuit Court and the Kentucky Court of Appeals held that further review either by direct appeal or by collateral proceeding was foreclosed to petitioner. *Thompson* v. *Taustine,* No. 40175, Jefferson (Kentucky) Circuit Court, Common Pleas Branch, Fifth Division (per Grauman, J.) (1959), unreported; *Taustine* v. *Thompson,* 322 S. W. 2d 100 (Ky. 1959).

[5] Without a stay and bail pending application for review petitioner would have served out his fines in prison in 10 days at the rate of $2 a day. *Taustine* v. *Thompson,* 322 S. W. 2d 100 (Ky. 1959).

conviction and sentence by the Police Court could be based" and that petitioner's "Federal Constitutional claims are substantial and not frivolous." [6] On appeal by the city, the Kentucky Court of Appeals held that the Circuit Court lacked the power to grant the stay it did, but nevertheless went on to take the extraordinary step of granting its own stay, even though petitioner had made no original application to that court for such a stay.[7] Explaining its reason, the Court of Appeals took occasion to agree with the Circuit Court that petitioner's "federal constitutional claims are substantial and not frivolous." [8] The Court of Appeals then went on to say that petitioner

> "appears to have a real question as to whether he has been denied due process under the Fourteenth Amendment of the Federal Constitution, yet this substantive right cannot be tested unless we grant him a stay of execution because his fines are not appealable and will be satisfied by being served in jail before he can prepare and file his petition for certiorari. Appellee's substantive right of due process is of no avail to him unless this court grants him the ancillary right whereby he may test same in the Supreme Court." [9]

Our examination of the record presented in the petition for certiorari convinced us that although the fines here are small, the due process questions presented are substantial and we therefore granted certiorari to review the police court's judgments. 360 U. S. 916. Compare *Yick Wo* v. *Hopkins,* 118 U. S. 356 (San Francisco Police Judges

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[6] *Thompson* v. *Taustine,* No. 40175, Jefferson (Kentucky) Circuit Court, Common Pleas Branch, Fifth Division (per Grauman, J.) (1959), unreported.

[7] *Taustine* v. *Thompson,* 322 S. W. 2d 100 (Ky. 1959).

[8] *Id.,* at 101.

[9] *Id.,* at 102.

Court judgment imposing a $10 fine, upheld by state appellate court, held invalid as in contravention of the Fourteenth Amendment).

The city correctly assumes here that if there is no support for these convictions in the record they are void as denials of due process.[10] The pertinent portion of the city ordinance under which petitioner was convicted of loitering reads as follows:

> "It shall be unlawful for any person . . . , without visible means of support, or who cannot give a satisfactory account of himself, . . . to sleep, lie, loaf, or trespass in or about any premises, building, or other structure in the City of Louisville, without first having obtained the consent of the owner or controller of said premises, structure, or building; . . ." § 85–12, Ordinances of the City of Louisville.[11]

In addition to the fact that petitioner proved he had "visible means of support," the prosecutor at trial said "This is a loitering charge here. There is no charge of no visible means of support." Moreover, there is no suggestion that petitioner was sleeping, lying or trespassing in or about this cafe. Accordingly he could only have been convicted for being unable to give a satisfactory account of himself while loitering in the cafe, without the consent of the manager. Under the words of the ordinance itself, if the evidence fails to prove all three elements of this loitering charge, the conviction is not supported by evidence, in which event it does not comport with due process of law. The record is entirely lacking in evidence to support any of the charges.

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[10] For illustration, the city's brief in this Court states that the questions presented are "1. Whether the evidence was sufficient to support the convictions, and therefore meets the requirements of the due process clause of the Fourteenth Amendment. . . ."

[11] Section 85–13 provides penalties for violation of § 85–12.

Here, petitioner spent about half an hour on a Saturday evening in January in a public cafe which sold food and beer to the public. When asked to account for his presence there, he said he was waiting for a bus. The city concedes that there is no law making it an offense for a person in such a cafe to "dance," "shuffle" or "pat" his feet in time to music. The undisputed testimony of the manager, who did not know whether petitioner had bought macaroni and beer or not but who did see the patting, shuffling or dancing, was that petitioner was welcome there. The manager testified that he did not at any time during petitioner's stay in the cafe object to anything petitioner was doing and that he never saw petitioner do anything that would cause any objection. Surely this is implied consent, which the city admitted in oral argument satisfies the ordinance. The arresting officer admitted that there was nothing in any way "vulgar" about what he called petitioner's "ordinary dance," whatever relevance, if any, vulgarity might have to a charge of loitering. There simply is no semblance of evidence from which any person could reasonably infer that petitioner could not give a satisfactory account of himself or that he was loitering or loafing there (in the ordinary sense of the words) without "the consent of the owner or controller" of the cafe.

Petitioner's conviction for disorderly conduct was under § 85–8 of the city ordinance which, without definition, provides that "[w]hoever shall be found guilty of disorderly conduct in the City of Louisville shall be fined . . . ." etc. The only evidence of "disorderly conduct" was the single statement of the policeman that after petitioner was arrested and taken out of the cafe he was very argumentative. There is no testimony that petitioner raised his voice, used offensive language, resisted the officers or engaged in any conduct of any kind likely in any way to adversely affect the good order and tranquillity of the

City of Louisville. The only information the record contains on what the petitioner was "argumentative" about is his statement that he asked the officers "what they arrested me for." We assume, for we are justified in assuming, that merely "arguing" with a policeman is not, because it could not be, "disorderly conduct" as a matter of the substantive law of Kentucky. See *Lanzetta* v. *New Jersey,* 306 U. S. 451. Moreover, Kentucky law itself seems to provide that if a man wrongfully arrested fails to object to the arresting officer, he waives any right to complain later that the arrest was unlawful. *Nickell* v. *Commonwealth,* 285 S. W. 2d 495, 496.

Thus we find no evidence whatever in the record to support these convictions. Just as "Conviction upon a charge not made would be sheer denial of due process," [12] so is it a violation of due process to convict and punish a man without evidence of his guilt.[13]

The judgments are reversed and the cause is remanded to the Police Court of the City of Louisville for proceedings not inconsistent with this opinion.

Reversed and remanded.

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[12] *De Jonge* v. *Oregon,* 299 U. S. 353, 362. See also *Cole* v. *Arkansas,* 333 U. S. 196, 201.

[13] See *Schware* v. *Board of Bar Examiners,* 353 U. S. 232; *United States ex rel. Vajtauer* v. *Commissioner,* 273 U. S. 103, 106; *Moore* v. *Dempsey,* 261 U. S. 86; *Yick Wo* v. *Hopkins,* 118 U. S. 356. Cf. *Akins* v. *Texas,* 325 U. S. 398, 402; *Tot* v. *United States,* 319 U. S. 463, 473 (concurring opinion); *Mooney* v. *Holohan,* 294 U. S. 103.

SCRIPTO, INC., *v.* CARSON, SHERIFF, ET AL.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 80. Argued February 24, 1960.—Decided March 21, 1960.

Appellant, a Georgia corporation, has no office or place of business in Florida and no property or regular full-time employees there; but it does have in Florida ten brokers, wholesalers or jobbers who solicit sales of appellant's products on a commission basis and forward orders to Georgia, where they are accepted and whence the goods are shipped to Florida residents. *Held:* A Florida statute which levies a tax on the use of such products in Florida and makes appellant responsible for its collection from Florida purchasers is not repugnant either to the Commerce Clause of the Constitution or to the Due Process Clause of the Fourteenth Amendment. *General Trading Co.* v. *State Tax Comm'n,* 322 U. S. 335, followed. *Miller Bros. Co.* v. *Maryland,* 347 U. S. 340, distinguished. Pp. 207–213.

105 So. 2d 775, affirmed.

George B. Haley, Jr. argued the cause for appellant. With him on the brief was *Ernest P. Rogers.*

Joseph C. Jacobs, Assistant Attorney General of Florida, argued the cause for appellees. With him on the brief were *Richard W. Ervin,* Attorney General of Florida, and *Sam Spector,* Special Assistant Attorney General.

MR. JUSTICE CLARK delivered the opinion of the Court.

Florida, by statute,[1] requires appellant, a Georgia corporation, to be responsible for the collection of a use tax on certain mechanical writing instruments which appel-

[1] The pertinent provisions of this statute are:

"212.06 Same; collectible from dealers; dealers defined; dealers to collect from purchasers; legislative intent as to scope of tax.—

"(1) The aforesaid tax at the rate of three per cent of the retail sales price, as of the moment of sale, or three per cent of the cost price, as of the moment of purchase, as the case may be, shall be

lant sells and ships from its place of business in Atlanta to residents of Florida for use and enjoyment there. Upon Scripto's failure to collect the tax, the appellee Comptroller levied a use tax liability of $5,150.66 against it. Appellant then brought this suit to test the validity of the imposition, contending that the requirement of Florida's statute places a burden on interstate commerce and violates the Due Process Clause of the Fourteenth Amendment to the Constitution. It claimed, in effect, that the nature of its operations in Florida does not form a sufficient nexus to subject it to the statute's exactions. Both the trial court and the Supreme Court of Florida held that appellant does have sufficient jurisdictional contacts in Florida and, therefore, must register as a dealer under the statute and collect and remit to the State the use tax imposed on its aforesaid sales. 105 So. 2d 775. We noted probable jurisdiction. 361 U. S. 806. We agree with the result reached by Florida's courts.

Appellant operates in Atlanta an advertising specialty division trading under the name of Adgif Company. Through it, appellant is engaged in the business of selling mechanical writing instruments which are adapted to advertising purposes by the placing of printed material thereon. In its Adgif operation, appellant does not

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collectible from all dealers as herein defined on the sale at retail, the use, the consumption, the distribution and the storage for use or consumption in this state, of tangible personal property.

"(2) . . . (g) 'Dealer' also means and includes every person who solicits business either by representatives or by the distribution of catalogs or other advertising matter and by reason thereof receives and accepts orders from consumers in the state, and such dealer shall collect the tax imposed by this chapter from the purchaser and no action either in law or in equity on a sale or transaction as provided by the terms of this chapter may be had in this state by any such dealer unless it be affirmatively shown that the provisions of this chapter have been fully complied with."

(1) own, lease, or maintain any office, distributing house, warehouse or other place of business in Florida, or (2) have any regular employee or agent there.[2] Nor does it own or maintain any bank account or stock of merchandise in the State. Orders for its products are solicited by advertising specialty brokers or, as the Supreme Court of Florida called them, wholesalers or jobbers, who are residents of Florida. At the time of suit, there were 10 such brokers—each having a written contract and a specific territory. The somewhat detailed contract provides, *inter alia,* that all compensation is to be on a commission basis on the sales made, provided they are accepted by appellant; repeat orders, even if not solicited, also carry a commission if the salesman has not become inactive through failure to secure acceptable orders during the previous 60 days. The contract specifically provides that it is the intention of the parties "to create the relationship . . . of independent contractor." Each order is to be signed by the solicitor as a "salesman"; however, he has no authority to make collections or incur debts involving appellant. Each salesman is furnished catalogs, samples, and advertising material, and is actively engaged in Florida as a representative "of Scripto for the purpose of attracting, soliciting and obtaining Florida customers" for its mechanical advertising specialties. Orders for such products are sent by these salesmen directly to the Atlanta office for acceptance or refusal. If accepted, the sale is consummated there and the salesman is paid his commission directly. No money passes between the purchaser and the salesman—although

[2] Appellant Scripto does employ one salesman but he handles its regular line of products and has no connection with Adgif. The Florida courts found that his presence was not relevant to the determination of whether appellant was included within the terms of the statute.

the latter does occasionally accept a check payable to the appellant, in which event he is required to forward it to appellant with the order.

As construed by Florida's highest court, the impost levied by the statute is a tax "on the privilege of using personal property . . . which has come to rest . . . and has become a part of the mass of property" within the State. 105 So. 2d, at 781. It is not a sales tax, but "was developed as a device to complement [such a tax] in order to prevent evasion . . . by the completion of purchases in a non-taxing state and shipment by interstate commerce into a taxing forum." *Id.*, at 779. The tax is collectible from "dealers" and is to be added to the purchase price of the merchandise "as far as practicable." In the event that a dealer fails to collect the tax, he himself is liable for its payment. The statute has the customary use tax provisions "against duplication of the tax, an allowance to the dealer for making the collection, and a reciprocal credit arrangement which credits against the Florida tax any amount up to the amount of the Florida tax which might have been paid to another state." *Id.*, at 782. Florida held appellant to be a dealer under its statute. "The application by that Court of its local laws and the facts on which it founded its judgment are of course controlling here." *General Trading Co.* v. *State Tax Comm'n,* 322 U. S. 335, 337 (1944).

The question remaining is whether Florida, in the light of appellant's operations there, may collect the State's use tax from it on the basis of property bought from appellant and shipped from its home office to purchasers in Florida for use there.

Florida has well stated the course of this Court's decisions governing such levies, and we need but drive home its clear understanding. There must be, as our Brother Jackson stated in *Miller Bros. Co.* v. *Maryland,* 347 U. S. 340, 344–345 (1954), "some definite link, some minimum

connection, between a state and the person, property or transaction it seeks to tax." We believe that such a nexus is present here. First, the tax is a nondiscriminatory exaction levied for the use and enjoyment of property which has been purchased by Florida residents and which has actually entered into and become a part of the mass of property in that State. The burden of the tax is placed on the ultimate purchaser in Florida and it is he who enjoys the use of the property, regardless of its source. We note that the appellant is charged with no tax—save when, as here, he fails or refuses to collect it from the Florida customer. Next, as Florida points out, appellant has 10 wholesalers, jobbers, or "salesmen" conducting continuous local solicitation in Florida and forwarding the resulting orders from that State to Atlanta for shipment of the ordered goods. The only incidence of this sales transaction that is nonlocal is the acceptance of the order. True, the "salesmen" are not regular employees of appellant devoting full time to its service, but we conclude that such a fine distinction is without constitutional significance. The formal shift in the contractual tagging of the salesman as "independent" neither results in changing his local function of solicitation nor bears upon its effectiveness in securing a substantial flow of goods into Florida. This is evidenced by the amount assessed against appellant on the statute's 3% basis over a period of but four years. To permit such formal "contractual shifts" to make a constitutional difference would open the gates to a stampede of tax avoidance. See Thomas Reed Powell, Sales and Use Taxes: Collection from Absentee Vendors, 57 Harv. L. Rev. 1086, 1090. Moreover, we cannot see, from a constitutional standpoint, "that it was important that the agent worked for several principals." Chief Judge Learned Hand, in *Bomze* v. *Nardis Sportswear,* 165 F. 2d 33, 36. The test is simply the nature and extent of the activities of the appellant

in Florida. In short, we conclude that this case is controlled by *General Trading Co., supra.* As was said there, "All these differentiations are without constitutional significance. Of course, no State can tax the privilege of doing interstate business. See *Western Live Stock* v. *Bureau,* 303 U. S. 250. That is within the protection of the Commerce Clause and subject to the power of Congress. On the other hand, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which he may draw from a State to the upkeep of which he may be asked to bear his fair share." 322 U. S., at 338.

Nor do we believe that Florida's requirement that appellant be its tax collector on such orders from its residents changes the situation. As was pointed out in *General Trading Co.,* this is "a familiar and sanctioned device." *Ibid.* Moreover, we note that Florida reimburses appellant for its service in this regard.

Appellant earnestly contends that *Miller Bros. Co.* v. *Maryland, supra,* is to the contrary. We think not. Miller had no solicitors in Maryland; there was no "exploitation of the consumer market"; no regular, systematic displaying of its products by catalogs, samples or the like. But, on the contrary, the goods on which Maryland sought to force Miller to collect its tax were sold to residents of Maryland when personally present at Miller's store in Delaware. True, there was an "occasional" delivery of such purchases by Miller into Maryland, and it did occasionally mail notices of special sales to former customers; but Marylanders went to Delaware to make purchases—Miller did not go to Maryland for sales. Moreover, it was impossible for Miller to determine that goods sold for cash to a customer over the counter at its store in Delaware were to be used and enjoyed in Maryland. This led the Court to conclude

that Miller would be made "more vulnerable to liability for another's tax than to a tax on itself." 347 U. S., at 346. In view of these considerations, we conclude that the "minimum connections" not present in *Miller* are more than sufficient here.

The judgment is therefore *Affirmed.*

MR. JUSTICE FRANKFURTER, deeming this case to be nearer to *General Trading Co.* v. *State Tax Commission,* 322 U. S. 335, than it is to *Miller Bros. Co.* v. *Maryland,* 347 U. S. 340, concurs in the result.

MR. JUSTICE WHITTAKER, believing that Florida's action denies to appellant due process of law and also directly burdens interstate commerce as held in *Miller Bros. Co.* v. *Maryland,* 347 U. S. 340, and in *McLeod* v. *Dilworth Co.,* 322 U. S. 327, and adhering to his views expressed in *Northwestern Cement Co.* v. *Minnesota,* 358 U. S. 450, 477, would reverse the judgment.

McGANN *v.* UNITED STATES.

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

No. 153. Argued March 3, 1960.—Decided March 21, 1960.

Certiorari dismissed as improvidently granted.

By appointment of the Court, 361 U. S. 803, *Thomas Homer Davis* argued the cause and filed a brief for petitioner.

Theodore George Gilinsky argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg.*

PER CURIAM.

The writ of certiorari was improvidently granted and must be dismissed. When the case was brought here, on the meager documentation which so often is all that is presented by indigent prisoners seeking review on their own behalf, we assumed that a question involving the construction of 28 U. S. C. § 2255 called for adjudication. After argument, it became clear that the question of construction is not appropriately presented by the record because petitioner's claim upon the merits was fully considered and decided below, and we find his challenge of that action to be so insubstantial as not to have warranted bringing the case here.

CITY OF COVINGTON, KENTUCKY, *v.* PUBLIC SERVICE COMM'N OF KENTUCKY ET AL.

APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

No. 628. Decided March 21, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 327 S. W. 2d 954.

Charles S. Rhyne and *S. White Rhyne, Jr.* for appellant.

Jerome M. Alper for appellees.

PER CURIAM.

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

SMITH ET AL. *v.* COLUMBIA COUNTY, OREGON, ET AL.

APPEAL FROM THE SUPREME COURT OF OREGON.

No. 645. Decided March 21, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 216 Ore. 662, 341 P. 2d 540.

Robert T. Mautz for appellants.

Robert Y. Thornton, Attorney General of Oregon, and *Carlisle B. Roberts* and *Theodore W. deLooze,* Assistant Attorneys General, for appellees.

PER CURIAM.

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

541680 O-60—18

WILLIS *v.* UNITED STATES.

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

No. 546, Misc. Decided March 21, 1960.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Solicitor General Rankin for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted. Upon the suggestion of the Solicitor General that the case be remanded to the Court of Appeals in light of what we are informed is the present practice of that court "to appoint an attorney in all cases on direct appeal where the trial judge's certificate of bad faith is attacked" the petition for writ of certiorari is granted. The judgment of the Court of Appeals for the District of Columbia Circuit is vacated and the case is remanded to that court for further proceedings.

Syllabus.

ABEL, ALIAS MARK, ALIAS COLLINS, ALIAS GOLDFUS, *v.* UNITED STATES.

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

No. 2. Argued February 24–25, 1959.—Restored to the calendar for reargument March 23, 1959.—Reargued November 9, 1959.—Decided March 28, 1960.

Immigration and Naturalization Service officers arrested petitioner on an administrative warrant for deportation, searched the hotel room where he was arrested, his person and his luggage, and seized certain articles. After petitioner had checked out of his hotel room, an agent of the Federal Bureau of Investigation made a further search of the room, without a warrant but with the consent of the hotel management, and seized certain articles which petitioner had left there. The articles so seized were admitted in evidence over petitioner's objection at his trial for conspiracy to commit espionage, and he was convicted. *Held:* These searches and seizures did not violate the Fourth or Fifth Amendment, and the use in evidence of the articles so seized did not invalidate petitioner's conviction. Pp. 218–241.

1. On the record in this case, the Government did not use the administrative warrant of the Immigration and Naturalization Service as an improper instrument of the Federal Bureau of Investigation in obtaining evidence for a criminal prosecution. Pp. 225–230.

2. Petitioner's claim that the administrative warrant under which he was first arrested was invalid under the Fourth Amendment is not properly before this Court, since it was not made below and was expressly disavowed there. Pp. 230–234.

3. The articles seized by the immigration officers during the searches here involved were properly admitted in evidence. Pp. 234–240.

4. Immigration officers who effect an arrest for deportation on an administrative warrant have a right of incidental search analogous to the search permitted criminal law-enforcement officers incidental to a lawful arrest. Pp. 235–237.

5. The search of the hotel room by an F. B. I. agent without a warrant but with the consent of the hotel management, after peti-

tioner had relinquished the room, and the seizure of articles which petitioner had abandoned there were lawful, and such articles were properly admitted in evidence. Pp. 240–241.

258 F. 2d 485, affirmed.

James B. Donovan argued and reargued the cause for petitioner. With him on the briefs was *Thomas M. Debevoise II.*

Solicitor General Rankin argued and reargued the cause for the United States. With him on the original brief were *Acting Assistant Attorney General Yeagley, William F. Tompkins* and *Kevin T. Maroney.* With him on the supplemental brief on reargument were *Assistant Attorney General Yeagley, John F. Davis, William F. Tompkins* and *Kevin T. Maroney.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The question in this case is whether seven items were properly admitted into evidence at the petitioner's trial for conspiracy to commit espionage. All seven items were seized by officers of the Government without a search warrant. The seizures did not occur in connection with the exertion of the criminal process against petitioner. They arose out of his administrative arrest by the United States Immigration and Naturalization Service as a preliminary to his deportation. A motion to suppress these items as evidence, duly made in the District Court, was denied after a full hearing. 155 F. Supp. 8. Petitioner was tried, convicted and sentenced to thirty years' imprisonment and to the payment of a fine of $3,000. The Court of Appeals affirmed, 258 F. 2d 485. We granted certiorari, 358 U. S. 813, limiting the grant to the following two questions:

"1. Whether the Fourth and Fifth Amendments to the Constitution of the United States are violated by

a search and the seizure of evidence without a search warrant, after an alien suspected and officially accused of espionage has been taken into custody for deportation, pursuant to an administrative Immigration Service warrant, but has not been arrested for the commission of a crime?

"2. Whether the Fourth and Fifth Amendments to the Constitution of the United States are violated when articles so seized are unrelated to the Immigration Service warrant and, together with other articles obtained from such leads, are introduced as evidence in a prosecution for espionage?"

Argument was first heard at October Term, 1958. The case having been set down for reargument at this Term, 359 U. S. 940, counsel were asked to discuss a series of additional questions, set out in the margin.*

We have considered the case on the assumption that the conviction must be reversed should we find challenged items of evidence to have been seized in violation of the Constitution and therefore improperly admitted into evidence. We find, however, that the admission of these items was free from any infirmity and we affirm the judgment. (Of course the nature of the case, the fact that it was a prosecution for espionage, has no bearing

* "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."

whatever upon the legal considerations relevant to the admissibility of evidence.)

The seven items, all in petitioner's possession at the time of his administrative arrest, the admissibility of which is in question, were the following:

> (1) a piece of graph paper, carrying groups of numbers arranged in rows, allegedly a coded message;
>
> (2) a forged birth certificate, certifying the birth of "Martin Collins" in New York County in 1897;
>
> (3) a birth certificate, certifying the birth of "Emil Goldfus" in New York in 1902 (Emil Goldfus died in 1903);
>
> (4) an international certificate of vaccination, issued in New York to "Martin Collins" in 1957;
>
> (5) a bank book of the East River Savings Bank containing the account of "Emil Goldfus";
>
> (6) a hollowed-out pencil containing 18 microfilms; and
>
> (7) a block of wood, wrapped in sandpaper, and containing within it a small booklet with a series of numbers on each page, a so-called "cipher pad."

Items (2), (3), (4) and (5) were relevant to the issues of the indictment for which petitioner was on trial in that they corroborated petitioner's use of false identities. Items (1), (6) and (7) were incriminatory as useful means for one engaged in espionage.

The main claims which petitioner pressed upon the Court may be thus summarized: (1) the administrative arrest was used by the Government in bad faith; (2) administrative arrests as preliminaries to deportation are unconstitutional; and (3) regardless of the validity of the administrative arrest here, the searches and seizures through which the challenged items came into the Government's possession were not lawful ancillaries to such an arrest. These claims cannot be judged apart from the circumstances leading up to the arrest and the nature of

the searches and seizures. It becomes necessary to relate these matters in considerable detail.

Petitioner was arrested by officers of the Immigration and Naturalization Service (hereafter abbreviated as I. N. S.) on June 21, 1957, in a single room in the Hotel Latham in New York City, his then abode. The attention of the I. N. S. had first been drawn to petitioner several days earlier when Noto, a Deputy Assistant Commissioner of the I. N. S., was told by a liaison officer of the Federal Bureau of Investigation (hereafter abbreviated as F. B. I.) that petitioner was believed by the F. B. I. to be an alien residing illegally in the United States. Noto was told of the F. B. I.'s interest in petitioner in connection with espionage.

An uncontested affidavit before the District Court asserted the following with regard to the events leading up to the F. B. I.'s communication with Noto about petitioner. About one month before the F. B. I. communicated with Noto, petitioner had been mentioned by Hayhanen, a recently defected Russian spy, as one with whom Hayhanen had for several years cooperated in attempting to commit espionage. The F. B. I. had thereupon placed petitioner under investigation. At the time the F. B. I. communicated with the I. N. S. regarding petitioner, the case against him rested chiefly upon Hayhanen's story, and Hayhanen, although he was later to be the Government's principal witness at the trial, at that time insisted that he would refuse to testify should petitioner be brought to trial, although he would fully cooperate with the Government in secret. The Department of Justice concluded that without Hayhanen's testimony the evidence was insufficient to justify petitioner's arrest and indictment on espionage charges. The decision was thereupon made to bring petitioner to the attention of the I. N. S., with a view to commencing deportation proceedings against him.

Upon being notified of the F. B. I.'s belief that petitioner was residing illegally in this country, Noto asked the F. B. I. to supply the I. N. S. with further information regarding petitioner's status as an alien. The F. B. I. did this within a week. The I. N. S. concluded that if petitioner were, as suspected, an alien, he would be subject to deportation in that he had failed to comply with the legal duty of aliens to notify the Attorney General every January of their address in the United States. 8 U. S. C. § 1305. Noto then determined on petitioner's administrative arrest as a preliminary to his deportation. The F. B. I. was so informed. On June 20, two I. N. S. officers, Schoenenberger and Kanzler, were dispatched by Noto to New York to supervise the arrest. These officers carried with them a warrant for petitioner's arrest and an order addressed to petitioner directing him to show cause why he should not be deported. They met in New York with the District Director of the I. N. S. who, after the information in the possession of the I. N. S. regarding petitioner was put before him, signed the warrant and the order. Following this, Schoenenberger and Kanzler went to F. B. I. headquarters in New York where, by prearrangement with the F. B. I. in Washington, they were met by several F. B. I. officers. These agreed to conduct agents of the I. N. S. to petitioner's hotel so that the I. N. S. might accomplish his arrest. The F. B. I. officer in charge asked whether, before the petitioner was arrested, the F. B. I. might "interview" him in an attempt to persuade him to "cooperate" with regard to his espionage. To this Schoenenberger agreed.

At 7 o'clock the next morning, June 21, two officers of the I. N. S. and several F. B. I. men gathered in the corridor outside petitioner's room at the Hotel Latham. All but two F. B. I. agents, Gamber and Blasco, went into the room next to petitioner's, which the F. B. I. had occupied in the course of its investigation of petitioner.

Gamber and Blasco were charged with confronting petitioner and soliciting his cooperation with the F. B. I. They had no warrant either to arrest or to search. If petitioner proved cooperative their instructions were to telephone to their superior for further instructions. If petitioner failed to cooperate they were to summon the waiting I. N. S. agents to execute their warrant for his arrest.

Gamber rapped on petitioner's door. When petitioner released the catch, Gamber pushed open the door and walked into the room, followed by Blasco. The door was left ajar and a third F. B. I. agent came into the room a few minutes later. Petitioner, who was nude, was told to put on a pair of undershorts and to sit on the bed, which he did. The F. B. I. agents remained in the room questioning petitioner for about twenty minutes. Although petitioner answered some of their questions, he did not "cooperate" regarding his alleged espionage. A signal was thereupon given to the two agents of the I. N. S. waiting in the next room. These came into petitioner's room and served petitioner with the warrant for his arrest and with the order to show cause. Shortly thereafter Schoenenberger and Kanzler, who had been waiting outside the hotel, also entered petitioner's room. These four agents of the I. N. S. remained with petitioner in his room for about an hour. For part of this time an F. B. I. agent was also in the room and during all of it another F. B. I. agent stood outside the open door of the room, where he could observe the interior.

After placing petitioner under arrest, the four I. N. S. agents undertook a search of his person and of all of his belongings in the room, and the adjoining bathroom, which lasted for from fifteen to twenty minutes. Petitioner did not give consent to this search; his consent was not sought. The F. B. I. agents observed this search but took no part in it. It was Schoenenberger's testimony to

the District Court that the purpose of this search was to discover weapons and documentary evidence of petitioner's "alienage"—that is, documents to substantiate the information regarding petitioner's status as an alien which the I. N. S. had received from the F. B. I. During this search one of the challenged items of evidence, the one we have designated (2), a birth certificate for "Martin Collins," was seized. Weapons were not found, nor was any other evidence regarding petitioner's "alienage."

When the search was completed, petitioner was told to dress himself, to assemble his things and to choose what he wished to take with him. With the help of the I. N. S. agents almost everything in the room was packed into petitioner's baggage. A few things petitioner deliberately left on a window sill, indicating that he did not want to take them, and several other things which he chose not to pack up into his luggage he put into the room's wastepaper basket. When everything had been assembled, petitioner asked and received permission to repack one of his suitcases. While petitioner was doing so, Schoenenberger noticed him slipping some papers into the sleeve of his coat. Schoenenberger seized these. One of them was the challenged item of evidence which we have designated (1), a piece of graph paper containing a coded message.

When petitioner's belongings had been completely packed, petitioner agreed to check out of the hotel. One of the F. B. I. agents obtained his bill from the hotel and petitioner paid it. Petitioner was then handcuffed and taken, along with his baggage, to a waiting automobile and thence to the headquarters of the I. N. S. in New York. At I. N. S. headquarters, the property petitioner had taken with him was searched more thoroughly than it had been in his hotel room, and three more of the challenged items were discovered and seized. These were the ones we have designated (3), (4) and (5), the "Emil

Goldfus" birth certificate, the international vaccination certificate, and the bank book.

As soon as petitioner had been taken from the hotel, an F. B. I. agent, Kehoe, who had been in the room adjoining petitioner's during the arrest and search and who, like the I. N. S. agents, had no search warrant, received permission from the hotel management to search the room just vacated by petitioner. Although the bill which petitioner had paid entitled him to occupy the room until 3 p. m. of that day, the hotel's practice was to consider a room vacated whenever a guest removed his baggage and turned in his key. Kehoe conducted a search of petitioner's room which lasted for about three hours. Among other things, he seized the contents of the wastepaper basket into which petitioner had put some things while packing his belongings. Two of the items thus seized were the challenged items of evidence we have designated (6) and (7): a hollow pencil containing microfilm and a block of wood containing a "cipher pad."

Later in the day of his arrest, petitioner was taken by airplane to a detention center for aliens in Texas. He remained there for several weeks until arrested upon the charge of conspiracy to commit espionage for which he was brought to trial and convicted in the Eastern District of New York.

I.

The underlying basis of petitioner's attack upon the admissibility of the challenged items of evidence concerns the motive of the Government in its use of the administrative arrest. We are asked to find that the Government resorted to a subterfuge, that the Immigration and Naturalization Service warrant here was a pretense and sham, was not what it purported to be. According to petitioner, it was not the Government's true purpose in arresting him under this warrant to take him into custody pending

a determination of his deportability. The Government's real aims, the argument runs, were (1) to place petitioner in custody so that pressure might be brought to bear upon him to confess his espionage and cooperate with the F. B. I., and (2) to permit the Government to search through his belongings for evidence of his espionage to be used in a designed criminal prosecution against him. The claim is, in short, that the Government used this administrative warrant for entirely illegitimate purposes and that articles seized as a consequence of its use ought to have been suppressed.

Were this claim justified by the record, it would indeed reveal a serious misconduct by law-enforcing officers. The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts. The preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States. A finding of bad faith is, however, not open to us on this record. What the motive was of the I. N. S. officials who determined to arrest petitioner, and whether the I. N. S. in doing so was not exercising its powers in the lawful discharge of its own responsibilities but was serving as a tool for the F. B. I. in building a criminal prosecution against petitioner, were issues fully canvassed in both courts below. The crucial facts were found against the petitioner.

On this phase of the case the district judge, having permitted full scope to the elucidation of petitioner's claim, having seen and heard witnesses, in addition to testimony by way of affidavits, and after extensive argument, made these findings:

> "[T]he evidence is persuasive that the action taken by the officials of the Immigration and Naturalization Service is found to have been in entire good faith.

> The testimony of Schoenenberger and Noto leaves no doubt that while the first information that came to them concerning the [petitioner] . . . was furnished by the F. B. I.—which cannot be an unusual happening—the proceedings taken by the Department differed in no respect from what would have been done in the case of an individual concerning whom no such information was known to exist.
>
> "The defendant argues that the testimony establishes that the arrest was made under the direction and supervision of the F. B. I., but the evidence is to the contrary, and it is so found.
>
> "No good reason has been suggested why these two branches of the Department of Justice should not cooperate, and that is the extent of the showing made on the part of the defendant." 155 F. Supp. 8, 11.

The opinion of the Court of Appeals, after careful consideration of the matter, held that the answer "must clearly be in the affirmative" to the question "whether the evidence in the record supports the finding of good faith made by the court below." 258 F. 2d 485, 494.

Among the statements in evidence relied upon by the lower courts in making these findings was testimony by Noto that the interest of the I. N. S. in petitioner was confined to petitioner's illegal status in the United States; that in informing the I. N. S. about petitioner's presence in the United States the F. B. I. did not indicate what action it wanted the I. N. S. to take; that Noto himself made the decision to arrest petitioner and to commence deportation proceedings against him; that the F. B. I. made no request of him to search for evidence of espionage at the time of the arrest; and that it was "usual and mandatory" for the F. B. I. and I. N. S. to work together in the manner they did. There was also the testimony of Schoenenberger, regarding the purpose of the search he

made of petitioner's belongings, that the motive was to look for weapons and documentary evidence of alienage. To be sure, the record is not barren of evidence supporting an inference opposed to the conclusion to which the two lower courts were led by the record as a whole: for example, the facts that the I. N. S. held off its arrest of petitioner while the F. B. I. solicited his cooperation, and that the F. B. I. held itself ready to search petitioner's room as soon as it was vacated. These elements, however, did not, and were not required to, persuade the two courts below in the face of ample evidence of good faith to the contrary, especially the human evidence of those involved in the episode. We are not free to overturn the conclusion of the courts below when justified by such solid proof.

Petitioner's basic contention comes down to this: even without a showing of bad faith, the F. B. I. and I. N. S. must be held to have cooperated to an impermissible extent in this case, the case being one where the alien arrested by the I. N. S. for deportation was also suspected by the F. B. I. of crime. At the worst, it may be said that the circumstances of this case reveal an opportunity for abuse of the administrative arrest. But to hold illegitimate, in the absence of bad faith, the cooperation between I. N. S. and F. B. I. would be to ignore the scope of rightful cooperation between two branches of a single Department of Justice concerned with enforcement of different areas of law under the common authority of the Attorney General.

The facts are that the F. B. I. suspected petitioner both of espionage and illegal residence in the United States as an alien. That agency surely acted not only with propriety but in discharge of its duty in bringing petitioner's illegal status to the attention of the I. N. S., particularly after it found itself unable to proceed with petitioner's prosecution for espionage. Only the I. N. S. is authorized to initiate deportation proceedings, and certainly the

F. B. I. is not to be required to remain mute regarding one they have reason to believe to be a deportable alien, merely because he is also suspected of one of the gravest of crimes and the F. B. I. entertains the hope that criminal proceedings may eventually be brought against him. The I. N. S., just as certainly, would not have performed its responsibilities had it been deterred from instituting deportation proceedings solely because it became aware of petitioner through the F. B. I., and had knowledge that the F. B. I. suspected petitioner of espionage. The Government has available two ways of dealing with a criminally suspect deportable alien. It would make no sense to say that branches of the Department of Justice may not cooperate in pursuing one course of action or the other, once it is honestly decided what course is to be preferred. For the same reasons this cooperation may properly extend to the extent and in the manner in which the F. B. I. and I. N. S. cooperated in effecting petitioner's administrative arrest. Nor does it taint the administrative arrest that the F. B. I. solicited petitioner's cooperation before it took place, stood by while it did, and searched the vacated room after the arrest. The F. B. I. was not barred from continuing its investigation in the hope that it might result in a prosecution for espionage because the I. N. S., in the discharge of its duties, had embarked upon an independent decision to initiate proceedings for deportation.

The Constitution does not require that honest law enforcement should be put to such an irrevocable choice between two recourses of the Government. For a contrast to the proper cooperation between two branches of a single Department of Justice as revealed in this case, see the story told in *Colyer* v. *Skeffington,* 265 F. 17. That case sets forth in detail the improper use of immigration authorities by the Bureau of Investigation of the Department of Justice when the immigration service was

a branch of the Department of Labor and was acting not within its lawful authority but as the cat's paw of another, unrelated branch of the Government.

We emphasize again that our view of the matter would be totally different had the evidence established, or were the courts below not justified in not finding, that the administrative warrant was here employed as an instrument of criminal law enforcement to circumvent the latter's legal restrictions, rather than as a bona fide preliminary step in a deportation proceeding. The test is whether the decision to proceed administratively toward deportation was influenced by, and was carried out for, a purpose of amassing evidence in the prosecution for crime. The record precludes such a finding by this Court.

II.

The claim that the administrative warrant by which petitioner was arrested was invalid, because it did not satisfy the requirements for "warrants" under the Fourth Amendment, is not entitled to our consideration in the circumstances before us. It was not made below; indeed, it was expressly disavowed. Statutes authorizing administrative arrest to achieve detention pending deportation proceedings have the sanction of time. It would emphasize the disregard for the presumptive respect the Court owes to the validity of Acts of Congress, especially when confirmed by uncontested historical legitimacy, to bring into question for the first time such a long-sanctioned practice of government at the behest of a party who not only did not challenge the exercise of authority below, but expressly acknowledged its validity.

The grounds relied on in the trial court and the Court of Appeals by petitioner were solely (in addition to the insufficiency of the evidence, a contention not here for review) (1) the bad faith of the Government's use of

the administrative arrest warrant and (2) the lack of a power incidental to the execution of an administrative warrant to search and seize articles for use as evidence in a later criminal prosecution. At no time did petitioner question the legality of the administrative arrest procedure either as unauthorized or as unconstitutional. Such challenges were, to repeat, disclaimed. At the hearing on the motion to suppress, petitioner's counsel was questioned by the court regarding the theory of relief relied upon:

"The Court: They [the Government] were not at liberty to arrest him [petitioner]?

"Mr. Fraiman: No, your Honor.

"They were perfectly proper in arresting him.

"We don't contend that at all.

"As a matter of fact, we contend it was their duty to arrest this man as they did.

"I think it should show or rather, it showed admirable thinking on the part of the F. B. I. and the Immigration Service.

"We don't find any fault with that.

"Our contention is that although they were permitted to arrest this man, and in fact, had a duty to arrest this man in a manner in which they did, they did not have a right to search his premises for the material which related to espionage.

. . . . . .

". . . He was charged with no criminal offense in this warrant.

"The Court: He was suspected of being illegally in the country, wasn't he?

"Mr. Fraiman: Yes, your Honor.

"The Court: He was properly arrested.

"Mr. Fraiman: He was properly arrested, we concede that, your Honor."

Counsel further made it plain that the arrest warrant whose validity he was conceding was "one of these Immigration warrants which is obtained without any background material at all." Affirmative acceptance of what is now sought to be questioned could not be plainer.

The present form of the legislation giving authority to the Attorney General or his delegate to arrest aliens pending deportation proceedings under an administrative warrant, not a judicial warrant within the scope of the Fourth Amendment, is § 242 (a) of the Immigration and Nationality Act of 1952. (8 U. S. C. § 1252 (a)). The regulations under this Act delegate the authority to issue these administrative warrants to the District Directors of the I. N. S. "[a]t the commencement of any proceeding [to deport] . . . or at any time thereafter . . . whenever, in [their] . . . discretion, it appears that the arrest of the respondent is necessary or desirable." 8 CFR § 242.2 (a). Also, according to these regulations, proceedings to deport are commenced by orders to show cause issued by the District Directors or others; and the "Operating Instructions" of the I. N. S. direct that the application for an order to show cause should be based upon a showing of a prima facie case of deportability. The warrant of arrest for petitioner was issued by the New York District Director of the I. N. S. at the same time as he signed an order to show cause. Schoenenberger testified that, before the warrant and order were issued, he and Kanzler related to the District Director what they had learned from the F. B. I. regarding petitioner's status as an alien, and the order to show cause recited that petitioner had failed to register, as aliens must. Since petitioner was a suspected spy, who had never acknowledged his residence in the United States to the Government or openly admitted his presence here, there was ample reason to believe that his arrest pending deportation was "necessary or desirable." The arrest procedure followed

in the present case fully complied with the statute and regulations.

Statutes providing for deportation have ordinarily authorized the arrest of deportable aliens by order of an executive official. The first of these was in 1798. Act of June 25, 1798, c. 58, § 2, 1 Stat. 571. And see, since that time, and before the present Act, Act of Oct. 19, 1888, c. 1210, 25 Stat. 566; Act of Mar. 3, 1903, c. 1012, § 21, 32 Stat. 1218; Act of Feb. 20, 1907, c. 1134, § 20, 34 Stat. 904; Act of Feb. 5, 1917, c. 29, § 19, 39 Stat. 889; Act of Oct. 16, 1918, c. 186, § 2, 40 Stat. 1012; Act of May 10, 1920, c. 174, 41 Stat. 593; Internal Security Act of 1950, c. 1024, Title I, § 22, 64 Stat. 1008. To be sure, some of these statutes, namely the Acts of 1888, 1903 and 1907, dealt only with aliens who had landed illegally in the United States, and not with aliens sought to be deported by reason of some act or failure to act since entering. Even apart from these, there remains overwhelming historical legislative recognition of the propriety of administrative arrest for deportable aliens such as petitioner.

The constitutional validity of this long-standing administrative arrest procedure in deportation cases has never been directly challenged in reported litigation. Two lower court cases involved oblique challenges, which were summarily rejected. *Podolski* v. *Baird,* 94 F. Supp. 294; *Ex parte Avakian,* 188 F. 688, 692. See also the discussion in *Colyer* v. *Skeffington,* 265 F. 17, reversed on other grounds *sub nom. Skeffington* v. *Katzeff,* 277 F. 129, where the District Court made an exhaustive examination of the fairness of a group of deportation proceedings initiated by administrative arrests, but nowhere brought into question the validity of the administrative arrest procedure as such. This Court seems never expressly to have directed its attention to the particular question of the constitutional validity of administrative deportation warrants. It has

frequently, however, upheld administrative deportation proceedings shown by the Court's opinion to have been begun by arrests pursuant to such warrants. See *The Japanese Immigrant Case,* 189 U. S. 86; *Zakonaite* v. *Wolf,* 226 U. S. 272; *Bilokumsky* v. *Tod,* 263 U. S. 149; *Carlson* v. *Landon,* 342 U. S. 524. In *Carlson* v. *Landon,* the validity of the arrest was necessarily implicated, for the Court there sustained discretion in the Attorney General to deny bail to alien Communists held pending deportation on administrative arrest warrants. In the presence of this impressive historical evidence of acceptance of the validity of statutes providing for administrative deportation arrest from almost the beginning of the Nation, petitioner's disavowal of the issue below calls for no further consideration.

III.

Since petitioner's arrest was valid, we reach the question whether the seven challenged items, all seized during searches which were a direct consequence of that arrest, were properly admitted into evidence. This issue raises three questions: (1) Were the searches which produced these items proper searches for the Government to have made? If they were not, then whatever the nature of the seized articles, and however proper it would have been to seize them during a valid search, they should have been suppressed as the fruits of activity in violation of the Fourth Amendment. *E. g., Weeks* v. *United States,* 232 U. S. 383, 393. (2) Were the articles seized properly subject to seizure, even during a lawful search? We have held in this regard that not every item may be seized which is properly inspectible by the Government in the course of a legal search; for example, private papers desired by the Government merely for use as evidence may not be seized, no matter how lawful the search which

discovers them, *Gouled* v. *United States,* 255 U. S. 298, 310, nor may the Government seize, wholesale, the contents of a house it might have searched, *Kremen* v. *United States,* 353 U. S. 346. (3) Was the Government free to use the articles, even if properly seized, as evidence in a criminal case, the seizures having been made in the course of a separate administrative proceeding?

The most fundamental of the issues involved concerns the legality of the search and seizures made in petitioner's room in the Hotel Latham. The ground of objection is that a search may not be conducted as an incident to a lawful administrative arrest.

We take as a starting point the cases in this Court dealing with the extent of the search which may properly be made without a warrant following a lawful arrest for crime. The several cases on this subject in this Court cannot be satisfactorily reconciled. This problem has, as is well-known, provoked strong and fluctuating differences of view on the Court. This is not the occasion to attempt to reconcile all the decisions, or to re-examine them. Compare *Marron* v. *United States,* 275 U. S. 192, with *Go-Bart Co.* v. *United States,* 282 U. S. 344, and *United States* v. *Lefkowitz,* 285 U. S. 452; compare *Go-Bart, supra,* and *Lefkowitz, supra,* with *Harris* v. *United States,* 331 U. S. 145, and *United States* v. *Rabinowitz,* 339 U. S. 56; compare also *Harris, supra,* with *Trupiano* v. *United States,* 334 U. S. 699, and *Trupiano* with *Rabinowitz, supra* (overruling *Trupiano*). Of these cases, *Harris* and *Rabinowitz* set by far the most permissive limits upon searches incidental to lawful arrests. In view of their judicial context, the trial judge and the Government justifiably relied upon these cases for guidance at the trial; and the petitioner himself accepted the *Harris* case on the motion to suppress, nor does he ask this Court to reconsider *Harris* and *Rabinowitz.* It would, under these circumstances, be unjustifiable retro-

spective lawmaking for the Court in this case to reject the authority of these decisions.

Are there to be permitted incidental to valid administrative arrests, searches as broad in physical area as, and analogous in purpose to, those permitted by the applicable precedents as incidents to lawful arrests for crime? Specifically, were the officers of the I. N. S. acting lawfully in this case when, after his arrest, they searched through petitioner's belongings in his hotel room looking for weapons and documents to evidence his "alienage"? There can be no doubt that a search for weapons has as much justification here as it has in the case of an arrest for crime, where it has been recognized as proper. *E. g., Agnello* v. *United States,* 269 U. S. 20, 30. It is no less important for government officers, acting under established procedure to effect a deportation arrest rather than one for crime, to protect themselves and to insure that their prisoner retains no means by which to accomplish an escape.

Nor is there any constitutional reason to limit the search for materials proving the deportability of an alien, when validly arrested, more severely than we limit the search for materials probative of crime when a valid criminal arrest is made. The need for the proof is as great in one case as in the other, for deportation can be accomplished only after a hearing at which deportability is established. Since a deportation arrest warrant is not a judicial warrant, a search incidental to a deportation arrest is without the authority of a judge or commissioner. But so is a search incidental to a criminal arrest made upon probable cause without a warrant, and under *Rabinowitz,* 339 U. S., at 60, such a search does not require a judicial warrant for its validity. It is to be remembered that an I. N. S. officer may not arrest and search on his own. Application for a warrant must be made to an independent responsible officer, the District Director

of the I. N. S., to whom a prima facie case of deportability must be shown. The differences between the procedural protections governing criminal and deportation arrests are not of a quality or magnitude to warrant the deduction of a constitutional difference regarding the right of incidental search. If anything, we ought to be more vigilant, not less, to protect individuals and their property from warrantless searches made for the purpose of turning up proof to convict than we are to protect them from searches for matter bearing on deportability. According to the uniform decisions of this Court deportation proceedings are not subject to the constitutional safeguards for criminal prosecutions. Searches for evidence of crime present situations demanding the greatest, not the least, restraint upon the Government's intrusion into privacy; although its protection is not limited to them, it was at these searches which the Fourth Amendment was primarily directed. We conclude, therefore, that government officers who effect a deportation arrest have a right of incidental search analogous to the search permitted criminal law-enforcement officers.

Judged by the prevailing doctrine, the search of petitioner's hotel room was justified. Its physical scope, being confined to the petitioner's room and the adjoining bathroom, was far less extensive than the search in *Harris*. The search here was less intensive than were the deliberately exhaustive quests in *Harris* and *Rabinowitz*, and its purpose not less justifiable. The only things sought here, in addition to weapons, were documents connected with petitioner's status as an alien. These may well be considered as instruments or means for accomplishing his illegal status, and thus proper objects of search under *Harris, supra*, 331 U. S., at 154.

Two of the challenged items were seized during this search of petitioner's property at his hotel room. The first was item (2), a forged New York birth certificate

for "Martin Collins," one of the false identities which petitioner assumed in this country in order to keep his presence here undetected. This item was seizable when found during a proper search, not only as a forged official document by which petitioner sought to evade his obligation to register as an alien, but also as a document which petitioner was using as an aid in the commission of espionage, for his undetected presence in this country was vital to his work as a spy. Documents used as a means to commit crime are the proper subjects of search warrants, *Gouled* v. *United States,* 255 U. S. 298, and are seizable when discovered in the course of a lawful search, *Marron* v. *United States,* 275 U. S. 192.

The other item seized in the course of the search of petitioner's hotel room was item (1), a piece of graph paper containing a coded message. This was seized by Schoenenberger as petitioner, while packing his suitcase, was seeking to hide it in his sleeve. An arresting officer is free to take hold of articles which he sees the accused deliberately trying to hide. This power derives from the dangers that a weapon will be concealed, or that relevant evidence will be destroyed. Once this piece of graph paper came into Schoenenberger's hands, it was not necessary for him to return it, as it was an instrumentality for the commission of espionage. This is so even though Schoenenberger was not only not looking for items connected with espionage but could not properly have been searching for the purpose of finding such items. When an article subject to lawful seizure properly comes into an officer's possession in the course of a lawful search it would be entirely without reason to say that he must return it because it was not one of the things it was his business to look for. See *Harris, supra,* 331 U. S., at 154–155.

Items (3), (4), and (5), a birth certificate for "Emil Goldfus" who died in 1903, a certificate of vaccination for "Martin Collins," and a bank book for "Emil Goldfus"

were seized, not in petitioner's hotel room, but in a more careful search at I. N. S. headquarters of the belongings petitioner chose to take with him when arrested. This search was a proper one. The property taken by petitioner to I. N. S. headquarters was all property which, under *Harris,* was subject to search at the place of arrest. We do not think it significantly different, when the accused decides to take the property with him, for the search of it to occur instead at the first place of detention when the accused arrives there, especially as the search of property carried by an accused to the place of detention has additional justifications, similar to those which justify a search of the person of one who is arrested. It is to be noted that this is not a case, like *Kremen* v. *United States,* 353 U. S. 346, where the entire contents of the place where the arrest was made were seized. Such a mass seizure is illegal. The Government here did not seize the contents of petitioner's hotel room. Petitioner took with him only what he wished. He chose to leave some things behind in his room, which he voluntarily relinquished. And items (3), (4), and (5) were articles subject to seizure when found during a lawful search. They were all capable of being used to establish and maintain a false identity for petitioner, just as the forged "Martin Collins" birth certificate, and were seizable for the same reasons.

Items (1)–(5) having come into the Government's possession through lawful searches and seizures connected with an arrest pending deportation, was the Government free to use them as evidence in a criminal prosecution to which they related? We hold that it was. Good reason must be shown for prohibiting the Government from using relevant, otherwise admissible, evidence. There is excellent reason for disallowing its use in the case of evidence, though relevant, which is seized by the Government in violation of the Fourth Amendment to the Constitution. "If letters and private documents can thus

be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." *Weeks* v. *United States,* 232 U. S. 383, 393.

These considerations are here absent, since items (1)–(5) were seized as a consequence of wholly lawful conduct. That being so, we can see no rational basis for excluding these relevant items from trial: no wrongdoing police officer would thereby be indirectly condemned, for there were no such wrongdoers; the Fourth Amendment would not thereby be enforced, for no illegal search or seizure was made; the Court would be lending its aid to no lawless government action, for none occurred. Of course cooperation between the branch of the Department of Justice dealing with criminal law enforcement and the branch dealing with the immigration laws would be less effective if evidence lawfully seized by the one could not be used by the other. Only to the extent that it would be to the public interest to deter and prevent such cooperation, would an exclusionary rule in a case like the present be desirable. Surely no consideration of civil liberties commends discouragement of such cooperation between these two branches when undertaken in good faith. When undertaken in bad faith to avoid constitutional restraints upon criminal law enforcement the evidence must be suppressed. That is not, as we have seen, this case. Individual cases of bad faith cooperation should be dealt with by findings to that effect in the cases as they arise, not by an exclusionary rule preventing effective cooperation when undertaken in entirely good faith.

We have left to the last the admissibility of items (6) and (7), the hollowed-out pencil and the block of wood containing a "cipher pad," because their admissibility is founded upon an entirely different set of considerations.

These two items were found by an agent of the F. B. I. in the course of a search he undertook of petitioner's hotel room, immediately after petitioner had paid his bill and vacated the room. They were found in the room's wastepaper basket, where petitioner had put them while packing his belongings and preparing to leave. No pretense is made that this search by the F. B. I. was for any purpose other than to gather evidence of crime, that is, evidence of petitioner's espionage. As such, however, it was entirely lawful, although undertaken without a warrant. This is so for the reason that at the time of the search petitioner had vacated the room. The hotel then had the exclusive right to its possession, and the hotel management freely gave its consent that the search be made. Nor was it unlawful to seize the entire contents of the wastepaper basket, even though some of its contents had no connection with crime. So far as the record shows, petitioner had abandoned these articles. He had thrown them away. So far as he was concerned, they were *bona vacantia.* There can be nothing unlawful in the Government's appropriation of such abandoned property. See *Hester* v. *United States,* 265 U. S. 57, 58. The two items which were eventually introduced in evidence were assertedly means for the commission of espionage, and were themselves seizable as such. These two items having been lawfully seized by the Government in connection with an investigation of crime, we encounter no basis for discussing further their admissibility as evidence.

Affirmed.

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

Cases of notorious criminals—like cases of small, miserable ones—are apt to make bad law. When guilt permeates a record, even judges sometimes relax and let the police take shortcuts not sanctioned by constitutional

procedures. That practice, in certain periods of our history and in certain courts, has lowered our standards of law administration. The harm in the given case may seem excusable. But the practices generated by the precedent have far-reaching consequences that are harmful and injurious beyond measurement. The present decision is an excellent example.

The opening wedge that broadened the power of administrative officers—as distinguished from police—to enter and search peoples' homes was *Frank* v. *Maryland,* 359 U. S. 360. That case allowed a health inspector to enter a home without a warrant, even though he had ample time to get one. The officials of the Immigration and Naturalization Service (I. N. S.) are now added to the preferred list. They are preferred because their duties, being strictly administrative, put them in a separate category from those who enforce the criminal law. They need not go to magistrates, the Court says, for warrants of arrest. Their warrants are issued within the hierarchy of the agency itself.[1] Yet, as I attempted to show in my dissent in the *Frank* case, the Fourth Amendment in origin had to do as much with ferreting out heretics and collecting taxes as with enforcement of the criminal laws. 359 U. S., at 376–379.

Moreover, the administrative officer who invades the privacy of the home may be only a front for the police who are thus saved the nuisance of getting a warrant. We need not go far to find examples. In *Maryland* v. *Pettiford,* Sup. Bench Balt. City, The Daily Record, Dec. 16, 1959, the police used the mask of a health inspector

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[1] Section 242 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 208, 8 U. S. C. § 1252 (a), provides "Pending a determination of deportability in the case of any alien . . . such alien may, upon warrant of the Attorney General, be arrested and taken into custody."

to make the *Frank* case serve as an easy way to get a search without a warrant. Happily, they were rebuked.[2] But that case shows the kind of problems the *Frank* doctrine generates. The present case is another example of the same kind, although here the police are not rebuked. The administrative official with an administrative warrant, over which no judicial official exercises any supervision and which by statute may be used only for deportation, performs a new role. The police wear his mask to do police work. That, in my view, may not be done, even though we assume that the administrative warrant

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[2] In the *Pettiford* case it appears that a police officer assigned to the Sanitation Division gained entrance into a home without a warrant and discovered that the defendant who occupied the premises was engaged in lottery activities. He then signaled to a policeman in charge of gambling activities who was waiting outside in accordance with a prior agreement. Lottery slips were seized and over the defendant's objection were received in evidence in a criminal trial. A motion for a new trial was granted. The Supreme Bench of Baltimore City said in its opinion:

"Section 120 of Article 12 of the Baltimore City Code provides that if the Commissioner of Health has cause to suspect that a nuisance exists in any home, he may demand entry therein in the daytime and the owner or occupier is subject to a fine if entry is denied. A conviction under this Section by the Criminal Court of Baltimore City was sustained by the Supreme Court of the United States in a five to four decision. *Frank vs. Maryland* [359 U. S. 360]. . . .

. . . . . .

"In this case, it is evident that a principal, if not the chief purpose of the entry of the police officer assigned to the sanitation division was to endeavor to secure evidence of a lottery violation for his colleague. 'The security of one's privacy against arbitrary intrusion by the police . . . is basic to a free society.' *Wolf vs. Colorado*, 338 U. S. 25, 27. An exception to that security, upheld because indispensible for the maintenance of the community health, is not to be used to cover searches without warrants inconsistent with the conceptions of human rights [embodied] in our State and Federal Constitutions."

issued by an administrative rather than a judicial officer is valid for an arrest for the purpose of deportation. We take liberties with an Act of Congress, as well as the Constitution, when we permit this to be done. The statute permits the arrest of an alien on an administrative warrant "[p]ending a determination of deportability." [3] The Court now reads the Act as if it read "Pending an investigation of criminal conduct." Such was the nature of the arrest.

With due deference to the two lower courts, I think the record plainly shows that F. B. I. agents were the moving force behind this arrest and search. For at least a month they investigated the espionage activities of petitioner. They were tipped off concerning this man and his role in May; the arrest and search were made on June 21. The F. B. I. had plenty of time to get a search warrant, as much if not more time than they had in *Johnson* v. *United States,* 333 U. S. 10, and *Kremen* v. *United States,* 353 U. S. 346, where the Court held warrantless searches illegal. But the F. B. I. did not go to a magistrate for a search warrant. They went instead to the I. N. S. and briefed the officials of that agency on what they had discovered. On the basis of this data a report was made to John Murff, Acting District Director of the I. N. S., who issued the warrant of arrest.

No effort was made by the F. B. I. to obtain a search warrant from any judicial officer, though, as I said, there was plenty of time for such an application. The administrative warrant of arrest was chosen with care and calculation as the vehicle through which the arrest and search were to be made. The F. B. I. had an agreement with the officials of I. N. S. that this warrant of arrest would not be served at least until petitioner refused to

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[3] Note 1, *supra.*

"cooperate." The F. B. I. agents went with agents of the I. N. S. to apprehend petitioner in his hotel room. Again, it was the F. B. I. agents who were first. They were the ones who entered petitioner's room and who interrogated him to see if he would "cooperate"; and when they were unable to get him to "cooperate" by threatening him with arrest, they signaled agents of the I. N. S. who had waited outside to come in and make the arrest. The search was made both by the F. B. I. agents and by officers of the I. N. S. And when petitioner was flown 1,000 miles to a special detention camp and held for three weeks, the agents of the F. B. I. as well as I. N. S. interrogated him.[4]

Thus the F. B. I. used an administrative warrant to make an arrest for criminal investigation both in violation of § 242 (a) of the Immigration and Nationality Act [5] and in violation of the Bill of Rights.

The issue is not whether these F. B. I. agents acted in bad faith. Of course they did not. The question is how far zeal may be permitted to carry officials bent on law enforcement. As Mr. Justice Brandeis once said, "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent." *Olmstead* v. *United States,* 277 U. S. 438, 479 (dissenting opinion). The facts seem to me clearly to establish that the F. B. I. agents wore the mask of I. N. S. to do what otherwise they could not have done. They did what they could do only if they had gone to a judicial officer pursuant to the requirements of the Fourth Amendment, disclosed

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[4] Immigration officials (who often claim that their actions have an administrative finality beyond the reach of courts, see *Ludecke* v. *Watkins,* 335 U. S. 160; *Jay* v. *Boyd,* 351 U. S. 345) have no authority to detain suspects for secret interrogation. See *United States* v. *Minker,* 350 U. S. 179.

[5] Note 1, *supra.*

their evidence, and obtained the necessary warrant for the searches which they made.

If the F. B. I. agents had gone to a magistrate, any search warrant issued would by terms of the Fourth Amendment have to "particularly" describe "the place to be searched" and the "things to be seized." How much more convenient it is for the police to find a way around those specific requirements of the Fourth Amendment! What a hindrance it is to work laboriously through constitutional procedures! How much easier to go to another official in the same department! The administrative officer can give a warrant good for unlimited search. No more showing of probable cause to a magistrate! No more limitations on what may be searched and when!

In *Rea* v. *United States,* 350 U. S. 214, federal police officers, who obtained evidence in violation of federal law governing searches and seizures and so lost their case in the federal court, repaired to a state court and proposed to use it there in a state criminal prosecution. The Court held that the Federal District Court could properly enjoin the federal official from using the illegal search and seizure as basis for testifying in the state court. The federal rules governing searches and seizures, we held, are "designed as standards for federal agents" no more to be defeated by devious than by direct methods. The present case is even more palpably vulnerable. No state agency is involved. Federal police seek to do what immigration officials can do to deport a person but what our rules, statutes, and Constitution forbid the police from doing to prosecute him for a crime.

The tragedy in our approval of these short cuts is that the protection afforded by the Fourth Amendment is removed from an important segment of our life. We today forget what the Court said in *Johnson* v. *United States, supra,* at 14, that the Fourth Amendment provision

for "probable cause" requires that those inferences "be drawn by a neutral and detached magistrate" not "by the officer engaged in the often competitive enterprise of ferreting out crime." This is a protection given not only to citizens but to aliens as well, as the opinion of the Court by implication holds. The right "of the people" covered by the Fourth Amendment certainly gives security to aliens in the same degree that "person" in the Fifth and "the accused" in the Sixth Amendments also protects them. See *Wong Wing* v. *United States,* 163 U. S. 228, 242. Here the F. B. I. works exclusively through an administrative agency—the I. N. S.—to accomplish what the Fourth Amendment says can be done only by a judicial officer. A procedure designed to serve administrative ends—deportation—is cleverly adapted to serve other ends—criminal prosecution. We have had like examples of this same trend in recent times. Lifting the requirements of the Fourth Amendment for the benefit of health inspectors was accomplished by *Frank* v. *Maryland,* as I have said. Allowing the Department of Justice rather than judicial officers to determine whether aliens will be entitled to release on bail pending deportation hearings is another. See *Carlson* v. *Landon,* 342 U. S. 524.

Some things in our protective scheme of civil rights are entrusted to the judiciary. Those controls are not always congenial to the police. Yet if we are to preserve our system of checks and balances and keep the police from being all-powerful, these judicial controls should be meticulously respected. When we read them out of the Bill of Rights by allowing short cuts as we do today and as the Court did in the *Frank* and *Carlson* cases, police and administrative officials in the Executive Branch acquire powers incompatible with the Bill of Rights.

The F. B. I. agents stalked petitioner for weeks and had plenty of time to obtain judicial warrants for searching the

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premises he occupied. I would require them to adhere to the command of the Fourth Amendment and not evade it by the simple device of wearing the masks of immigration officials while in fact they are preparing a case for criminal prosecution.

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

This is a notorious case, with a notorious defendant. Yet we must take care to enforce the Constitution without regard to the nature of the crime or the nature of the criminal. The Fourth Amendment protects "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." This right is a basic one of all the people, without exception; and this Court ruled in *Weeks* v. *United States,* 232 U. S. 383, that the fruits of governmental violation of this guarantee could not be used in a criminal prosecution. The Amendment's protection is thus made effective for everyone only by upholding it when invoked by the worst of men.

The opinion of the Court makes it plain that the seizure of certain of the items of petitioner taken from his room at the Hotel Latham and used in evidence against him must depend upon the existence of a broad power, without a warrant, to search the premises of one arrested, in connection with and "incidental" to his arrest. This power is of the sort recognized by *Harris* v. *United States,* 331 U. S. 145, and later asserted even where the arresting officers, as here, had ample time and opportunity to secure a search warrant. *United States* v. *Rabinowitz,* 339 U. S. 56, overruling *Trupiano* v. *United States,* 334 U. S. 699. The leading early cases do not recognize any such power to make a search generally through premises attendant upon an arrest. See *Go-Bart Importing Co.* v.

United States, 282 U. S. 344; *United States* v. *Lefkowitz,* 285 U. S. 452.[1]

The general question has been extensively canvassed here, in the general context of an arrest for crime, in the *Harris, Trupiano* and *Rabinowitz* cases. Whether *Harris* and *Rabinowitz* should now be followed on their own facts is a question with which the Court is not now faced. Rather the question is whether the doctrine of those cases should be extended to a new and different set of facts—facts which present a search made under circumstances much less consistent with the Fourth Amendment's prohibition against unreasonable searches than any which this Court has hitherto approved. Factual differences weigh heavily in this area: "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." *Go-Bart Importing Co.* v. *United States, supra,* at 357. In *Harris* and *Rabinowitz,* the broad search was performed as an incident to an arrest for crime under warrants lawfully issued. 331 U. S., at 148; 339 U. S., at 58. The issuance of these warrants is by no means automatic—it is controlled by a constitutionally prescribed standard. It thus could be held that sufficient protection was given the individual without the execution of a second warrant for the search. Cf. Clark, J., dissenting in *United States* v. *Rabinowitz,* 176 F. 2d 732, 736, reversed, 339 U. S. 56. And while a search generally through premises "incident" to an arrest for crime without a warrant has been sanctioned only inferentially here,[2] even if such a search be deemed permissible under the Fourth Amendment, it would not go so far as the result here. Such an arrest may

[1] Earlier expressions looking the other way, *Agnello* v. *United States,* 269 U. S. 20, 30; *Marron* v. *United States,* 275 U. S. 192, 198–199, were put in proper perspective by their author in *Go-Bart* and *Lefkowitz.* See 282 U. S., at 358; 285 U. S., at 465.

[2] See *United States* v. *Rabinowitz, supra,* at 60.

constitutionally be made only upon probable cause, the existence of which is subject to judicial examination, see *Henry* v. *United States,* 361 U. S. 98, 100; and such an arrest demands the prompt bringing of the person arrested before a judicial officer, where the existence of probable cause is to be inquired into. Fed. Rules Crim. Proc., 5 (a) and (c). This Court has been astute to fashion methods of ensuring the due observance of these safeguards. *Henry* v. *United States, supra; Mallory* v. *United States,* 354 U. S. 449; *McNabb* v. *United States,* 318 U. S. 332.

Even assuming that the power of Congress over aliens may be as great as was said in *Galvan* v. *Press,* 347 U. S. 522, and that deportation may be styled "civil," *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 594, it does not follow that Congress may strip aliens of the protections of the Fourth Amendment and authorize unreasonable searches of their premises, books and papers. Even if Congress could make the exclusionary sanction of the Amendment inapplicable in deportation proceedings, the fruits of the search here were used in a prosecution whose criminal character no dialectic can conceal. Clearly the consequence of the Fourth Amendment in such a trial is that the fruits of such a search may not be given in evidence, under the rule declared in *Weeks* v. *United States, supra.* We need not, in my view, inquire as to whether the sort of "administrative" arrest made here is constitutionally valid as to permit the officers to hold petitioner's person for deportation proceedings. With the Court, this issue may be treated as not properly before us for our consideration, and the arrest may be treated for the purposes of this case as lawful in itself. But even with *Harris* and *Rabinowitz,* that does not conclude the matter as to the search. It is patent that the sort of search permitted by those cases, and necessary to sustain the seizures here, goes beyond what is reasonably related

to the mechanics of the arrest itself—ensuring the safety of the arresting officers and the security of the arrest against the prisoner's escape. Since it does, I think it plain that before it can be concluded here that the search was not an unreasonable one, there must be some inquiry into the over-all protection given the individual by the totality of the processes necessary to the arrest and the seizure. Here the arrest, while had on what is called a warrant, was made totally without the intervention of an independent magistrate; it was made on the authorization of one administrative official to another. And after the petitioner was taken into custody, there was no obligation upon the administrative officials who arrested him to take him before any independent officer, sitting under the conditions of publicity that characterize our judicial institutions, and justify what had been done.[3] Concretely, what happened instead was this: petitioner, upon his arrest, was taken to a local administrative headquarters and then flown in a special aircraft to a special detention camp over 1,000 miles away. He was incarcerated in solitary confinement there. As far as the world knew, he had vanished. He was questioned daily at the place of incarceration for over three weeks. An executive procedure as to his deportability was had, at the camp, after a few days, but there was never any independent inquiry or judicial control over the circumstances of the arrest and the seizure till over five weeks after his arrest, when, at the detention camp, he was served with a bench warrant for his arrest on criminal charges, upon an indictment.

The Fourth Amendment imposes substantive standards for searches and seizures; but with them one of the important safeguards it establishes is a procedure; and

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[3] This procedure is statutorily based on § 242 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 208, 8 U. S. C. § 1252 (a).

central to this procedure is an independent control over the actions of officers effecting searches of private premises. "Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests." *United States* v. *Lefkowitz, supra,* at 464. "Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police." *McDonald* v. *United States,* 335 U. S. 451, 455. It is one thing to say that an adequate substitute for this sort of intervention by a magistrate can be found in the strict protections with which federal criminal procedure surrounds the making of a criminal arrest—where the action of the officers must receive an antecedent or immediately subsequent independent scrutiny. It goes much further to say that such a substitute can be found in the executive processes employed here. The question is not whether they are constitutionally adequate in their own terms—whether they are a proper means of taking into custody one not charged with crime. The question is rather whether they furnish a context in which a search generally through premises can be said to be a reasonable one under the Fourth Amendment. These arrest procedures, as exemplified here, differ as night from day from the processes of an arrest for crime. When the power to make a broad, warrantless search is added to them, we create a complete concentration of power in executive officers over the person and effects of the individual. We completely remove any independent control over the powers of executive officers to make searches. They may take any man they think to be a deportable alien into their own custody, hold him without arraignment or bond, and, having been careful to apprehend him at home, make a search generally through his premises. I cannot see

how this can be said to be consistent with the Fourth Amendment's command; it was, rather, against such a concentration of executive power over the privacy of the individual that the Fourth Amendment was raised. I do not think the *Harris* and *Rabinowitz* cases have taken us to this point.

If the search here were of the sort the Fourth Amendment contemplated, there would be no need for the elaborate, if somewhat pointless, inquiry the Court makes into the "good faith" of the arrest. Once it is established that a simple executive arrest of one as a deportable alien gives the arresting officers the power to search his premises, what precise state of mind on the part of the officers will make the arrest a "subterfuge" for the start of criminal proceedings, and render the search unreasonable? We are not, I fear, given any workable answer, and of course the practical problems relative to the trial of such a matter hardly need elaboration; but the Court verbalizes the issue as "whether the decision to proceed administratively toward deportation was influenced by, and was carried out for, a purpose of amassing evidence in the prosecution for crime." But under today's ruling, every administrative arrest offers this possibility of a facile search, theoretically for things connected with unlawful presence in the country, that may turn up evidence of crime; and this possibility will be well known to arresting officers. Perhaps the question is how much basis the officers had to suspect the person of crime; but it would appear a strange test as to whether a search which turns up criminal evidence is unreasonable, that the search is the more justifiable the less there was antecedent probable cause to suspect the defendant of crime. If the search were made on a valid warrant, there would be no such issue even if it turned up matter relevant to another crime. See *Gouled* v. *United States,* 255 U. S. 298, 311–312. External procedural control in accord with the

basic demands of the Fourth Amendment removes the grounds for abuse; but the Court's attitude here must be based on a recognition of the great possibilities of abuse its decision leaves in the present situation. These possibilities have been recognized before, in a case posing less danger: "Arrest under a warrant for a minor or a trumped-up charge has been familiar practice in the past, is a commonplace in the police state of today, and too well-known in this country. . . . The progress is too easy from police action unscrutinized by judicial authorization to the police state." *United States* v. *Rabinowitz, supra,* at 82 (dissenting opinion). Where a species of arrest is available that is subject to no judicial control, the possibilities become more and more serious. The remedy is not to invite fruitless litigation into the purity of official motives, or the specific direction of official purposes. One may always assume that the officers are zealous to perform their duty. The remedy is rather to recognize that the power to perform a search generally throughout premises upon a purely executive arrest is so unconfined by any safeguards that it cannot be countenanced as consistent with the Fourth Amendment.

One more word. We are told that the governmental power to make a warrantless search might be greater where the object of the search is not related to crime but to some other "civil" proceeding—such as matter bearing on the issue whether a man should forcibly be sent from the country. The distinction is rather hollow here, where the proofs that turn up are in fact given in evidence in a criminal prosecution. And the distinction, again, invites a trial of the officers' purposes. But in any event, I think it perverts the Amendment to make this distinction. The Amendment states its own purpose, the protection of the privacy of the individual and of his property against the incursions of officials: the "right of the people to be secure in their persons, houses, papers, and effects." See

Boyd v. *United States,* 116 U. S. 616, 627. Like most of the Bill of Rights it was not designed to be a shelter for criminals, but a basic protection for everyone; to be sure, it must be upheld when asserted by criminals, in order that it may be at all effective, but it "reaches all alike, whether accused of crime or not." *Weeks* v. *United States, supra,* at 392. It is the individual's interest in privacy which the Amendment protects, and that would not appear to fluctuate with the "intent" of the invading officers. It is true that the greatest and most effective preventive against unlawful searches that has been devised is the exclusion of their fruits from criminal evidence, see *Weeks* v. *United States, supra; Boyd* v. *United States, supra;* but it is strange reasoning to infer from this that the central thrust of the guarantee is to protect against a search for such evidence. The argument that it is seems no more convincing to me now than when it was made by the Court in *Frank* v. *Maryland,* 359 U. S. 360. To be sure, the Court in *Boyd* v. *United States, supra,* and in subsequent cases [4] has commented upon the intimate relationship between the privilege against unlawful searches and seizures and that against self-incrimination. This has been said to be erroneous history; [5] if it was, it was even less than a harmless error; it was part of the process through which the Fourth Amendment, by means of the exclusionary rule, has become more than a dead letter in the federal courts. Certainly this putative relationship between the guarantees is not to be used as a

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[4] See, *e. g., Gouled* v. *United States, supra,* at 306; *United States* v. *Lefkowitz, supra,* at 466–467. The *Weeks* case itself, though drawing great support from *Boyd,* appears to rest most heavily on the Fourth Amendment itself.

[5] The famous attack on the *Boyd* case's historical basis is, of course, to be found in 8 Wigmore, Evidence (3d ed. 1940), §§ 2184, 2264. The attack is incident to Wigmore's strictures on the exclusionary rule. *Id.,* §§ 2183–2184.

basis of a stinting construction of either—it was the *Boyd* case itself [6] which set what might have been hoped to be the spirit of later construction of these Amendments by declaring that the start of abuse can "only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed." 116 U. S., at 635.

Since evidence was introduced against petitioner which had been obtained in violation of his constitutional guarantees as embodied in the Fourth Amendment, I would reverse his conviction for a new trial on the evidence not subject to this objection.

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[6] It is not without interest to note, too, that the *Boyd* case itself involved a search not in connection with a prosecution to impose fine or imprisonment, but simply with an action to forfeit 35 cases of plate glass said to have been imported into the country under a false customs declaration.

JONES *v.* UNITED STATES.

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

No. 69. Argued January 21, 1960.—Decided March 28, 1960.

1. While petitioner was in an apartment which he testified later was not his but that of a friend who permitted him to use it, the apartment was searched by federal officers armed with a search warrant, narcotics were found and seized, and petitioner was arrested and charged with violating the narcotics laws. He moved to suppress the evidence so seized on the ground that the search was illegal. *Held:* Petitioner was a "person aggrieved" within the meaning of Rule 41 (e) of the Federal Rules of Criminal Procedure, and he had standing to make the motion under that Rule. Pp. 260–267.

2. Issuance of the search warrant here involved was based solely on an affidavit by a federal narcotics officer reciting that: (1) he had received information from an unnamed informer that petitioner and another person were involved in illicit narcotics traffic and kept a supply of heroin on hand in the apartment and that the informer had purchased narcotics from them in the apartment; (2) information previously received from this informer had been correct; (3) the same information had been received from other sources; (4) petitioner and his associate were known to be drug addicts; and (5) the affiant believed that illicit drugs were being secreted in the apartment by petitioner and another person. *Held:* This was sufficient evidence of probable cause to justify issuance of the search warrant. Pp. 267–272.

3. Without having done so in the District Court, petitioner attacked in the Court of Appeals the legality of the search, on the ground that the warrant was not executed in conformity with 18 U. S. C. § 3109. The Court of Appeals fully considered the claim and rejected it. The Government did not contend that the issue was not properly before this Court. *Held:* The question is open to decision by this Court; but it cannot be resolved satisfactorily on the record. Therefore, the judgment of the Court of Appeals sustaining petitioner's conviction is vacated, and the case is remanded to the District Court to consider this issue. Pp. 272–273.

104 U. S. App. D. C. 345, 262 F. 2d 234, judgment vacated and case remanded.

Louis Henkin argued the cause for petitioner. With him on the brief was *Herbert S. Marks.*

James W. Knapp argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Wilkey, Robert S. Erdahl* and *Philip R. Monahan.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a prosecution for violation of federal narcotics laws. In the first count of a two-count indictment petitioner was charged with having "purchased, sold, dispensed and distributed" narcotics in violation of 26 U. S. C. § 4704 (a), that is, not in or from the "original stamped package." In the second count petitioner was charged under 21 U. S. C. § 174 with having "facilitated the concealment and sale of" the same narcotics, knowing them to have been imported illegally into the United States. Petitioner was found guilty on both counts and sentenced to seven years' imprisonment. The Court of Appeals, one judge dissenting, affirmed the conviction. 104 U. S. App. D. C. 345, 262 F. 2d 234. Since the case presented important questions in the administration of criminal justice, more particularly a defendant's standing to challenge the legality of a search in the circumstances of this case, as well as the legality of the particular search should standing be established, we granted certiorari. 359 U. S. 988.

Both statutory provisions under which petitioner was prosecuted permit conviction upon proof of the defendant's possession of narcotics, and in the case of 26 U. S. C. § 4704 (a) of the absence of the appropriate stamps. Possession was the basis of the Government's case against petitioner. The evidence against him may be briefly summarized. He was arrested in an apartment in the District of Columbia by federal narcotics officers, who

were executing a warrant to search for narcotics. Those officers found narcotics, without appropriate stamps, and narcotics paraphernalia in a bird's nest in an awning just outside a window in the apartment. Another officer, stationed outside the building, had a short time before seen petitioner put his hand on the awning. Upon the discovery of the narcotics and the paraphernalia petitioner had admitted to the officers that some of these were his and that he was living in the apartment.

Prior to trial petitioner duly moved to suppress the evidence obtained through the execution of the search warrant on the ground that the warrant had been issued without a showing of probable cause. The Government challenged petitioner's standing to make this motion because petitioner alleged neither ownership of the seized articles nor an interest in the apartment greater than that of an "invitee or guest." The District Court agreed to take evidence on the issue of petitioner's standing. Only petitioner gave evidence. On direct examination he testified that the apartment belonged to a friend, Evans, who had given him the use of it, and a key, with which petitioner had admitted himself on the day of the arrest. On cross-examination petitioner testified that he had a suit and shirt at the apartment, that his home was elsewhere, that he paid nothing for the use of the apartment, that Evans had let him use it "as a friend," that he had slept there "maybe a night," and that at the time of the search Evans had been away in Philadelphia for about five days.

Solely on the basis of petitioner's lack of standing to make it, the district judge denied petitioner's motion to suppress. When the case came on for trial before a different judge, the motion to suppress was renewed and was denied on the basis of the prior ruling. An unsuccessful objection was made when the seized items were offered in evidence at the trial.

In affirming petitioner's conviction the Court of Appeals agreed with the District Court that petitioner lacked standing, but proceeded to rule that even if it were to find that petitioner had standing, it would hold the evidence to have been lawfully received. A challenge to the search which petitioner had not made in the District Court, namely, that the method of executing the warrant had been illegal, was considered by the Court of Appeals and rejected, while the contention petitioner had made below, that there had been insufficient cause to issue the warrant, was rejected without discussion.

The issue of petitioner's standing is to be decided with reference to Rule 41 (e) of the Federal Rules of Criminal Procedure. This is a statutory direction governing the suppression of evidence acquired in violation of the conditions validating a search. It is desirable to set forth the Rule.

> "A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity

> therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. Rule 41 (e) applies the general principle that a party will not be heard to claim a constitutional protection unless he "belongs to the class for whose sake the constitutional protection is given." *Hatch* v. *Reardon,* 204 U. S. 152, 160. The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property. They are not exclusionary provisions against the admission of kinds of evidence deemed inherently unreliable or prejudicial. The exclusion in federal trials of evidence otherwise competent but gathered by federal officials in violation of the Fourth Amendment is a means for making effective the protection of privacy.

Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy. But prosecutions like this one have presented a special problem. To establish "standing," Courts of Appeals have generally required that the movant claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched. Since narcotics charges like those in the present indictment may be established through proof solely of possession of narcotics, a defendant seeking to comply with what has

been the conventional standing requirement has been forced to allege facts the proof of which would tend, if indeed not be sufficient, to convict him. At the least, such a defendant has been placed in the criminally tendentious position of explaining his possession of the premises. He has been faced, not only with the chance that the allegations made on the motion to suppress may be used against him at the trial, although that they may is by no means an inevitable holding, but also with the encouragement that he perjure himself if he seeks to establish "standing" while maintaining a defense to the charge of possession.

The dilemma that has thus been created for defendants in cases like this has been pointedly put by Judge Learned Hand:

> "Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma." *Connolly* v. *Medalie,* 58 F. 2d 629, 630.

Following this holding, several Courts of Appeals have pinioned a defendant within this dilemma. See, *e. g., Scoggins* v. *United States,* 92 U. S. App. D. C. 29–30, 202 F. 2d 211, 212; *United States* v. *Eversole,* 209 F. 2d 766, 768; *Accardo* v. *United States,* 101 U. S. App. D. C. 162, 163–164, 247 F. 2d 568, 569–570; *Grainger* v. *United States,* 158 F. 2d 236. A District Court has held otherwise. *United States* v. *Dean,* 50 F. 2d 905, 906 (D. C. Mass.). The Government urges us to follow the body of Court of Appeals' decisions and to rule that the lower

courts, including the courts below, have been right in barring a defendant in a case like this from challenging a search because of his failure, when making his motion to suppress, to allege either that he owned or possessed the property seized or that he had a possessory interest in the premises searched greater than the interest of an "invitee or guest."

Judge Hand's dilemma is not inescapable. It presupposes requirements of "standing" which we do not find compelling. Two separate lines of thought effectively sustain defendant's standing in this case. (1) The same element in this prosecution which has caused a dilemma, *i. e.*, that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged. (2) Even were this not a prosecution turning on illicit possession, the legally requisite interest in the premises was here satisfied, for it need not be as extensive a property interest as was required by the courts below.

As to the first ground, we are persuaded by this consideration: to hold to the contrary, that is, to hold that petitioner's failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction. Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction

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such squarely contradictory assertions of power by the Government. The possession on the basis of which petitioner is to be and was convicted suffices to give him standing under any fair and rational conception of the requirements of Rule 41 (e).

The Government's argument to the contrary essentially invokes *elegantia juris*. In the interest of normal procedural orderliness, a motion to suppress, under Rule 41 (e), must be made prior to trial, if the defendant then has knowledge of the grounds on which to base the motion. The Government argues that the defendant therefore must establish his standing to suppress the evidence at that time through affirmative allegations and may not wait to rest standing upon the Government's case at the trial. This provision of Rule 41 (e), requiring the motion to suppress to be made before trial, is a crystallization of decisions of this Court requiring that procedure, and is designed to eliminate from the trial disputes over police conduct not immediately relevant to the question of guilt. See *Nardone* v. *United States,* 308 U. S. 338, 341–342; *Segurola* v. *United States,* 275 U. S. 106, 111–112; *Agnello* v. *United States,* 269 U. S. 20, 34; *Adams* v. *New York,* 192 U. S. 585. As codified, the rule is not a rigid one, for under Rule 41 (e) "the court in its discretion may entertain the motion [to suppress] at the trial or hearing." This qualification proves that we are dealing with carrying out an important social policy and not a narrow, finicky procedural requirement. This underlying policy likewise precludes application of the Rule so as to compel the injustice of an internally inconsistent conviction. In cases where the indictment itself charges possession, the defendant in a very real sense is revealed as a "person aggrieved by an unlawful search and seizure" upon a motion to suppress evidence prior to trial. Rule 41 (e) should not be applied to allow the Government to deprive the defendant of standing to bring a motion

to suppress by framing the indictment in general terms, while prosecuting for possession.[1]

As a second ground sustaining "standing" here we hold that petitioner's testimony on the motion to suppress made out a sufficient interest in the premises to establish him as a "person aggrieved" by their search. That testimony established that at the time of the search petitioner was present in the apartment with the permission of Evans, whose apartment it was. The Government asserts that such an interest is insufficient to give standing. The Government does not contend that only ownership of the premises may confer standing. It would draw distinctions among various classes of possessors, deeming some, such as "guests" and "invitees" with only the "use" of the premises, to have too "tenuous" an interest although concededly having "some measure of control" through their "temporary presence," while conceding that others, who in a "realistic sense, have dominion of the apartment" or who are "domiciled" there, have standing. Petitioner, it is insisted, by his own testimony falls in the former class.

While this Court has never passed upon the interest in the searched premises necessary to maintain a motion to suppress, the Government's argument closely follows the prevailing view in the lower courts. They have denied standing to "guests" and "invitees" (*e. g., Gaskins* v. *United States,* 95 U. S. App. D. C. 34, 35, 218 F. 2d 47, 48; *Gibson* v. *United States,* 80 U. S. App. D. C. 81, 84, 149 F. 2d 381, 384; *In re Nassetta,* 125 F. 2d 924; *Jones* v. *United States,* 104 U. S. App. D. C. 345, 262 F. 2d 234),

[1] Ordinarily the Government should choose between opposing a motion to suppress made before trial and basing the case upon possession, but if necessary the District Court's discretion to hear the motion to suppress during trial may be invoked. The Government must, in any case, not permit a conviction to be obtained on the basis of possession, without the merits of a duly made motion to suppress having been considered.

and employees, who though in "control" or "occupancy" lacked "possession" (*e. g., Connolly* v. *Medalie,* 58 F. 2d 629, 630; *United States* v. *Conoscente,* 63 F. 2d 811). The necessary quantum of interest has been distinguished as being, variously, "ownership in or right to possession of the premises" (*e. g., Jeffers* v. *United States,* 88 U. S. App. D. C. 58, 61, 187 F. 2d 498, 501, affirmed, *Jeffers* v. *United States,* 342 U. S. 48), the interest of a "lessee or licensee" (*United States* v. *De Bousi,* 32 F. 2d 902), or of one with "dominion" (*McMillan* v. *United States,* 26 F. 2d 58, 60; *Steeber* v. *United States,* 198 F. 2d 615, 617). We do not lightly depart from this course of decisions by the lower courts. We are persuaded, however, that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. Even in the area from which they derive, due consideration has led to the discarding of these distinctions in the homeland of the common law. See Occupiers' Liability Act, 1957, 5 and 6 Eliz. 2, c. 31, carrying out Law Reform Committee, Third Report, Cmd. 9305. Distinctions such as those between "lessee," "licensee," "invitee" and "guest," often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards.

We rejected such distinctions as inappropriate to the law of maritime torts in *Kermarec* v. *Compagnie Generale,* 358 U. S. 625, 630–632. We found there to be a duty of ordinary care to one rightfully on the ship, regardless of whether he was a "licensee" rather than an "invitee." "For the admiralty law at this late date to import such conceptual distinctions would be foreign to its traditions

of simplicity and practicality." 358 U. S., at 631. *A fortiori* we ought not to bow to them in the fair administration of the criminal law. To do so would not comport with our justly proud claim of the procedural protections accorded to those charged with crime. No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched. As petitioner's testimony established Evans' consent to his presence in the apartment, he was entitled to have the merits of his motion to suppress adjudicated.

We come to consider the grounds upon which the search is alleged to have been illegal. The attack which was made in the District Court was one of lack of probable cause for issuing the search warrant. The question raised is whether sufficient evidence to establish probable cause to search was put before the Commissioner by the officer, Didone, who applied for the warrant. The sole evidence upon which the warrant was issued was an affidavit signed by Didone. Both parties urge us to decide the question here, without remanding it to the District Court which, because it found lack of standing, did not pass on it. We think it appropriate to decide the question.

The affidavit is set out in the margin.[2] Didone was a member of the Narcotic Squad in the District of Columbia.

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[2] "Affidavit in Support of a U. S. Commissioners Search Warrant for Premises 1436 Meridian Place, N. W., Washington, D. C., apartment 36, including window spaces of said apartment. Occupied by Cecil Jones and Earline Richardson.

"In the late afternoon of Tuesday, August 20, 1957, I, Detective Thomas Didone, Jr. received information that Cecil Jones and Earline

His affidavit claimed no direct knowledge of the presence of narcotics in the apartment. He swore that on the day before making the affidavit he had been given information, by one unnamed, that petitioner and another "were involved in the illicit narcotic traffic" and "kept a ready supply of heroin on hand" in the apartment. He swore that his informant claimed to have purchased narcotics at the apartment from petitioner and another "on many occasions," the last of which had been the day before the warrant was applied for. Didone swore that his informant "has given information to the undersigned on previous occasion and which was correct," that "[t]his same

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Richardson were involved in the illicit narcotic traffic and that they kept a ready supply of heroin on hand in the above mentioned apartment. The source of information also relates that the two aforementioned persons kept these same narcotics either on their person, under a pillow, on a dresser or on a window ledge in said apartment. The source of information goes on to relate that on many occasions the source of information has gone to said apartment and purchased narcotic drugs from the above mentioned persons and that the narcotics were secreated [*sic*] in the above mentioned places. The last time being August 20, 1957.

"Both the aforementioned persons are familiar to the undersigned and other members of the Narcotic Squad. Both have admitted to the use of narcotic drugs and display needle marks as evidence of same.

"This same information, regarding the illicit narcotic traffic, conducted by Cecil Jones and Earline Richardson, has been given to the undersigned and to other officers of the narcotic squad by other sources of information.

"Because the source of information mentioned in the opening paragraph has given information to the undersigned on previous occasion and which was correct, and because this same information is given by other sources does believe that there is now illicit narcotic drugs being secreated [*sic*] in the above apartment by Cecil Jones and Earline Richardson.

"Det. Thomas Didone, Jr., Narcotic Squad, MPDC.

"Subscribed and sworn to before me this 21 day of August, 1957.

"James F. Splain, U. S. Commissioner, D. C."

information" regarding petitioner had been given the narcotic squad by "other sources of information" and that the petitioner and the other implicated by the informant had admitted being users of narcotics. On this basis Didone founded his oath that he believed "that there is now illicit narcotic drugs being secreated [*sic*] in the above apartment by Cecil Jones."

This affidavit was, it is claimed, insufficient to establish probable cause because it did not set forth the affiant's personal observations regarding the presence of narcotics in the apartment, but rested wholly on hearsay. We held in *Nathanson* v. *United States,* 290 U. S. 41, that an affidavit does not establish probable cause which merely states the affiant's belief that there is cause to search, without stating facts upon which that belief is based. *A fortiori* this is true of an affidavit which states only the belief of one not the affiant. That is not, however, this case. The question here is whether an affidavit which sets out personal observations relating to the existence of cause to search is to be deemed insufficient by virtue of the fact that it sets out not the affiant's observations but those of another. An affidavit is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented.

In testing the sufficiency of probable cause for an officer's action even without a warrant, we have held that he may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge. *Draper* v. *United States,* 358 U. S. 307. We there upheld an arrest without a warrant solely upon an informant's statement that the defendant was peddling narcotics, as corroborated by the fact that the informant's description of the defendant's appearance, and of where he would be on a given morning (matters in themselves totally

innocuous) agreed with the officer's observations. We rejected the contention that an officer may act without a warrant only when his basis for acting would be competent evidence upon a trial to prove defendant's guilt. Quoting from *Brinegar* v. *United States,* 338 U. S. 160, 172, we said that such a contention "goes much too far in confusing and disregarding the difference between what is required to prove guilt in a criminal case and what is required to show probable cause for arrest or search. . . . There is a large difference between the two things to be proved [guilt and probable cause] . . . and therefore a like difference in the *quanta* and modes of proof required to establish them." 358 U. S., at 311–312. The dictum to the contrary in *Grau* v. *United States,* 287 U. S. 124, 128, was expressly rejected in *Draper.* 358 U. S., at 312, n. 4. See also Judge Learned Hand in *United States* v. *Heitner,* 149 F. 2d 105, 106.

What we have ruled in the case of an officer who acts without a warrant governs our decision here. If an officer may act upon probable cause without a warrant when the only incriminating evidence in his possession is hearsay, it would be incongruous to hold that such evidence presented in an affidavit is insufficient basis for a warrant. If evidence of a more judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant must be presented when a warrant is sought, warrants could seldom legitimatize police conduct, and resort to them would ultimately be discouraged. Due regard for the safeguards governing arrests and searches counsels the contrary. In a doubtful case, when the officer does not have clearly convincing evidence of the immediate need to search, it is most important that resort be had to a warrant, so that the evidence in the possession of the police may be weighed by an independent judicial officer, whose decision, not that

of the police, may govern whether liberty or privacy is to be invaded.

We conclude therefore that hearsay may be the basis for a warrant. We cannot say that there was so little basis for accepting the hearsay here that the Commissioner acted improperly. The Commissioner need not have been convinced of the presence of narcotics in the apartment. He might have found the affidavit insufficient and withheld his warrant. But there was substantial basis for him to conclude that narcotics were probably present in the apartment, and that is sufficient. It is not suggested that the Commissioner doubted Didone's word. Thus we may assume that Didone had the day before been told, by one who claimed to have bought narcotics there, that petitioner was selling narcotics in the apartment. Had that been all, it might not have been enough; but Didone swore to a basis for accepting the informant's story. The informant had previously given accurate information. His story was corroborated by other sources of information. And petitioner was known by the police to be a user of narcotics. Corroboration through other sources of information reduced the chances of a reckless or prevaricating tale; that petitioner was a known user of narcotics made the charge against him much less subject to scepticism than would be such a charge against one without such a history.

Petitioner argues that the warrant was defective because Didone's informants were not produced, because his affidavit did not even state their names, and Didone did not undertake and swear to the results of his own independent investigation of the claims made by his informants. If the objections raised were that Didone had misrepresented to the Commissioner his basis for seeking a warrant, these matters might be relevant. Such a charge is not made. All we are here asked to decide is

whether the Commissioner acted properly, not whether Didone did. We have decided that, as hearsay alone does not render an affidavit insufficient, the Commissioner need not have required the informants or their affidavits to be produced, or that Didone have personally made inquiries about the apartment, so long as there was a substantial basis for crediting the hearsay.

In the Court of Appeals petitioner presented an additional attack upon the legality of the search, namely, that the warrant was not executed in conformity with 18 U. S. C. § 3109.[3] Since petitioner did not, with ample opportunity to do so, make this claim in the District Court, we should not ordinarily consider it here had the Court of Appeals refused for that reason to entertain it. The Court of Appeals, however, fully considered the claim and rejected it; nor does the Government contend that it is not properly before us. In these circumstances we hold that the question of the legality of the execution of the search warrant under 18 U. S. C. § 3109 is open for our decision.

Unlike the claim of lack of probable cause, this contention is not one which can satisfactorily be resolved upon the record before us. As *Miller* v. *United States,* 357 U. S. 301, demonstrated, a claim under 18 U. S. C. § 3109 depends upon the particular circumstances surrounding the execution of the warrant. The trial revealed a direct conflict in testimony on this matter. We cannot yield to the Government's suggestion that we ignore that conflict and consider the question on the version of the warrant's execution given at the trial most favorable to the prosecution. We therefore vacate the

[3] "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

decision of the Court of Appeals and remand the case to the District Court to consider petitioner's contention under 18 U. S. C. § 3109, in light of our decision that petitioner had standing to make it.

Vacated and remanded.

MR. JUSTICE DOUGLAS.

I join the part of the opinion which holds that petitioner had "standing" to challenge the legality of the search. But I dissent from the ruling that there was "probable cause" for issuance of the warrant. The view that there was "probable cause" finds some support in *Draper* v. *United States,* 358 U. S. 307. But my dissent in *Draper* gives, I think, the true dimensions of the problem. This is an age where faceless informers have been reintroduced into our society in alarming ways. Sometimes their anonymity is defended on the ground that revelation of their names would ruin counter-espionage or cripple an underground network of agents. Yet I think in these Fourth Amendment cases the duty of the magistrate is nondelegable. It is not sufficient that the police think there is cause for an invasion of the privacy of the home. The judicial officer must also be convinced; and to him the police must go except for emergency situations. The magistrate should know the evidence on which the police propose to act. Unless that is the requirement, unless the magistrate makes his independent judgment on all the known facts, then he tends to become merely the tool of police interests. Though the police are honest and their aims worthy, history shows they are not appropriate guardians of the privacy which the Fourth Amendment protects.

NATIONAL LABOR RELATIONS BOARD *v.* DRIVERS, CHAUFFEURS, HELPERS, LOCAL UNION No. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

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

No. 34. Argued January 14, 1960.—Decided March 28, 1960.

Peaceful picketing by a labor union, which does not represent a majority of the employees, to compel the employer to recognize the union as the exclusive bargaining agent of its employees, is not conduct of the union "to restrain or coerce" the employees in the exercise of rights guaranteed in § 7 of the National Labor Relations Act, as amended, and therefore such picketing is not an unfair labor practice under § 8 (b) (1) (A) of the Act, as added by the Taft-Hartley Act. Pp. 275–292.

(a) Section 13 of the Act, as amended by the Taft-Hartley Act, is a command of Congress to the courts to resolve doubts and ambiguities in favor of an interpretation of § 8 (b) (1) (A) which safeguards the right to strike as understood prior to passage of the Taft-Hartley Act. Pp. 281–282.

(b) Section 8 (b) (1) (A) does not vest broad power in the National Labor Relations Board to sit in judgment upon, and to condemn, a minority union's resort to a specific economic weapon such as peaceful picketing. It is a limited grant of power to proceed against union tactics involving violence, intimidation and reprisal, or threats thereof—conduct involving more than the general pressures implicit in economic strikes. Pp. 282–290.

(c) In the Taft-Hartley Act Congress authorized the Board to regulate peaceful "recognitional" picketing only when it is employed to accomplish objectives specified in § 8 (b) (4). P. 290.

107 U. S. App. D. C. 42, 274 F. 2d 551, affirmed.

Dominick L. Manoli argued the cause for petitioner. With him on the brief were *Solicitor General Rankin, Stuart Rothman, Thomas J. McDermott* and *Norton J. Come.*

Herbert S. Thatcher argued the cause for respondent. With him on the brief was *David Previant.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question in this case is whether peaceful picketing by a union, which does not represent a majority of the employees, to compel immediate recognition as the employees' exclusive bargaining agent, is conduct of the union "to restrain or coerce" the employees in the exercise of rights guaranteed in § 7,[1] and thus an unfair labor practice under § 8 (b)(1)(A) of the National Labor Relations Act, as amended by the Taft-Hartley Act.[2]

Curtis Bros., Inc., has a retail store and a warehouse in Washington, D. C., in which it carries on a moving, warehousing and retail furniture business. In 1953 respondent Teamsters Local 639 was certified by the National Labor Relations Board, following a Board-conducted election, to be the exclusive representative of the Company's drivers, helpers, warehousemen and furniture finishers. However, when the Local called a strike over

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[1] Section 7, as amended by the Taft-Hartley Act, provides:

"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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3)." 49 Stat. 452, as amended, 61 Stat. 140, 29 U. S. C. § 157.

[2] Section 8 (b)(1)(A) provides in pertinent part:

"It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . . ." 61 Stat. 141, 29 U. S. C. § 158 (b)(1)(A).

contract terms in February 1954 only nine of 21 employees in the unit left their jobs and Curtis Bros. replaced the nine with new employees. The strike continued but the Local gradually lost membership, and when after a year Curtis Bros. petitioned the Board to conduct another election, the Local wrote the Board that it did not claim to represent a majority of the employees. The Board nevertheless ordered another election, 114 N. L. R. B. 116, which was held in October 1955, and the then employees of the unit voted 28 to one in favor of "no union." [3]

A month after the election, in November 1955, the Local withdrew a picket line which had been maintained before the employees' entrance to the warehouse during the period from February 1954. However, picketing at the customers' entrance to the retail store was continued, but limited to not more than two pickets at any time. The pickets were orderly at all times and made no attempt to prevent anyone from entering the store. They simply patrolled before the entrance carrying signs reading on one side, "Curtis Bros. employs nonunion drivers, helpers, warehousemen and etc. Unfair to Teamsters Union No. 639 AFL," and on the other side, "Teamsters Union No. 639 AFL wants employes of Curtis Bros. to join them to gain union wages, hours, and working conditions."

After this picketing continued for about six months, Curtis Bros. made it the subject of an unfair labor practice charge against the Local for alleged violation of §8 (b)(1)(A). A complaint issued which alleged, in substance, that the picketing was activity to "restrain or coerce" the employees in the exercise of § 7 rights, and

[3] The nine strikers who had been replaced were not permitted to vote in the election. Cf. § 9 (c)(3), as amended by § 702 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 542, which permits striking employees who have been replaced to vote under certain circumstances.

thus an unfair labor practice under § 8 (b)(1)(A), because it was "recognitional" picketing, that is, picketing designed to induce Curtis Bros. to recognize the Local as the exclusive bargaining agent for the employees, although the union did not represent a majority of the employees.

The Trial Examiner recommended that the complaint be dismissed on the ground that the Local's peaceful picketing, even if "recognitional," was not conduct to "restrain or coerce." The Board, one member disssenting, disagreed and entered a cease-and-desist order, 119 N. L. R. B. 232. On review at the instance of the Local, the United States Court of Appeals for the District of Columbia Circuit, by a divided court, set aside the Board's order, holding that § 8 (b)(1)(A) "is inapplicable to peaceful picketing, whether 'organizational' or 'recognitional' in nature . . . ." 107 U. S. App. D. C. 42, 43, 274 F. 2d 551, 552.[4] Because of the importance of the question in the administration of the Act, we granted certiorari. 359 U. S. 965.

After we granted certiorari, the Congress enacted the Labor-Management Reporting and Disclosure Act of 1959, which, among other things, adds a new § 8 (b)(7) to the National Labor Relations Act.[5] It was stated

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[4] Accord: *Labor Board* v. *International Brotherhood of Teamsters, Local No. 182,* 272 F. 2d 85 (C. A. 2d Cir.). Contra: *Labor Board* v. *United Rubber Workers,* 269 F. 2d 694 (C. A. 4th Cir.), cert. granted and judgment reversed, *post,* p. 329.

[5] New § 8 (b)(7) provides:

"It shall be an unfair labor practice for a labor organization or its agents—

. . . . . .

"(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organiza-

by the Board on oral argument that if this case arose under the 1959 Act, the Board might have proceeded against the Local under § 8 (b)(7). This does not, however, relegate this litigation to the status of an unimportant controversy over the meaning of a statute which has been significantly changed. For the Board contends that new § 8 (b)(7) does not displace § 8 (b)(1)(A) but merely "supplements the power already conferred by Section 8 (b)(1)(A)." [6] It argues that the Board may

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tion as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

"(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9 (c) of this Act,

"(B) where within the preceding twelve months a valid election under section 9 (c) of this Act has been conducted, or

"(C) where such picketing has been conducted without a petition under section 9 (c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9 (c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

"Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8 (b)." 73 Stat. 544.

[6] The Solicitor General stated in a memorandum filed in this Court on October 21, 1959, in another case—*Rubber Workers* v. *Labor Board*, *post*, p. 329—with reference to the several cases raising the "so-called

proceed against peaceful "recognitional" picketing conducted by a minority union in more situations than are specified in § 8 (b)(7) and without regard to the limitations of § 8 (b)(7)(C).[7]

Basic to the right guaranteed to employees in § 7 to form, join or assist labor organizations, is the right to engage in concerted activities to persuade other employees to join for their mutual aid and protection. Indeed, even before the Norris-LaGuardia Act, 47 Stat. 70, and the Wagner Act, 49 Stat. 449, this Court recognized a right in unions to "use all lawful propaganda to enlarge their membership." *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184, 209. However, the Taft-Hartley Act added another right of employees also guaranteed protection, namely, the right to refrain from joining a

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Curtis issue," that the passage of the 1959 Act injected "additional considerations [which] may, in the Court's view, warrant remand . . . to the Board for further examination in the light of" the 1959 Act. However, remand of this case would serve no purpose. After the Solicitor General made the suggestion the Board, on November 17, 1959, considered a case which arose prior to the 1959 Act. The Board, with four of its five members sitting, examined its position as to the scope of § 8 (b)(1)(A) in the light of the 1959 Act and by a vote of three to one decided that the doctrine announced in this, the *Curtis Bros.*, case was in no way affected by the 1959 Act, stating that "[C]ontrary to our dissenting colleague, we believe that the new provisions concerning recognition and/or organizational picketing merely amplify the . . . Section 8 (b) proscriptions. . . ." *Local 208, International Brotherhood of Teamsters* (*Sierra Furniture Co.*), 125 N. L. R. B. 159, 162, n. 6.

[7] The Board does not rely, as support for its order here under § 8 (b)(1)(A), upon the fact that the Local picketed after the election. In *Local 208, International Brotherhood of Teamsters* (*Sierra Furniture Co.*), 125 N. L. R. B. 159, a like order was issued against peaceful "recognitional" picketing although no election had been held. We agree with the Board that if § 8 (b)(1)(A) confers power on the Board to proceed against such picketing, Congress did not limit its application to picketing following the conduct of an election at which the employees reject the union as their representative.

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union, except as that right might be affected by an agreement authorized in § 8 (a)(3). Thus tension exists between the two rights of employees protected by § 7—their right to form, join or assist labor organizations, and their right to refrain from doing so. This tension is necessarily quite real when a union employs economic weapons to organize employees who do not want to join the union. The Board held here that peaceful picketing is not lawfully employed as an economic weapon to further self-organization if its objective is "recognitional." The Board stated: "Because the object of the Union's picketing in this case was to force the Company to commit an act prohibited by the statute itself [that is, to recognize and contract with the Local although it was not the chosen representative of a majority of the Curtis Bros. employees] and directly to deprive the employees of a right expressly guaranteed to them by the same Act, there is no occasion here to balance conflicting interests or rights." 119 N. L. R. B. 232, 238.[8] It therefore found

[8] The Board does not say, however, that a union which does not represent a majority of the employees will always violate § 8 (b)(1)(A) if it peacefully pickets an employer to organize his employees, even, as here, if the picketing is carried on after the union has been rejected by the employees in a Board-conducted election. The Board says in its brief that the picketing is "organizational" and not "recognitional" if its purpose is "merely to organize the employees, with a view to demanding recognition in the future should majority support be acquired." The Board's view is that, if the picketing is "organizational," a different question may be presented under § 8 (b)(1)(A)—that in such case its function to balance the competing rights of the union and the employees under § 7 may be invoked, and the picketing found to be privileged because the balance may be struck in favor of "a competing interest which the Act [§ 7] recognizes," namely, the right to form, join or assist labor organizations.

If § 8 (b)(1)(A) empowers the Board to proceed against peaceful picketing in any circumstances, the validity of a distinction in coverage between peaceful "organizational" and "recognitional" picketing

no justification for the threat to the employees' job security which was thought to be inherent in the economic pressure directed against the employer by the picketing. It was this threat which was said to taint peaceful picketing as unlawful conduct to "restrain or coerce" which the Board might forbid.

We first consider § 8 (b)(1)(A) in the light of § 13, as amended, which provides, in substance, that the Taft-Hartley Act shall not be taken as restricting or expanding either the right to strike or the limitations or qualifications on that right, as these were understood prior to 1947, unless "specifically provided for" in the Act itself.[9] The Wagner Act conferred upon the Board wide authority to protect strikers from employer retaliation. However, the Court and the Board fashioned the doctrine that the Board should deny reinstatement to strikers who engaged in strikes which were conducted in an unlawful manner or for an unlawful objective. See for example *Southern S. S. Co.* v. *Labor Board,* 316 U. S. 31; *Labor Board* v. *Fansteel Metallurgical Corp.,* 306 U. S. 240; *Labor Board* v. *Sands Mfg. Co.,* 306 U. S. 332; and *American News Co.,* 55 N. L. R. B. 1302. These are the "limitations or qualifications" on the right to strike referred to in § 13.

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has been challenged. See Cox, Some Current Problems in Labor Law: An Appraisal, 35 L. R. R. M. 48, 53–57; Bornstein, Organizational Picketing in American Law, 46 Ky. L. J. 25; Isaacson, Organizational Picketing: What is the Law?—Ought the Law to be Changed? 8 Buffalo L. R. 345. New § 8(b)(7) does not make the distinction.

[9] Section 13 provides:

"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 61 Stat. 151, 29 U. S. C. § 163.

Picketing has been equated with striking for the purposes of § 13. See, *e. g., Labor Board* v. *International Rice Milling Co.,* 341 U. S. 665. Cf. *International Brotherhood of Teamsters, Local No. 807 (Schultz Refrigerated Service, Inc.),* 87 N. L. R. B. 502.

See S. Rep. No. 105, 80th Cong., 1st Sess. 28. The Board makes no claim that prior to 1947 it was authorized, because of any "limitation" or "qualification," to issue a cease-and-desist order against peaceful "recognitional" picketing; indeed the full protections of the Norris-LaGuardia Act extended to peaceful picketing by minority unions for recognition. See *Fur Workers Union No. 21238* v. *Fur Workers Union, Local No. 72,* 308 U. S. 522, *per curiam* affirming 70 App. D. C. 122, 105 F. 2d 1; *Lauf* v. *Shinner & Co.,* 303 U. S. 323. Therefore, since the Board's order in this case against peaceful picketing would obviously "impede" the right to strike, it can only be sustained if such power is "specifically provided for" in § 8 (b)(1)(A), as added by the Taft-Hartley Act. To be sure, § 13 does not require that the authority for the Board action be spelled out in so many words. Rather, since the Board does not contend that § 8 (b)(1)(A) embodies one of the "limitations or qualifications" on the right to strike, § 13 declares a rule of construction which cautions against an expansive reading of that section which would adversely affect the right to strike, unless the congressional purpose to give it that meaning persuasively appears either from the structure or history of the statute. Therefore, § 13 is a command of Congress to the courts to resolve doubts and ambiguities in favor of an interpretation of § 8 (b)(1)(A) which safeguards the right to strike as understood prior to the passage of the Taft-Hartley Act.

The Board asserts that the very general standard in § 8 (b)(1)(A) vests power in the Board to sit in judgment upon, and to condemn, a minority union's resort to a specific economic weapon, here peaceful picketing. The structure of § 8 (b), which defines unfair labor practices, hardly supports the Board's claims. Earlier this Term we pointed out that "Congress has been rather specific when it has come to outlaw particular economic weapons

on the part of unions." *Labor Board* v. *Insurance Agents' International Union,* 361 U. S. 477, 498. We referred to § 8 (b)(4) as illustrative of the congressional practice.[10] In the context of a union's striking to promote enlarged membership, Congress there explicitly prohibited a union's resort to the secondary boycott, to the strike to force em-

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[10] Section 8 (b)(4) provides:

"It shall be an unfair labor practice for a labor organization or its agents—

. . . . . .

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or 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 under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

ployers or self-employed persons to join unions, and, very pertinent here, to the "recognitional" strike where another union is certified. Plainly if the Board's interpretation is sustained, § 8 (b)(1)(A) largely overlaps at least this last-mentioned prohibition, namely § 8 (b)(4)(C), to the extent of making it almost redundant.[11] But the Court has rejected an argument that a provision of § 8 (b)(4) is a repetition of the prohibitions of § 8 (b)(1)(A). In *International Brotherhood of Electrical Workers* v. *Labor Board,* 341 U. S. 694, the Court, in holding that a peaceful strike to promote self-organization was proscribed by § 8 (b)(4)(A) if its objective was to "induce or encourage" a secondary boycott, contrasted the language of the two subsections and labeled the words "restrain or coerce" in § 8 (b)(1)(A) a "restricted phrase" to be equated with "threat of reprisal or force or promise of benefit." *Id.,* at 701–703.

In the sensitive area of peaceful picketing Congress has dealt explicitly with isolated evils which experience has established flow from such picketing. Therefore, unless there is the clearest indication in the legislative history of § 8 (b)(1)(A) supporting the Board's claim of power under that section, we cannot sustain the Board's order here. We now turn to an examination of the legislative history.

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[11] If peaceful "recognitional" picketing by a minority union may be prohibited under § 8 (b)(1)(A) whenever it occurs, the only independent coverage of § 8 (b)(4)(C) would be when a *majority* union pickets for recognition in the face of another union's being certified. Although § 8 (b)(4)(C) may cover such a situation, a question which we do not have to decide, any suggestion that it was placed in the statute primarily because of a solicitude for a minority union whose certification is formally unrevoked is without any support in the legislative history. See S. Rep. No. 105, 80th Cong., 1st Sess. 22; H. R. Conf. Rep. No. 510 on H. R. 3020, 80th Cong., 1st Sess. 44; 93 Cong. Rec. 3838.

In the comprehensive review of union practices leading up to the enactment of the Taft-Hartley Act, picketing practices were subjected to intensive inquiry by both House and Senate Labor Committees. The Senate bill, as brought to the floor by the Senate Labor Committee regulated organizational activity in specified situations. Proposed § 8 (b)(4)(3), now § 8 (b)(4)(C) of the law, made "recognitional" picketing of a primary employer unlawful only where "another labor organization has been certified as the representative" of his employees. Section 8 (b)(4)(2), now § 8 (b)(4)(B), prohibited attempts to force recognition through secondary pressure.

However, five members of the Senate Labor Committee, including Senators Taft and Ball, believed that the Senate bill did not go far enough in the regulation of practices employed by unions for organizational purposes. These Senators introduced on the floor a proposed amendment to the Committee bill. The amendment as originally phrased was the counterpart of § 8 (a)(1) applicable to employers; it would have made it an unfair labor practice for a labor organization "to interfere with" as well as "to restrain or coerce employees in the exercise of the rights guaranteed in § 7 . . . ." The words "interfere with" were dropped during the debate, but except for this change, the amendment became § 8 (b)(1)(A).

The report of supplemental views which announced the five Senators' intention to propose the amendment identifies the abuses which the section was designed to reach. That report states: "The committee heard many instances of union coercion of employees such as that brought about by threats of reprisal against employees and their families in the course of organizing campaigns; also direct interference by mass picketing and other violence. Some of these acts are illegal under State law, but we see no reason why they should not also constitute

unfair labor practices to be investigated by the National Labor Relations Board, and at least deprive the violators of any protection furnished by the Wagner Act." S. Rep. No. 105, 80th Cong., 1st Sess. 50. Similar expressions pervaded the Senate debates on the amendment. The note repeatedly sounded is as to the necessity for protecting individual workers from union organizational tactics tinged with violence, duress or reprisal. Senator Ball cited numerous examples of organizing drives characterized by threats against unorganized workers of violence, job reprisals and such repressive assertions as that double initiation fees would be charged those who delayed joining the union. 93 Cong. Rec. 4016–4017. When Senator Ives objected to the words "interfere with" as too broad, Senator Taft insisted that even those words would have a limited application and would reach "reprehensible" practices but not methods of peaceful persuasion. He continued:

> "Why should a union be able to go to an employee and threaten violence if he does not join the union? Why should a union be able to say to an employee, 'If you do not join this union we will see that you cannot work in the plant'? . . . We know that such things have actually occurred. We know that men have been threatened. There have been many cases in which unions have threatened men or their wives. They have called on them on the telephone and insisted that they sign bargaining cards. They have said to them, 'Sooner or later we are going to organize this plant with a closed shop, and you will be out.' . . ." 93 Cong. Rec. 4021.

It is true that here and there in the record of the debates there are isolated references to instances of conduct which might suggest a broader reach of the amendment. See

for example 93 Cong. Rec. 4023–4024.[12] But they appear more as asides in a debate, the central theme of which was not the curtailment of the right peacefully to strike, except as provided in § 8 (b)(4), but the elimination of the use of repressive tactics bordering on violence or involving particularized threats of economic reprisal. The plainest indication negating an intention to restrict the use by unions of methods of peaceful persuasion, including peaceful picketing, is seen in the comments of Senator Taft near the close of the debate. He said:

> "It seems to me very clear that so long as a union-organizing drive is conducted by persuasion, by propaganda, so long as it has every legitimate purpose, the Board cannot in any way interfere with it. . . ." 93 Cong. Rec. 4434.
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> . . . . .
>
> "The effect of the pending amendment is that the Board may call the union before them, exactly as it

[12] It is not at all clear that these references support the suggested inference. The context in which they appear is that early in the debate Senator Pepper had urged that employees do not need protection from union leaders because these leaders can be controlled through union elections. Senator Taft denied this, and gave one example in which a union which represented some employees in the plant seeking to organize other unwilling employees, "coerced them" by threats to "close down" the plant in which they worked thereby depriving them of their jobs.

"The dockmen in that case were not striking for any particular benefit for themselves, but they were striking to coerce the other employees to leave the union of which they were members, and to join the other union—clearly an improper course of action, and clearly a matter which should be restrained by the National Labor Relations Board." 93 Cong. Rec. 4023.

Again, replying to Senator Pepper, Senator Taft cited an instance in which picketing closed a plant for several months. Senator Taft observed, "[c]oercion is not merely against union members; it may be against all employees." 93 Cong. Rec. 4024.

has called the employer, and say, 'Here are the rules of the game. You must cease and desist from coercing and restraining the employees who want to work from going to work and earning the money which they are entitled to earn.' The Board may say, 'You can persuade them; you can put up signs; you can conduct any form of propaganda you want to in order to persuade them, but you cannot, by threat of force or threat of economic reprisal, prevent them from exercising their right to work.' As I see it, that is the effect of the amendment." 93 Cong. Rec. 4436.

. . . . .

"The Senator says it will slow up organizational drives. It will slow up organizational drives only if they are accompanied by threats and coercion. The cease-and-desist order will be directed against the use of threats and coercion. It will not be directed against the use of propaganda or the use of persuasion, or against the use of any of the other peaceful methods of organizing employees.

"Mr. President, I can see nothing in the pending measure which, as suggested by the Senator from Oregon, would in some way outlaw strikes. It would outlaw threats against employees. It would not outlaw anybody striking who wanted to strike. It would not prevent anyone using the strike in a legitimate way, conducting peaceful picketing, or employing persuasion. All it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work." *Ibid.*

This approach in the Senate is in sharp contrast to the House view, which was that picketing should be strictly circumscribed. The House passed a bill imposing drastic

limitations upon the right to picket. Section 12 (a)(1) of that bill dealt specifically with the use of force and threats of force, but especially pertinent here are §§ 12 (a)(2) and 12 (a)(3)(C) which went far beyond this. The former would have outlawed all picketing of "an employer's premises for the purpose of leading persons to believe that there exists a labor dispute involving such employer, in any case in which the employees are not involved in a labor dispute with their employer." And the latter would have banned picketing "an object of which [was] (i) to compel an employer to recognize for collective bargaining a representative not certified under section 9 . . . or (iii) to compel an employer to violate any law . . . ." H. R. 3020, 80th Cong., 1st Sess. 47–49. Plainly the Local's conduct in the instant case would have been prohibited if the House bill had become law.

But the House conferees abandoned the House bill in conference and accepted the Senate proposal. H. R. Conf. Rep. No. 510 on H. R. 3020, 80th Cong., 1st Sess. 42.[13] They joined in a Conference Report which stated that "the primary strike for recognition (without a Board certification) was not prohibited." *Id.*, at 43.

This history makes pertinent what the Court said in *Local 1976, United Brotherhood of Carpenters* v. *Labor Board,* 357 U. S. 93, 99–100: "It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appro-

[13] The Conference Report states that § 8 (b)(1)(A) of the Senate version covers "all of the activities which were proscribed in section 12 (a)(1) of the House bill as unlawful concerted activities and some of the activities which were proscribed in the other paragraphs of section 12 (a)."

priate balance to be struck between the uncontrolled power of management and labor to further their respective interests. This is relevant in that it counsels wariness in finding by construction a broad policy . . . as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law." Certainly due regard for this admonition quite apart from the caveat in § 13 requires caution against finding in the nonspecific, indeed vague, words, "restrain or coerce" that Congress intended the broad sweep for which the Board contends.

We conclude that the Board's interpretation of § 8 (b)(1)(A) finds support neither in the way Congress structured § 8 (b) nor in the legislative history of § 8 (b)(1)(A). Rather it seems clear, and we hold, that Congress in the Taft-Hartley Act authorized the Board to regulate peaceful "recognitional" picketing only when it is employed to accomplish objectives specified in § 8 (b)(4); and that § 8 (b)(1)(A) is a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof—conduct involving more than the general pressures upon persons employed by the affected employers implicit in economic strikes.

The Board's own interpretation for nearly a decade after the passage of the Taft-Hartley Act gave § 8 (b)(1)(A) this limited application. See, *e. g., National Maritime Union,* 78 N. L. R. B. 971, enforcement granted, 175 F. 2d 686; *Local 74, United Brotherhood of Carpenters (Watson's Specialty Store)*, 80 N. L. R. B. 533, enforcement granted, 181 F. 2d 126, affirmed, 341 U. S. 707; *Perry Norvell Co.,* 80 N. L. R. B. 225; *Miami Copper Co.,* 92 N. L. R. B. 322; *Medford Building & Construction Trades Council (Kogap Lumber Industries)*, 96

N. L. R. B. 165; *District 50, United Mine Workers (Tungsten Mining Corp.)*, 106 N. L. R. B. 903. In *Perry Norvell, supra,* at 239, the Board declared:

> "By Section 8 (b)(1)(A), Congress sought to fix the rules of the game, to insure that strikes and other organizational activities of employees were conducted peaceably by persuasion and propaganda and not by physical force, or threats of force, or of economic reprisal. In that Section, Congress was aiming at means, not at ends."

The Board dismisses these cases as "dubious precedent." 119 N. L. R. B., at 246. We think they gave a sounder construction to § 8 (b)(1)(A) than the Board's construction in the present case.

We are confirmed in our view by the action of Congress in passing the Labor-Management Reporting and Disclosure Act of 1959. That Act goes beyond the Taft-Hartley Act to legislate a comprehensive code governing organizational strikes and picketing and draws no distinction between "organizational" and "recognitional" picketing. While proscribing peaceful organizational strikes in many situations, it also establishes safeguards against the Board's interference with legitimate picketing activity. See § 8 (b)(7)(C).[14] Were § 8 (b)(1)(A) to have the sweep contended for by the Board, the Board might proceed against peaceful picketing in disregard of these safeguards. To be sure, what Congress did in 1959 does not establish what it meant in 1947. However, as another major step in an evolving pattern of regulation of union conduct, the 1959 Act is a relevant consideration. Courts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might

[14] See note 5, *supra.*

permit. We avoid the incongruous result implicit in the Board's construction by reading § 8 (b)(1)(A), which is only one of many interwoven sections in a complex Act, mindful of the manifest purpose of the Congress to fashion a coherent national labor policy.

Affirmed.

Memorandum of MR. JUSTICE STEWART, with whom MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITTAKER join.

At the time the writ of certiorari was granted in this case, it clearly appeared that there was involved an "important question of federal law which has not been, but should be, settled by this court." See Rule 19, of the Revised Rules of the Supreme Court of the United States. Subsequently, however, Congress enacted the Labor-Management Reporting and Disclosure Act of 1959. Section 704 (c) of that statute added to the National Labor Relations Act a new provision, § 8 (b)(7), which bans picketing for recognition or organizational purposes where: (A) the employer is lawfully recognizing another labor organization and a question concerning representation may not appropriately be raised under § 9; (B) within the preceding 12 months a valid election has been conducted; or (C) the picketing has been going on for an unreasonable period of time without a representation petition having been filed. See, *ante,* p. 277, note 5.

This new statutory provision seems squarely to cover the type of conduct involved here, and I would remand this case to the Board for reconsideration in the light of the 1959 legislation, as suggested by the Solicitor General.*

*The single sentence in a footnote to an opinion joined by but three members of the Board, referred to in note 6 of the Court's opinion, *ante,* p. 279, hardly reflects the kind of reconsideration which I have in mind, and certainly does not stand in the way of a more thorough re-examination by the Board.

Syllabus.

FEDERAL TRADE COMMISSION *v.* TRAVELERS HEALTH ASSOCIATION.

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

No. 51. Argued December 10, 1959.—Decided March 28, 1960.

Respondent, a Nebraska corporation engaged in the business of selling health insurance to residents of all States, is licensed only in Nebraska and Virginia. All of its business is transacted by mail from an office in Nebraska, where policies are issued, premiums are paid and claims are filed. A Nebraska statute prohibits unfair or deceptive practices in the insurance business there or "in any other state." *Held:* As to alleged deceptive practices outside the State of Nebraska, this statute is not sufficient to bring respondent within § 2 (b) of the McCarran-Ferguson Act, which exempts the insurance business from the Federal Trade Commission Act to the extent that it is "regulated by State law." Pp. 294–302.

(a) *Federal Trade Commission* v. *National Casualty Co.*, 357 U. S. 560, distinguished. Pp. 297–298.

(b) The state regulation which Congress provided should operate to displace the Federal Trade Commission Act means regulation by the State in which the deception is practiced and has its impact. Pp. 298–302.

262 F. 2d 241, judgment vacated and case remanded.

Charles H. Weston argued the cause for petitioner. With him on the brief were *Acting Solicitor General Davis, Acting Assistant Attorney General Bicks, Daniel J. McCauley, Jr.* and *Alan B. Hobbes.*

C. C. Fraizer argued the cause and filed a brief for respondent.

Clarence S. Beck, Attorney General of Nebraska, filed a brief, as *amicus curiae,* urging affirmance. The following States joined in this brief: Alabama, by *MacDonald Gallion,* Attorney General; Arkansas, by *Bruce Bennett,* Attorney General; California, by *Stanley Mosk,* Attorney General; Colorado, by *Duke W. Dunbar,* Attorney Gen-

eral; Florida, by *Richard W. Ervin,* Attorney General; Indiana, by *Edwin K. Steers,* Attorney General; Iowa, by *Norman A. Erbe,* Attorney General; Kansas, by *John Anderson, Jr.,* Attorney General; Kentucky, by *Jo M. Ferguson,* Attorney General; Louisiana, by *Jack P. F. Gremillion,* Attorney General; Maine, by *Frank A. Hancock,* Attorney General; Maryland, by *C. Ferdinand Sybert,* Attorney General; Massachusetts, by *Edward J. McCormack, Jr.,* Attorney General; Michigan, by *Paul L. Adams,* Attorney General; Nevada, by *Roger D. Foley,* Attorney General; New Hampshire, by *Louis C. Wyman,* Attorney General; New York, by *Louis J. Lefkowitz,* Attorney General; North Carolina, by *Malcolm B. Seawell,* Attorney General; North Dakota, by *Leslie Burgum,* Attorney General; Ohio, by *Mark McElroy,* Attorney General; South Carolina, by *Daniel R. McLeod,* Attorney General; South Dakota, by *Parnell J. Donohue,* Attorney General; Tennessee, by *George F. McCanless,* Attorney General; Texas, by *Will Wilson,* Attorney General; Utah, by *Walter L. Budge,* Attorney General; Vermont, by *Frederick M. Reed,* Attorney General; and Virginia, by *A. S. Harrison, Jr.,* Attorney General.

Briefs of *amici curiae* urging affirmance were also filed by *Grenville Beardsley,* Attorney General of Illinois; and by *Whitney North Seymour* for the Health Insurance Association of America et al.

MR. JUSTICE STEWART delivered the opinion of the Court.

Section 2 (b) of the McCarran-Ferguson Act provides that "[T]he Federal Trade Commission Act, . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law." [1] The State

[1] The here pertinent portions of the McCarran-Ferguson Act are as follows: "That the Congress hereby declares that the continued

in which the respondent is incorporated prohibits unfair or deceptive practices in the insurance business there or "in any other state." The question presented is whether the respondent's interstate mail order insurance business is thereby "regulated by State law" so as to insulate its practices in commerce from the regulative authority of the Federal Trade Commission.

The respondent, a Nebraska corporation, is engaged in the business of selling health insurance. Licensed only in the States of Nebraska and Virginia, the respondent sells no policies through agents, but from its office in Omaha transacts business by mail with residents of every State. It solicits business by mailing circular letters to prospective buyers recommended by existing policyholders. All business is carried on by direct mail from the Omaha office; it is from there that policies are issued, and there that premiums are paid and claims filed.

A Nebraska statute provides: "No person shall engage in this state in unfair methods of competition or in unfair or deceptive acts and practices in the conduct of the business of insurance. No person domiciled in or resident of

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regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

"SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) 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, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, . . . the Sherman Act, . . . the Clayton Act, and . . . the Federal Trade Commission Act, . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law. . . ." 59 Stat. 33, as amended, 61 Stat. 448.

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this state shall engage in unfair methods of competition or in unfair or deceptive acts and practices in the conduct of the business of insurance in any other state, territory, possession, province, country, or district." [2]

The Court of Appeals set aside a cease-and-desist order of the Federal Trade Commission prohibiting the respondent from making certain statements and representations in its circular letters found by the Commission to be misleading and deceptive in violation of the Federal Trade Commission Act. 15 U. S. C. § 45. The court concluded that "[w]ith every activity of the [respondent], in the conduct of its business, subject to the supervision and control of the Director of Insurance of Nebraska, we think that the [respondent's] practices in the solicitation of insurance by mail in Nebraska or elsewhere reasonably and realistically cannot be held to be unregulated by State law." The court accordingly decided that the Commission was "without authority to regulate the practices of the [respondent] in soliciting insurance." 262 F. 2d 241, 244. Judge Vogel dissented, stating his belief that it was "impractical and ineffective" to "force the citizens of other states to rely upon Nebraska's regulation of the

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[2] Section 44–1503 of Reissue Revised Statutes of Nebraska, 1943, as amended by the Emergency Act of May 14, 1957, Laws of Nebraska, 1957, c. 191, § 2. This provision is part of the Nebraska "Unfair Competition and Trade Practices" Act of 1947, as amended. (§§ 44–1501 to 44–1521, Reissue Revised Statutes of Nebraska, 1943, 1957 Cumulative Supplement, Laws of Nebraska, 1957, c. 191.) Other provisions of the Act empower the Director of Insurance (1) to prefer charges against any such insurer if he has reason to believe that it has, in Nebraska or elsewhere, engaged "in any unfair or deceptive act or practice in the conduct of such business," and to give the insurer notice of a hearing on the charges (§ 44–1506); (2) to take evidence at the hearing (§ 44–1507); and (3) to issue a cease-and-desist order if he determines that the insurer has engaged in the wrongful acts and practices with which it is charged (§ 44–1509).

long distance advertising practices of the [respondent] in the promotion and sale by mail or otherwise of insurance outside the State of Nebraska." It was his view that Nebraska's regulation of deceptive practices "in any other state" is not "the kind of regulation by state law Congress had in mind" in enacting the McCarran-Ferguson Act. 262 F. 2d 241, 245. Certiorari was granted, 359 U. S. 988, to resolve an important question left undecided in *Federal Trade Comm'n* v. *National Casualty Co.*, 357 U. S. 560.

In that case the issue involved the effect of state laws regulating the advertising practices of insurance companies which were licensed to do business within the States and which were engaged in advertising programs requiring distribution of material by local agents. In those circumstances the Court found there was "no question but that the States possess ample means to regulate this advertising within their respective boundaries." 357 U. S., at 564. It was held that § 2 (b) of the McCarran-Ferguson Act "withdrew from the Federal Trade Commission the authority to regulate respondents' advertising practices in those States which are regulating those practices under their own laws." 357 U. S., at 563. The Court expressed no view as to "the intent of Congress with regard to interstate insurance practices which the States cannot for constitutional reasons regulate effectively . . . ." 357 U. S., at 564.

The question here is thus quite different from that presented in *National Casualty*. In this case the state regulation relied on to displace the federal law is not the protective legislation of the States whose citizens are the targets of the advertising practices in question. Rather, we are asked to hold that the McCarran-Ferguson Act operates to oust the Commission of jurisdiction by reason of a single State's attempted regulation of its domicil-

iary's extraterritorial activities.[3] But we cannot believe that this kind of law of a single State takes from the residents of every other State the protection of the Federal Trade Commission Act.[4] In our opinion the state regula-

[3] This basic difference was effectively emphasized in Commissioner Gwynne's separate opinion concurring in the Commission's action in the present proceeding. He pointed out that he had dissented from the Commission's assumption of jurisdiction in the *American Hospital* proceeding, where the "insurance company operated exclusively through agents in various states, in which it was duly licensed under the respective state laws," where "every such state had adopted the Model Code, or equivalent legislation," and where the "advertising practice complained of involved bundles of advertising matter mailed from the home office to the company's agents in the several states and disseminated there by such agents." 53 F. T. C. 548, 558–559. (Commissioner Gwynne's view as to the Commission's lack of jurisdiction in the *American Hospital* proceeding was ultimately upheld here in *Federal Trade Comm'n* v. *National Casualty Co.*, 357 U. S. 560, which disposed of both the order against National Casualty Company and the order against American Hospital & Life Insurance Company.) In the present case, by contrast, Commissioner Gwynne pointed out that the respondent was making representations to induce sales of insurance in States where it was not licensed and had no agents. He concluded that "this type of law (that is, a law purporting to protect the people *of another state* from deceptive advertising) can hardly be said to be the type of law referred to in Section 2 (b) of the McCarran Act. Section 2 (b) makes the Federal Trade Commission Act applicable to the business of insurance to the extent that such business is not regulated by state law. I think this refers to the laws of the state whose citizens are being affected by the advertising and not to laws of some other state operating extraterritorially." 53 F. T. C. 548, 563. Commissioner Gwynne, as a member of Congress, participated in the debates leading to the passage of the McCarran-Ferguson Act, 91 Cong. Rec. 1089, 1090. See also 90 Cong. Rec. 6534–6536.

[4] The respondent has argued in this Court that the Federal Trade Commission lacked jurisdiction because the respondent's advertising practices are regulated not only by Nebraska, but also by "all other states" in which the respondent conducts its mail order business. To this the petitioner replies that (1) the respondent did not raise

tion which Congress provided should operate to displace this federal law means regulation by the State in which the deception is practiced and has its impact.

The McCarran-Ferguson Act was passed in 1945. Its basic purpose was to allay doubts, thought to have been raised by this Court's decision of the previous year in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, as to the continuing power of the States to tax and regulate the business of insurance.[5] See *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408, 429–433; *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409, 413; *Securities & Exchange Comm'n* v. *Variable Annuity Co.*, 359 U. S. 65, 99 (dissenting opinion). The original bills as passed by both the Senate and the House would have made the Federal Trade Commission Act completely inapplicable to the insurance business. S. 340, 79th

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this argument before the Commission and, therefore, has waived it; (2) the statutes of the "other" States do not purport to apply to misrepresentations mailed to their residents by unlicensed, nonresident insurance companies having no local agents; and (3) even if these state statutes purported to be applicable to misrepresentations by such insurers, there still would not be regulation by state law within the meaning of the § 2 (b) proviso because the statutes could not be effectively enforced against the respondent. The Court of Appeals gave no consideration to the effect of "regulation" by any State other than Nebraska. In accord with accepted principles, we decline to consider these issues on the present record, leaving them "to be considered for what they are worth by the court below, if duly presented and relied upon . . . ." *Marconi Wireless Co.* v. *Simon*, 246 U. S. 46, 57. See *Tunstall* v. *Brotherhood*, 323 U. S. 210, 214; *United States* v. *Beach*, 324 U. S. 193, 196; *Federal Communications Comm'n* v. *WJR*, 337 U. S. 265, 285.

[5] While the appeal in *South-Eastern Underwriters* was pending here, there had been abortive attempts in the Seventy-eighth Congress to immunize the business of insurance from the federal antitrust laws. See H. R. 3270, S. 1362, 78th Cong., 1st Sess.; H. R. Rep. No. 873, 78th Cong., 1st Sess.; 89 Cong. Rec. 7686, 10532, 10659–10664.

Cong., 1st Sess., 91 Cong. Rec. 478–488, 1085, 1093–1094. During the debate in the House, however, several members objected to the provision exempting the business of insurance from this federal statute (91 Cong. Rec. 1027–1028, 1086, 1089, 1092–1093), and Representative Sumners, Chairman of the House Judiciary Committee, stated that in conference he would support an amendment which would make the Federal Trade Commission Act applicable to the same extent as the Sherman and Clayton Acts. 91 Cong. Rec. 1093. Thus it was that § 2 (b) in the form finally enacted first appeared as a recommendation of the Conference Committee of the two Houses. H. R. Conf. Rep. No. 213, 79th Cong., 1st Sess.

Since the House accepted the Conference Report without debate, 91 Cong. Rec. 1396, the only discussion of § 2 (b) in its present form occurred in the Senate. Yet, from that somewhat limited debate, as well as the earlier debate in both Houses as to the effect of the Sherman and Clayton Acts, it is clear that Congress viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated. There was no indication of any thought that a State could regulate activities carried on beyond its own borders.

Thus the report on the original House bill stated: "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association case.* Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court,

as, for instance, in *Allgeyer* v. *Louisiana* (165 U. S. 578), *St. Louis Cotton Compress Co.* v. *Arkansas* (260 U. S. 346), and *Connecticut General Insurance Co.* v. *Johnson* (303 U. S. 77), which hold, inter alia, that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way." (H. R. Rep. No. 143, 79th Cong., 1st Sess. 3.)

Significantly, when Senator McCarran presented to the Senate the bill agreed to in conference, he began by reading most of the foregoing quotation from the original House Report as part of his explanation of the bill. 91 Cong. Rec. 1442. The ensuing Senate debate centered around § 2 (b). The three Senate conferees, Senators McCarran, O'Mahoney, and Ferguson, repeatedly emphasized that the provision did not authorize state regulation of extraterritorial activities. See, *e. g.*, 91 Cong. Rec. 1481, 1483, 1484. Typical is the following statement by Senator O'Mahoney: "When the moratorium period passes, the Sherman Act, the Clayton Act, and the Federal Trade Commission Act come to life again in the field of interstate commerce, and in the field of interstate regulation. Nothing in the proposed law would authorize a State to try to regulate for other States, or authorize any private group or association to regulate in the field of interstate commerce." 91 Cong. Rec. 1483.

Not only this specific legislative history, but also a basic motivating policy behind the legislative movement that culminated in the enactment of the McCarran-Ferguson Act serve to confirm the conclusion that when Congress provided that the Federal Trade Commission Act would be displaced to the extent that the insurance business was "regulated" by state law, it referred only to regulation by the State where the business activities

have their operative force. One of the major arguments advanced by proponents of leaving regulation to the States was that the States were in close proximity to the people affected by the insurance business and, therefore, were in a better position to regulate that business than the Federal Government. See, *e. g.,* 91 Cong. Rec. 1087; 90 Cong. Rec. 6532. Joint Hearings before the Subcommittees of the Committees on the Judiciary on S. 1362, H. R. 3269, H. R. 3270, 78th Cong., 1st Sess. 17, 37, 117, 238–239, 242–243, 244, 252. Such a purpose would hardly be served by delegating to any one State sole legislative and administrative control of the practices of an insurance business affecting the residents of every other State in the Union. This Court has referred before to the "unwisdom, unfairness and injustice of permitting policyholders to seek redress only in some distant state where the insurer is incorporated." *Travelers Health Assn.* v. *Virginia,* 339 U. S. 643, 649.

Because of our view as to the meaning of § 2 (b) of the McCarran-Ferguson Act, we do not need to consider the constitutional questions that might arise as to the applicability of the Nebraska statute to misrepresentations made to residents of other States. Compare *Alaska Packers Assn.* v. *Industrial Accident Commission,* 294 U. S. 532; *Western Union Telegraph Co.* v. *Brown,* 234 U. S. 542; *Sligh* v. *Kirkwood,* 237 U. S. 52. Suffice it to note that the impediments, contingencies, and doubts which constitutional limitations might create as to Nebraska's power to regulate any given aspect of extraterritorial activity serve only to confirm the reading we have given to § 2 (b) of the Act.

It follows that the judgment of the Court of Appeals must be vacated, and the case remanded to that court for further proceedings consistent with the views expressed in this opinion.

Vacated and remanded.

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

This case marks the second time within a year that the Court has made inroads upon the policy of the McCarran-Ferguson Act by which Congress pervasively restored to the States the regulation of the business of insurance, a function which until this Court's decision in *United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533, traditionally had been considered to be exclusively theirs. Last Term the Court held variable annuity policies, sold across state lines, subject to regulation by the Securities and Exchange Commission. See *Securities & Exchange Comm'n* v. *Variable Annuity Co.,* 359 U. S. 65, 93–101 (dissenting opinion). Today it holds that advertising materials mailed into other States by a health insurance company, already regulated under the laws of its own State with respect to the out-of-state transmission of such materials, are subject also to regulation by the Federal Trade Commission, at least to the extent that such advertising matter is unregulated by the laws of the State into which it is sent.

The Court's holding is based upon its conclusion "that when Congress provided [in § 2 (b) of the McCarran-Ferguson Act] that the Federal Trade Commission Act would be displaced to the extent that the insurance business was 'regulated' by state law, it referred only to regulation by the State where the business activities have their operative force." I think the data on which the Court relies is much too meagre to justify this conclusion, and believe, as the Court of Appeals did, that Nebraska's regulation of these activities of the respondent foreclosed Federal Trade Commission jurisdiction.

What is referred to in the majority opinion as "specific legislative history" on the issue before us seems to me to fall far short of being persuasive towards the Court's view

of the statute. The report on the original House bill, on which so much store is placed, was directed, as I read it, not to differentiating between the kinds of state insurance regulation which would, after the moratorium period provided in the statute had ended,[1] exempt from federal regulation and control the business of insurance in all but limited aspects,[2] but to the general proposition that the new statute would not enlarge or narrow state regulatory power as it had existed before this Court's decision in the *South-Eastern Underwriters* case, *supra*. That no more than this can be got out of the report on the original House bill is made manifest by Senator McCarran's explanation of the conference bill when he presented it to the Senate—an episode to which the Court refers. Quoting from the report, the Senator said: "That expression [meaning the report] should be made a part of this explanation. In other words, we give to the States no more powers than those they previously had, and we take none from them." [3] 91 Cong. Rec. 1442.

I believe that the fragments from the ensuing Senate debate, on which the Court further relies, indicate no

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[1] In addition to § 2 (b) set forth in note 1 of the Court's opinion, *ante*, p. 295, § 3 (a) of the Act provides: "Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof."

[2] Section 3 (b) of the Act provides: "Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

[3] Senator McCarran's reading of the report on the original House bill stopped short of the last clause (following the citation of cases) quoted in the Court's opinion. *Ante*, p. 301.

more than does the report.[4] The same is true, in my opinion, of expressions made during the debate relating to the desirability of leaving insurance regulation to local authorities because they were, so to speak, on the ground, expressions which, the Court correctly observes, reflected "a basic motivating policy behind the legislative movement that culminated in the enactment of the McCarran-Ferguson Act." And since the Court very gingerly throws out possible constitutional questions, I think it appropriate to say that the right of Nebraska to police its own insurance company domiciliaries, with respect to their advertising sent from Nebraska into other States, is not seriously open to constitutional doubt. See *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322; *Sligh* v. *Kirkwood,* 237 U. S. 52. There is certainly nothing in *Alaska*

[4] It is worth observing that one of the hypothetical questions put to Senator Ferguson by Senator Pepper of Florida, an opponent of the bill, related to whether the bill would permit Florida, in disregard of the federal antitrust laws, to authorize the sale in Florida of insurance at rates fixed by an out-of-state insurance rating bureau, and that Senator Ferguson replied in the affirmative. 91 Cong. Rec. 1481. Yet the Court now finds it offensive to the concept of the statute to consider that other States may be content to rely on Nebraska's regulation of advertising material mailed to their citizens by Nebraska insurance companies. The Court reserves "for what they are worth" the questions that would arise were such other States to legislate against the out-of-state mailing of insurance advertising into their jurisdictions. Yet even if such legislation proved abortive as a practical matter, because of a foreign insurance company having no office, agents, or assets within the State so legislating, such legislation would nonetheless presumably exclude Federal Trade Commission jurisdiction, unless we were to depart from our holding in *Federal Trade Comm'n* v. *National Casualty Co.,* 357 U. S. 560, to the effect that it is the *existence* of state regulatory legislation, and not the *effectiveness* of such regulation, that is the controlling factor. The distinction between such a case as that, and the one before us, seems to me to be one without a difference.

Packers Assn. v. *Commission,* 294 U. S. 532, which points to the contrary.

The temptation is strong, no doubt, to ask the Court to innovate with respect to the McCarran-Ferguson Act when state regulation may be thought to have fallen short. Two years ago we declined to do so when invited by the Federal Trade Commission in the *National Casualty* case, *supra,* at 564–565. I think it unwise for us now to yield to this encore on the part of the Commission. One innovation with the Act is apt to lead to another, and may ultimately result in a hybrid scheme of insurance regulation, bringing about uncertainties and possible duplications which should be avoided.

> "Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects.
>
> "Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with

> these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations." *Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408, 429–430.

See also *Wilburn Boat Co.* v. *Fireman's Ins. Co.,* 348 U. S. 310, 318–321; *Securities & Exchange Comm'n* v. *Variable Annuity Co., supra,* at 68–69, and dissenting opinion at 93 *et seq.*

If innovations in the policy of the McCarran-Ferguson Act are thought desirable, they should be made by Congress, not by us.

I would affirm.

TILGHMAN *v.* CULVER, PRISON CUSTODIAN.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS.

No. 135, Misc. Decided March 28, 1960.

Certiorari granted; judgment vacated; and case remanded.
Reported below: —— So. 2d ——.

Petitioner *pro se.*

Richard W. Ervin, Attorney General of Florida, and *Reeves Bowen,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted. The motion for leave to file a petition for writ of habeas corpus is denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is granted. In view of the representations of the Attorney General of Florida that the cause has become moot, the judgment of the Supreme Court of Florida is vacated and the cause is remanded for such further proceedings as that Court may deem appropriate. See *N. A. A. C. P.* v. *Committee on Offenses Against the Administration of Justice,* 358 U. S. 40.

McGANN *v.* UNITED STATES.

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

No. 488, Misc. Decided March 28, 1960.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Solicitor General Rankin for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. Upon the suggestion of the Solicitor General that inasmuch as the petitioner had been granted leave to proceed *in forma pauperis* by the District Court, the application to the Court of Appeals was unnecessary, the judgment of the Court of Appeals is vacated and the case is remanded to that Court for further proceedings.

MITCHELL, SECRETARY OF LABOR, *v.* H. B. ZACHRY CO.

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

No. 83. Argued February 25, 1960.—Decided April 4, 1960.

Employees of a large construction contractor engaged in constructing a dam solely to increase the reservoir capacity of the local water system of a city and its vicinity, all within a single State, are not "engaged in commerce or in the production of goods for commerce" or in "any closely related process or occupation directly essential to the production thereof," within the meaning of §§ 3 (j) and 7 (a) of the Fair Labor Standards Act, as amended in 1949, and, therefore, they are not covered by the overtime requirements of the Act, even though a substantial part of the water will be used by producers of goods for interstate commerce and an insignificant part by interstate instrumentalities. Pp. 310–321.

262 F. 2d 546, affirmed.

Bessie Margolin argued the cause for petitioner. With her on the brief were *Solicitor General Rankin, Harold C. Nystrom, Sylvia S. Ellison* and *Jacob I. Karro.*

R. Dean Moorhead and *Chester H. Johnson* argued the cause and filed a brief for respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Once again we are presented with a nice question concerning the scope of the Fair Labor Standards Act, as amended. 63 Stat. 912, 29 U. S. C. § 207. The respondent, a construction contractor, was engaged by the Lower Nueces River Water Supply District (hereafter to be called the District) to construct a dam and impounding facilities on the lower Nueces River in Texas at a cost of about $6,000,000, in order to increase roughly tenfold the District's then-existing reservoir capacity. The dam is not a multi-purpose project; its sole purpose is to

create an expanded reservoir for the District. The water impounded by the District is supplied to consumers locally, within the State of Texas. The site of the new dam was chosen 1,400 feet downstream from the old, with the expectation that upon completion of the new construction the old dam would be inundated and thus replaced by the greatly expanded reservoir. In the interim until completion, the old facilities could serve to assure a continuing water supply.

The District, though for some purposes an independent governmental agency under Texas law, may here be dealt with simply as the water supply system of the included City of Corpus Christi. Its contract with the City requires it to supply the City with the entire water output; and the City in turn agrees to operate and maintain the completed dam and impounding facilities and to supply water to consumers within the District, but outside city limits. It is conceded that between 40% and 50% of all water consumption from the system is accounted for by industrial (as distinguished from residential, commercial, hospital, municipal and other) users, most of whom produce goods for commerce, and that water is essential to their operations. Nor is it contested that an unspecified amount of the water supplied by the District is consumed by facilities and instrumentalities of commerce.

It is agreed that as to the employees here involved—those actually engaged in construction work on the dam—the respondent failed to comply with the requirements of § 7 of the Act, if it is applicable.[1]

On the basis of its applicability the Secretary of Labor sought an injunction in the United States District Court for the Southern District of Texas. That court granted

[1] With exceptions not relevant here, § 7, the hours provision, directs an employer to comply with its provisions as to "any of his employees who is engaged in commerce or in the production of goods for commerce . . . ."

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the injunction, on two grounds of coverage: (1) since water from the system is supplied to facilities and instrumentalities of commerce, those engaged in building the dam are engaged in the production of goods—water—for commerce; and (2) since the water supplied is essential to industries in Corpus Christi producing goods for commerce, construction of the dam is an occupation "closely related" and "directly essential" to the production of goods for commerce. While the District Court conceded "that Congress intended to narrow the scope of coverage" by the 1949 amendment of the statutory definition of "produced" in § 3 (j), 63 Stat. 911,[2] it concluded that this employment remained within the coverage of the Act.

On appeal the Court of Appeals for the Fifth Circuit reversed. 262 F. 2d 546. It disposed of the first ground of the District Court's decision by holding that the building of a dam could not itself constitute the production of goods for commerce, whatever the use to which the impounded water might be put. In disposing of the second, it invoked a rule that "those engaged in building a plant to be used for the manufacturing of goods do not even come within . . . the . . . statutory definition . . . ." It concluded that under such a rule there could be no coverage of employees engaged in construction of a facility which was not to engage in, but merely to support, the manufacture of goods for commerce. It con-

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[2] Only the last clause of § 3 (j) was amended in 1949. Before the amendment it was provided that "an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, *or in any process or occupation necessary to the production thereof*, in any State." 52 Stat. 1061. (Emphasis added.) The amended last clause provides: "*or in any closely related process or occupation directly essential to the production thereof*, in any State." 63 Stat. 911. (Emphasis added.)

cluded further that the "remoteness" of these jobs from production justified their exclusion from coverage. Both conclusions reflected its general view that "the amendment of 1949 made even more restrictive the definition of production of goods" than it was under the Act of 1938, when it substituted the words "directly essential" for the word "necessary," and added the requirement that the employment be "closely related" to production.

We brought the case here, 361 U. S. 807, because of an asserted conflict between circuits. (See *Chambers Construction Co.* v. *Mitchell,* 233 F. 2d 717, and *Mitchell* v. *Chambers Construction Co.,* 214 F. 2d 515.)

The court below, in applying its rule excluding "construction," relied on our *per curiam* decision in *Murphey* v. *Reed,* 335 U. S. 865, and distinguished the more detailed decision in *Mitchell* v. *Vollmer & Co.,* 349 U. S. 427, which expressly rejected the "new construction" rule and held construction of a new lock on the Gulf Intracoastal Waterway to be covered employment. It did so by holding that *Vollmer* concerned only coverage under the "in commerce" provision of the Act. The *Vollmer* decision cannot be so confined. It rejected an inflexible "new construction" rule, which had developed in cases under the Federal Employers' Liability Act, see 349 U. S., at 429, 431–432, as inconsistent with the more pragmatic test of coverage under the Fair Labor Standards Act. As early as *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, we recognized that the penetrating and elusive duty which this Act casts upon the courts to define in particular cases the less-than-constitutional reach of its scope, cannot be adequately discharged by talismanic or abstract tests, embodied in tags or formulas. No exclusion of construction work from coverage can be derived from the *per curiam* disposition of *Murphey* v. *Reed, supra.* There, as here, whether construction work is covered depends upon all the circumstances of the relation of the particular activity

to "commerce" in the statutory sense and setting, the question to which we now turn.

By confining the Act to employment "in commerce or in the production of goods for commerce," Congress has impliedly left to the States a domain for regulation. For want of a provision for an administrative determination, by an agency like the National Labor Relations Board, the primary responsibility has been vested in courts to apply, and so to give content to, the guiding yet undefined and imprecise phrases by which Congress has designated the boundaries of that domain.

Before 1949 the boundary of "production" coverage was indicated by the statutory requirement that to be included an activity not "in" production must be "necessary" to it. 52 Stat. 1061. The interaction and interdependence of the processes and functions of the industrial society within which these definitions must be applied, could easily lead courts to find few activities that were discernibly related to production not to be "necessary" to it, in a logical sense of that requirement. The statute, as illuminated by its history, see *Kirschbaum Co.* v. *Walling, supra,* at 522, demanded that such merely logical deduction be eschewed. Courts were to be on the alert "not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation." *10 East 40th St. Co.* v. *Callus,* 325 U. S. 578, 582–583.

In *Kirschbaum Co.* v. *Walling, supra,* we added what was deemed a compelled gloss to suggest the limitations of "necessary." We found that the jobs of building-maintenance employees, ranging in responsibility from electrician to porter, of a loft building locally owned but tenanted by production facilities of producers for commerce, had "such a close and immediate tie with the process of production for commerce, and [were] therefore so much an essential part of it," that the employees' occu-

pations were "necessary" to production. In *Borden Co.* v. *Borella,* 325 U. S. 679, precisely the same formulation expressed our conclusion that maintenance employees of a producer-owned office building which was tenanted in part by the producer's central offices, but not by any production facilities, were also within the Act's coverage. In *10 East 40th St. Co.* v. *Callus,* 325 U. S. 578, however, maintenance employees of an office building were held not to be covered. Although the building contained offices of some producers, it was locally owned, held out for general tenancy, and in fact tenanted by a miscellany of tenants. Regardful of the governing principle that coverage turns upon the nature of the employees' duties, and not upon the nature, local or interstate, of the employer's general business, we held the case distinguishable from *Borden* and *Kirschbaum* because the employment, since part of an enterprise which "spontaneously satisfies the common understanding of what is local business," was itself sufficiently different, despite identical employee duties, from prior cases to justify regarding it as separate from the "necessary parts of a commercial process" which are within the Act. These decisions and distinctions were not exercises in lexicography. No niceties in phrasing or formula of words could do service for judgment, could dispense with painstaking appraisal of all the variant elements in the different situations presented by successive cases in light of the purpose of Congress to limit coverage short of the exercise by it of its full power under the Commerce Clause.

While attempted formulas of the relationship to production required for coverage cannot furnish automatic or spontaneous answers to specific problems of application as they arise in their protean diversity, general principles of the Act's scope afford direction of inquiry by defining the broad bounds within which decision must move. In *Kirschbaum Co.* v. *Walling, supra,* we found

that limits on coverage cannot be understood merely in terms of the social purposes of the Act, in light of which any limitations must appear inconsistent. For the Act also manifests the competing concern of Congress to avoid undue displacement of state regulation of activities of a dominantly local character. Accommodation of these interests was sought by the device of confinement of coverage to employment in activities of traditionally national concern. The focus of coverage became "commerce," not in the broadest constitutional sense, but in the limited sense of § 3 (b) of the statute: "trade, commerce, transportation, transmission, or communication among the several States . . . ." Employment "in" such activities is least affected by local interests. A step removed from employment "in commerce" is employment "in" production which is "for" commerce. Under this clause we have sustained coverage whether the product is to be consumed primarily by commerce in the statutory sense, by its "facilities and instrumentalities," see *Alstate Construction Co.* v. *Durkin,* 345 U. S. 13, or, as in the case of the products of the industrial consumers of water here, to move in it. Furthest removed from "commerce" is employment not "in" production "for" commerce but in an activity which is only "related" to such production. In applying this provision, we have necessarily borne in mind that it is furthest removed in the scheme of the statute from the hub of the national interest in "commerce" upon which a limited displacement of state power is predicated.

The amendment of § 3 (j) in 1949 did not alter the basic statutory scheme of coverage, but did reinforce the requirement that in applying the last clause of the section its position at the periphery of coverage be taken into account as a relevant factor in the determination. In revising coverage Congress turned only to the last clause of the section, which it evidently continued to regard as

marking the outer limits of applicability. The amendment substantially adopts the gloss of *Kirschbaum* to indicate the scope of coverage of activities only "related" to production. But examination of its history discloses that in adopting that gloss the purpose of Congress was not simply to approve everything done here and in the lower courts in what purported to be specific applications of that inevitably elusive formulation. While the approach of *Kirschbaum* was confirmed, the change manifests the view of Congress that on occasion courts, including this Court, had found activities to be covered, which the law-defining body deemed too remote from commerce or too incidental to it.

The House, overriding the contrary action of its Labor Committee which had left § 3 (j) unchanged, see H. R. 5856, as reported, and H. R. Rep. No. 267, 81st Cong., 1st Sess., 1949, adopted an amendment proposed by Committee member Lucas from the floor (95 Cong. Rec. 11000), which did amend § 3 (j). Representative Lucas made it plain that it was his purpose to constrict coverage. 95 Cong. Rec. 11001. As passed by the House, § 3 (j) was identical with the present Act except that for "directly essential" the House version used "indispensable."

The Senate substituted its own bill, S. 653, for the House draft, and its version left § 3 (j) unchanged. The resulting conference adopted the House bill insofar as it amended § 3 (j), with only the change already noted.

While the reports presented to the House and Senate by their respective conferees manifest some disagreement as to degree,[3] it is apparent that some restraint on coverage was intended by both. In the House, for example, *Kirschbaum* was approved and our decision in *Martino* v. *Michigan Window Cleaning Co.*, 327 U. S. 173, was dis-

[3] The views of a minority of the Senate conferees emphasize the apparent inconsistencies between the reports delivered to the House and Senate. 95 Cong. Rec. 14880.

approved (H. R. Conf. Rep. No. 1453, 81st Cong., 1st Sess., p. 15); while the Senate conferees, with different emphasis, noted only that the standard applied in "most" of our decisions was adopted. 95 Cong. Rec. 14874.

Both reports use as illustrations of coverage which remains unchanged by the amendment, employment in utilities supplying water to the producers of goods for commerce. H. R. Conf. Rep. No. 1453, p. 14; 95 Cong. Rec. 14875. But no illustration in either statement deals with construction of a dam designed solely for use as an impounding facility for a local water distribution system. The House Report does expressly state that the case of *Schroeder Co.* v. *Clifton,* 153 F. 2d 385 (C. A. 10th Cir.), is an instance of an activity not within the amended Act. But the activity there involved was one in support of construction of a dam; it was not the construction of the dam itself. Thus, even were we to accept the illustrations in the House Report as authoritative, we would not be relieved of the duty of deciding where between these boundaries of approval and disapproval the present facts lie. To do so requires that we once again apply the formulation set down in *Kirschbaum,* which, in light of the 1949 amendment, we must do with renewed awareness of the purpose of Congress to avoid intrusion into withdrawn local activities.

To establish coverage the Secretary relies upon *Farmers Reservoir & Irrigation Co.* v. *McComb,* 337 U. S. 755, which, he asserts, establishes that employees are covered who are engaged not merely in operation of, but in maintenance and repair of, the facilities of a company distributing water for consumption by producers for commerce.[4] He urges that once it is recognized—as the court

[4] The Secretary similarly relies on the approval in general terms of such coverage in the reports of the House and Senate conferees. H. R. Conf. Rep. No. 1453, 81st Cong., 1st Sess., p. 14; 95 Cong. Rec. 14875.

below failed to do—that construction work is not excluded from the Act's coverage, this concededly essential expansion of facilities is not distinguishable from maintenance and repair in any characteristic made relevant by the standard of "closely related" and "directly essential" to production. We do not agree.

Assuming *arguendo* that maintenance and repair of the completed dam would be covered employment, it does not follow that construction of the dam therefore is. The activities are undoubtedly equally "directly essential" to the producers of goods who depend upon the water supply; but they are not equally remote from production or from the "commerce" for which production is intended. The distinction between maintenance and repair on the one hand, and replacement or new construction on the other, may often be difficult to delineate but is a practical distinction to which law must not be indifferent. Its relevance here, where our purpose must be to isolate primarily local activities from the flow of commerce to which they invariably relate, lies in the close relation of maintenance and repair to operation, as opposed to replacement or new construction which is a separate undertaking necessarily prior to operation and therefore more remote from the end result of the process. As we held in *Vollmer,* that an activity is rightly called construction and is therefore distinct from operation, does not *per se* remove it from coverage. Construction may be sufficiently "closely related" to production to place it in that proximity to "commerce" which the Act demands as a predicate to coverage. Here, however, neither a facility of "commerce" nor a facility of "production" is under construction. Operation of the completed dam will merely support production facilities; and construction of the dam is yet another step more remote.

The Secretary relies upon *Mitchell* v. *Lublin, McGaughy & Associates,* 358 U. S. 207, and *Mitchell* v.

Vollmer & Co., supra, to establish that this construction is closely enough related to "production of goods for commerce" to be within the coverage of the Act. In each of those cases a construction activity was found "directly and vitally related" to "commerce" and therefore "in commerce," and what we have already said demonstrates that they are not useful guides here. As *Lublin, supra,* manifests, an activity sufficiently "directly related" to commerce to be "in" it is, at most, no further removed from "commerce" than is the employment "in production" itself which the Act expressly covers. Compare *Mitchell* v. *Lublin, McGaughy & Associates, supra,* with *Alstate Construction Co.* v. *Durkin,* 345 U. S. 13. For this reason, although the Act has never contained even a general definition of the relationship of an activity to commerce necessary to justify its inclusion, such a relationship has been extrapolated by the courts in conformity with the statutory scheme, so as to displace state regulation "throughout the farthest reaches of the channels of interstate commerce." *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564, 567. No independent vitality attaches to conclusory phrases such as "directly" or "vitally related." What is finally controlling in each case is the relationship of the employment to "commerce," in the sense of the statute, and it needs no argument that as to that relationship this case is significantly different from *Lublin* or *Vollmer.*

Moreover, though construction and operation of this dam are equally "directly essential" to the producers who require the water impounded and distributed, neither the construction nor the operation of the dam is designed for their use. Water is supplied by the District to a miscellany of users throughout its geographical area, and somewhat less than half of the consumption is by producers. These facilities, and their construction, are thus to be differentiated from the irrigation system in the

Farmers Reservoir case, which was dedicated exclusively to supply water to farmers producing for commerce.

These are no doubt matters of the nicest degree. They are inevitably so in the scheme and mode of enforcement of this statute. Bearing in mind the cautionary revision in 1949, and that the focal center of coverage is "commerce," the combination of the remoteness of this construction from production, and the absence of a dedication of the completed facilities either exclusively or primarily to production, persuades us that the activity is not "closely related" or "directly essential" to production for commerce."

The Secretary alternatively urges that because some of the water supplied by the District is consumed by facilities and instrumentalities of commerce, the water should be regarded as "goods" produced "for commerce" and the construction of the dam should be found sufficiently related to such production to be within the Act's coverage. He relies on *Alstate Construction Co.* v. *Durkin, supra,* and compares the water here to the construction materials there produced primarily for use in road construction. It is a sufficient answer to this contention that the record is devoid of evidence of a purposeful and substantial dedication of otherwise local production to consumption by "commerce" which was the basis of our decision in *Alstate.* Indeed, it appears that the water supplied to the facilities and instrumentalities of commerce is but an insignificant portion of the total.

Affirmed.

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

The opinion of the Court is more consistent with the dissent in *Mitchell* v. *Vollmer & Co.,* 349 U. S. 427, in which my Brother FRANKFURTER joined, than it is with

the Court's opinion in that case. The liberal construction given the Act from *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, to *Alstate Construction Co.* v. *Durkin,* 345 U. S. 13, and down to and including the *Vollmer* case is now forsaken. Yet this seems to me to be a singularly inappropriate occasion to change the direction of the law in a *mere matter of statutory construction.*

The report of the Senate Conferees (95 Cong. Rec. 14874–14875) which ushered § 3 (j) into the law in its present form [1] said:

> "The work of employees of employers who produce or supply goods or facilities for customers engaged within the same State in the production of other goods for interstate commerce may also be covered as closely related and directly essential to such production. This would be true, for example, of employees engaged in the following activities:
>
> . . . . . .
>
> "2. Producing and supplying fuel, power, water, or other goods for customers using such goods in the production of different goods for interstate commerce. *Reynolds v. Salt River Valley Water Users Asso.* (143 F. (2d) 863 (C. A. 9)); *Phillips* v. *Meeker Coop. Light and Power Asso.* (158 F. (2d) 698 (C. A. 8)); *Lewis* v. *Florida Light and Power Co.* (154 F. (2d) 751 (C. A. 5)); *West Kentucky Coal Co.* v. *Walling* (153 F. (2d) 152 (C. A. 6))."

[1] Section 3 (j) provides:

" 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

The dam here under construction was to furnish the City of Corpus Christi with a water supply—a city water system that services railroads, truck companies, airlines, other instrumentalities of interstate commerce and various producers of goods for commerce. It is conceded that the major industries in this area produce goods for commerce and use a substantial amount of water in that connection. Indeed, 40% to 50% of all water furnished by the city is used industrially.

Reynolds v. *Salt River Valley Water Users Assn.,* 143 F. 2d 863 (C. A. 9th Cir.), held that repair and maintenance employees of canals and dams of an irrigation company supplying water for growers of crops intended for shipment in interstate commerce were engaged in an occupation necessary for the production of goods for commerce.

West Kentucky Coal Co. v. *Walling,* 153 F. 2d 582 (C. A. 6th Cir.), held that men producing coal sold to factories producing goods for commerce were covered by the Act.

Meeker Cooperative Light & Power Assn. v. *Phillips,* 158 F. 2d 698 (C. A. 8th Cir.), held that employees of a power cooperative distributing electricity to companies that produced goods for commerce were covered by the Act.

These three decisions, as noted, were approved by the Senate report defining the scope of § 3 (j). Certainly then, employees maintaining this new dam would be covered by the Act, as our own decision in *Farmers Irrigation Co.* v. *McComb,* 337 U. S. 755, indicates.

How then, if these precedents are to be followed, can employees who built the dam be out of reach of the Act?

We held in *Mitchell* v. *Vollmer & Co., supra,* that construction of a lock to be used in commerce was work

"in commerce." "The test is whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity." P. 429. There is no more remoteness here than there. It is difficult to understand why a stringent test of remoteness is used in determining whether construction work is related to "production of goods for commerce" when a liberal test was applied in the *Vollmer* case in holding that such work was "in commerce." See *Armour & Co.* v. *Wantock,* 323 U. S. 126, 131.

Prior to the 1949 amendments the standard in § 3 (j) was whether the work was in any "process or occupation necessary" for the production of goods for commerce. The present standard, so far as material here, is whether the work is "in any closely related process or occupation directly essential to the production" of goods for commerce.[2] The Senate report said that employees "repairing, maintaining, improving or enlarging . . . facilities of producers of goods" were covered. 95 Cong. Rec. 14875. This group, the report stated, were included because they were "performing tasks necessary to effective productive operations of the producer." 95 Cong. Rec. 14874.

Most of the decisions cited in the report which are descriptive of this category of employees were cases where the employees were working on existing structures or appliances used by producers of goods for commerce,[3] whether or not those facilities were owned by the producers. Such is the case of *Borden Co.* v. *Borella,* 325 U. S. 679. But one of the cases cited by the report as

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[2] See note 1, *supra.*

[3] And see *Roland Electrical Co.* v. *Walling,* 326 U. S. 657, also cited with approval in the report. 95 Cong. Rec. 14875.

also descriptive of this group of employees was *Walling* v. *McCrady Construction Co.*, 156 F. 2d 932 (C. A. 3d Cir.), which brought within the Act's coverage workers building roads and bridges to be used to transport goods in process of production for interstate commerce. These facilities, like the one in the present case, were not owned by the producers, nor were some of them yet in existence. But when completed they would serve as facilities for those who were producing goods for commerce. That case clearly suggests that the Congress in redefining the scope of § 3 (j) was following the broad contours of the coverage which had been delineated by the *construction* cases, as well as by the *maintenance* cases.

It seems as if there could be no doubt that the present case is brought squarely within that category, for this project was not the construction of a wholly new water system but an improvement of an existing water system. Moreover, the water system being improved would seem to be as much a facility of those producing goods for commerce as was the highway in the *McCrady* case. Moreover, in *Alstate Construction Co.* v. *Durkin, supra,* a company, making products sold intrastate but used to improve the facilities of those producing goods for commerce, was held to be employing workers covered by the Act. The work in improving the present facility used by producers of goods for commerce is at least as close to the process of production as the labor of the men in the *Alstate* case.

So it is that I believe today's decision changes the symmetry of the judicial rulings under the Act, narrows its scope, and impairs its effectiveness. Today's ruling is a departure from the accepted construction. By this retreat I fear we invite hostile constructions that will undermine the broad base which Congress gave the Act. If there is to be a change in the direction of the law or an

alteration in its emphasis, it should be done by Congress which is far better suited than we to mark the farthest areas which the liberal policies of the Act were designed to cover. I regret that today we give up territory that Congress has fairly claimed, that we take a backward step from the measures Congress designed to protect the lowest paid and weakest group of wage earners in the Nation.

Per Curiam.

UNION PACIFIC RAILROAD CO. *v.* UNITED STATES.

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

No. 98. Argued March 23, 1960.—Decided April 4, 1960.

In order to afford shippers additional time to find a market for lumber while in transit, appellant railroad renders a 14-day delayed lumber service over a route ordinarily requiring from two to four days. In doing so, it incurs additional operational problems and costs not present in its fast freight service and not included in its published tariff. *Held:* Such delayed service constitutes the furnishing of additional "privileges or facilities," within the meaning of § 6 (7) of the Interstate Commerce Act, and must be published and filed in appellant's tariff. Pp. 327–328.

173 F. Supp. 397, affirmed.

Elmer B. Collins argued the cause for appellant. With him on the brief was *James H. Anderson.*

John G. Laughlin, Jr. argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander.*

PER CURIAM.

Appellant, along with other railroads, has for years engaged in the "roller lumber traffic" by performing intentionally delayed service in the transportation of lumber from the West Coast to market. Six roads so engaged have filed tariffs covering such services at the same rate as their fast freight, and the Interstate Commerce Commission now has such tariffs under investigation and consideration. Appellant, however, has refused to file a tariff covering such service but continues to handle roller lumber traffic on the same tariff as its fast freight.

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The United States, at the instance of the Interstate Commerce Commission, sought and obtained a permanent injunction restraining appellant from performing its roller lumber traffic service until it publishes and files a tariff covering the same. The District Court found that appellant renders a 14-day delayed lumber service over a route ordinarily requiring from two to four days. The delay is accomplished by the holding of cars on sidings at certain points on its trunk lines awaiting diversion orders to move the shipment forward over the railroad's regular service. This affords the shipper additional time to find a market for the lumber while it is in transit. This service, the District Court found, incurred additional "operational problems and costs" for appellant, including switching, siding, storage and "per diem cost for the use of foreign cars" not present in its fast freight service and not included in its published tariff. We agree with the District Court that such delayed service constitutes the furnishing of additional "privileges or facilities" under § 6 (7) of the Interstate Commerce Act, and, therefore, must be published and filed in its tariff. 49 U. S. C. § 6 (1). See *Turner Lumber Co.* v. *Chicago, M. & St. P. R. Co.*, 271 U. S. 259, 262 (1926).

If and when appellant publishes and files such a tariff, as other roads have already done, the Commission can then consider the reasonableness and justness of appellant's service in the light of that rate, giving due regard to any unjust or unreasonable preferences or advantages that might result to shippers or other roads should the same not be approved.

Affirmed.

UNITED RUBBER, CORK, LINOLEUM & PLASTIC WORKERS OF AMERICA, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 316. Decided April 4, 1960.

Certiorari granted and judgment reversed.

Reported below: 269 F. 2d 694.

Garnet L. Patterson and *Arthur J. Goldberg* for petitioners.

Solicitor General Rankin, Stuart Rothman, Thomas J. McDermott, Dominick L. Manoli and *Norton J. Come* for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the United States Court of Appeals for the Fourth Circuit is reversed. *National Labor Relations Board* v. *Drivers, Chauffeurs, Helpers, Local Union No. 639, ante,* p. 274.

ORDER OF RAILROAD TELEGRAPHERS ET AL. *v.* CHICAGO & NORTH WESTERN RAILWAY CO.

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

No. 100. Argued March 1–2, 1960.—Decided April 18, 1960.

An interstate railroad applied to the public utility commissions of four States for permission to abolish or consolidate many of its little-used stations. The labor union which was the bargaining agent of the station agents and telegraphers whose jobs would be abolished notified the railroad under § 6 of the Railway Labor Act of a desire to negotiate for an amendment to its current bargaining agreement which would prevent the railroad from abolishing any position without the union's consent, and it threatened to strike if the railroad refused to negotiate about the amendment. The railroad sued in a Federal District Court to enjoin such a strike. *Held:* The case involves or grows out of a "labor dispute" within the meaning of the Norris-LaGuardia Act, and the District Court was without jurisdiction to enjoin the strike permanently. Pp. 331–343.

(a) This controversy was a "labor dispute," as defined in § 13 (c) of the Norris-LaGuardia Act. Pp. 335–338.

(b) The strike here involved could not be enjoined on the theory that it was unlawful for the union to seek to bargain about the consolidation or abandonment of railroad stations, which are within the control of state regulatory commissions. Pp. 338–341.

(c) The dispute here involved was not a "minor" one which the Railway Labor Act requires to be heard by the National Railroad Adjustment Board. P. 341.

264 F. 2d 254, reversed.

Lester P. Schoene argued the cause for petitioners. With him on the brief were *Alex Elson, Brainerd Currie* and *Philip B. Kurland.*

Carl McGowan argued the cause for respondent. With him on the brief was *Jordan Jay Hillman.*

Solicitor General Rankin, Acting Assistant Attorney General Bicks and *Charles H. Weston* filed a brief for the National Mediation Board, as *amicus curiae.*

Clarence M. Mulholland, Edward J. Hickey, Jr. and *James L. Highsaw, Jr.* filed a brief for the Railway Labor Executives' Association, as *amicus curiae,* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Austin L. Roberts, Jr.* for the National Association of Railroad and Utilities Commissioners, and by *Walter J. Cummings, Jr.* for the Bureau of Information of Eastern Railways et al.

MR. JUSTICE BLACK delivered the opinion of the Court.

According to the verified complaint filed in a United States District Court in Illinois by the respondent, Chicago & North Western Railway Company, against the petitioners, the Order of Railroad Telegraphers and its officials, "This is an action for injunction to restrain and enjoin the calling and carrying out of a wrongful and unlawful strike or work stoppage on plaintiff's railroad." Section 4 of the Norris-LaGuardia Act provides, however, that "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of *any labor dispute* to prohibit any person or persons . . . from . . . (a) Ceasing or refusing to perform any work or to remain in any relation of employment; . . ." [1] The main question in this case then was, and still is, whether this prohibition of the Norris-LaGuardia Act bars an injunction in the circumstances of this case.

Respondent railroad, owning and operating a rail system of over 9,000 miles in the States of Illinois, Wis-

[1] 47 Stat. 70, 29 U. S. C. § 104. (Emphasis supplied.)

consin, Iowa, Minnesota, Michigan, Nebraska, South Dakota, North Dakota, and Wyoming, is an integral part of the nationwide railway system important to the transportation of passengers and freight in interstate commerce. When the railroad began operations, about 100 years ago, traffic was such that railroad stations were established about 7 to 10 miles apart. Trucks, automobiles, airplanes, barges, pipelines and modern roads have reduced the amount of railroad traffic so that the work now performed at many of these stations by agents is less than one hour during a normal eight-hour day. Maintenance of so many agencies where company employees do so little work, the complaint alleges, is wasteful and consequently in 1957 the railroad filed petitions with the public utility commissions in four of the nine States in which it operated asking permission to institute a "Central Agency Plan whereby certain stations would be made central agencies . . ." and others abolished. The plan would necessarily result in loss of jobs for some of the station agents and telegraphers, members of the petitioner union. A few weeks after the state proceedings were filed and before any decision had been made, the petitioner union, the duly recognized, certified and acting collective bargaining agent for the railroad's employees, notified the railroad under § 6 of the Railway Labor Act, 45 U. S. C. § 156, that it wanted to negotiate with the railroad to amend the current bargaining agreement by adding the following rule:

> "No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization."

The railroad took the position, according to its complaint, that this request did not constitute a "labor dispute under the Railway Labor Act," that it did not raise a bargainable issue, and that the union had no right to protest

or to seek relief except by appearing before the state public utility commissions which had power to determine whether station agencies could be discontinued, a power which private parties could not thwart by entering into a bargaining agreement. The respondent added that maintenance of the unnecessary agencies was offensive to the national transportation policy Congress adopted in the Interstate Commerce Act, 49 U. S. C. §§ 1–27, and that the duties that Act imposed on railroads could not be contracted away.

The union contended that the District Court was without jurisdiction to grant injunctive relief under the provisions of the Norris-LaGuardia Act because this case involved a labor dispute, and that the railroad had refused to negotiate in good faith on the proposed change in the agreement in violation of § 2, First, of the Railway Labor Act, 45 U. S. C. § 152, First, which requires the railroad to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions. Therefore, the union argued, an injunction in federal court is barred if for no other reason because of § 8 of the Norris-LaGuardia Act which provides:

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." 29 U. S. C. § 108.

See *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50.

After hearings, the District Court found, so far as is relevant here, that the railroad "refused to negotiate, confer, mediate or otherwise treat with defendant Teleg-

raphers on the proposed change in agreement set forth in the Section 6 notice," although the railroad "did show willingness to negotiate upon the central agency plan, including a possibility concerning severance pay"; that the proposed contract change referred to in the § 6 notice "relates to the length or term of employment as well as stabilization of employment" and that collective bargaining as to the length or term of employment is commonplace; that "The dispute giving rise to the proposed strike is a major dispute and not a minor grievance under the Railway Labor Act, and no issue involved therein is properly referable to the National Railroad Adjustment Board"; [2] and that the contract change proposed in the § 6 notice related to "rates of pay, rules and working conditions," and was therefore a bargainable issue under the Railway Labor Act. On its findings and conclusions of law, the District Court granted temporary relief but declined to grant a permanent injunction on the ground that it was without jurisdiction to do so.

On appeal the Court of Appeals did grant a permanent injunction upon its decision that "The District Court's finding that the proposed contract change related to 'rates of pay, rules, or working conditions,' and was thus a bargainable issue under the Railway Labor Act, is clearly erroneous." [3] It held that the Norris-LaGuardia Act did not apply to bar an injunction against this strike [4] and

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[2] See *Brotherhood of Railroad Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30.

[3] *Chicago & N. W. R. Co.* v. *Order of Railroad Telegraphers*, 264 F. 2d 254, at 260.

[4] *Ibid.* See *Brotherhood of Railroad Trainmen* v. *New York Central R. Co.*, 246 F. 2d 114. But see *Bull Steamship Co.* v. *Seafarers' International Union*, 250 F. 2d 326.

At the time of the District Court's decision, two States (South Dakota and Iowa) of the four in which the railroad had sought permission to institute its Central Agency Plan (the other two were Minnesota and Wisconsin) had granted permission and the plan was

we granted certiorari, 361 U. S. 809, to consider this important question.[5]

We hold, with the District Court, that this case involves or grows out of a labor dispute within the meaning of the Norris-LaGuardia Act and that the District Court was without jurisdiction permanently to enjoin the strike.

Section 4 of the Norris-LaGuardia Act specifically withdraws jurisdiction from a District Court to prohibit any person or persons from "[c]easing or refusing to perform any work or to remain in any relation of employment" "in any case involving or growing out of any labor dispute" as "herein defined."[6] Section 13 (c) of the Act defines a labor dispute as including,

> "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."[7]

Unless the literal language of this definition is to be ignored, it squarely covers this controversy. Congress made the definition broad because it wanted it to be broad. There are few pieces of legislation where the congressional hearings, committee reports, and the language in the legislation itself more clearly point to the necessity for giving an Act a construction that will protect the congressional policy the Act adopted. Section 2 of this Act specifies the public policy to be taken into

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promptly placed in effect. Since then, we are given to understand, the commissions in the remaining two States have issued orders approving the plan.

[5] Compare *Marine Cooks & Stewards* v. *Panama Steamship Co.*, *post*, p. 365, decided this day.

[6] 29 U. S. C. § 104.

[7] 29 U. S. C. § 113 (c).

consideration in interpreting the Act's language and in determining the jurisdiction and authority of federal courts; it is one of freedom of association, organization, representation and negotiation on the part of workers.[8] The hearings and committee reports reveal that Congress attempted to write its bill in unmistakable language because it believed previous measures looking toward the same policy against nonjudicial intervention in labor disputes had been given unduly limited constructions by the courts.[9]

Plainly the controversy here relates to an effort on the part of the union to change the "terms" of an existing collective bargaining agreement. The change desired just as plainly referred to "conditions of employment" of the railroad's employees who are represented by the union. The employment of many of these station agents inescapably hangs on the number of railroad stations that will be either completely abandoned or consolidated with other stations. And, in the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment. The District Court's finding that "[c]ollective bargaining as to the length or term of employment is commonplace," is not challenged.

We cannot agree with the Court of Appeals that the union's effort to negotiate about the job security of its members "represents an attempt to usurp legitimate managerial prerogative in the exercise of business judgment with respect to the most economical and efficient conduct of its operations." [10] The Railway Labor Act

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[8] 29 U. S. C. § 102.

[9] See *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797, 805; *United States* v. *Hutcheson*, 312 U. S. 219, 230–236; *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91, 102–103.

[10] 264 F. 2d, at 259.

and the Interstate Commerce Act recognize that stable and fair terms and conditions of railroad employment are essential to a well-functioning national transportation system. The Railway Labor Act safeguards an opportunity for employees to obtain contracts through collective rather than individualistic bargaining. Where combinations and consolidations of railroads might adversely affect the interests of employees, Congress in the Interstate Commerce Act has expressly required that before approving such consolidations the Interstate Commerce Commission "shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." [11] It requires the Commission to do this by including *"terms and conditions"* which provide that for a term of years after a consolidation employees shall not be "in a worse position with respect to their employment" than they would otherwise have been.[12] (Emphasis supplied.)

In 1942 this Court held that when a railroad abandons a portion of its lines, the Interstate Commerce Commission has power to include conditions for the protection of displaced workers in deciding what "the public convenience and necessity may require." We so construed the Interstate Commerce Act specifically on the basis that imposition of such conditions "might strengthen the national system through their effect on the morale and stability of railway workers generally." *Interstate Commerce Comm'n* v. *Railway L. Exec. Assn.*, 315 U. S. 373, 378, citing *United States* v. *Lowden,* 308 U. S. 225. The brief for the railroad associations there called our attention to testimony previously given to Congress that as early as 1936 railroads representing 85% of the mileage of the country had made collective bargaining agreements

[11] 49 U. S. C. § 5 (2)(f). And see § 5 (2)(c).

[12] 49 U. S. C. § 5 (2)(f).

with their employees to provide a schedule of benefits for workers who might be displaced or adversely affected by coordinations or mergers.[13] In an effort to prevent a disruption and stoppage of interstate commerce, the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which workers and railroads may or must negotiate and bargain collectively. Furthermore, the whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees themselves. It is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large.

The railroad has argued throughout the proceedings that the union's strike here may be enjoined, regardless of Norris-LaGuardia, because its effort to bargain about the consolidation and abandonment of railroad stations is unlawful. It is true that in a series of cases where collective bargaining agents stepped outside their legal duties and violated the Act which called them into being, we held that they could be enjoined.[14] None of these cases, however, enjoined conduct which the Norris-LaGuardia Act withdrew from the injunctive power of the federal courts except the *Chicago River* case which held

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[13] Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 2531, 76th Cong., 1st Sess. 216–217.

[14] *Brotherhood of Railroad Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30; *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768; *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U. S. 232; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210; *Virginian R. Co.* v. *System Federation No. 40*, 300 U. S. 515. See also *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, 457–459. And see *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192.

that a strike could be enjoined to prevent a plain violation of a basic command of the Railway Labor Act "adopted as a part of a pattern of labor legislation." 353 U. S. 30, 42. The Court there regarded as inapposite those cases in which it was held that the Norris-LaGuardia Act's ban on federal injunctions is not lifted because the conduct of the union is unlawful under some other, nonlabor statute.[15] Here, far from violating the Railway Labor Act, the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes "concerning rates of pay, rules, and working conditions." 45 U. S. C. § 152, First. Moreover, neither the respondent nor anyone else points to any other specific legal command that the union violated here by attempting to bring about a change in its collective bargaining agreement. It would stretch credulity too far

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[15] The Court cited the following cases to show that unlawfulness under nonlabor legislation did not remove the restrictions of the Norris-LaGuardia Act upon the jurisdiction of federal courts: *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91, 103 (alleged violations of Sherman Act); *East Texas Motor Freight Lines* v. *International Brotherhood of Teamsters*, 163 F. 2d 10, 12 (violation of Interstate Commerce Act and Motor Carrier Act).

Of course, a holding here that mere unlawfulness under any law is enough to remove the strictures of the Norris-LaGuardia Act would require a modification or abandonment of our statement that "For us to hold, in the face of this legislation [the Clayton and Norris-LaGuardia Acts], that the federal courts have jurisdiction to grant injunctions in cases growing out of labor disputes, merely because alleged violations of the Sherman Act are involved, would run counter to the plain mandate of the [Norris-LaGuardia] Act and would reverse the declared purpose of Congress." *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91, 103. See also *Lee Way Motor Freight* v. *Keystone Freight Lines*, 126 F. 2d 931, 934.

to say that the Railway Labor Act, designed to protect railroad workers, was somehow violated by the union acting precisely in accordance with that Act's purpose to obtain stability and permanence in employment for workers. There is no express provision of law, and certainly we can infer none from the Interstate Commerce Act, making it unlawful for unions to want to discuss with railroads actions that may vitally and adversely affect the security, seniority and stability of railroad jobs.[16] And for a number of reasons the state public utility proceedings, invoked by the railroad to obtain approval of consolidation or abandonment of stations, could not stamp illegality on the union's effort to negotiate this whole question with the railroad. The union merely asked for a contractual right to bargain with the railroad about any voluntary steps it might take to abandon stations or to seek permission to abandon stations and thus abolish jobs. Nothing the union requested would require the railroad to violate any valid law or the valid order of any public agency. There is no testimony and there are no findings that this union has set itself up in defiance of any state mandatory order. In fact, there was no state order of any kind at the time the union first asked to negotiate about the proposed contractual change. Even if a Norris-LaGuardia "labor dispute" could not arise out

[16] Moreover, this railroad operates in nine States; it has instituted proceedings in the state regulatory commissions of four only and at the time of the District Court's decision, only two of these had rendered decisions. Yet the union's proposal was to negotiate for a clause which would apply to respondent's entire system. The railroad's refusal to bargain was not limited, however, to operations in the four States in which proceedings had begun. And even assuming that the order of one State, South Dakota, was mandatory and that this fact is of importance, it would not relieve the railroad from any duty it had to bargain on the proposed contract change in the eight other States involved.

of an unlawful bargaining demand, but see *Afran Transp. Co.* v. *National Maritime Union,* 169 F. Supp. 416, 1959 Am. Mar. Cas. 326, the union's proposal here was not unlawful.

The union contends that, whether the state rulings were mandatory or permissive, the States are without authority to order an abandonment of stations that would conflict with collective bargaining agreements made or to be made between the railroad and the union. Whether this contention is valid or not we need not decide since there is no such conflict before us. And the District Court expressly refused to find that the union's proposal was prompted by the railroad's action in seeking state authority to put its Central Agency Plan into effect. Instead, the District Court specifically found that the dispute grew out of the failure of the parties to reach an agreement on the contract change proposed by the union.

Only a word need be said about the railroad's contention that the dispute here with the union was a minor one relating to an interpretation of its contract and therefore one that the Railway Labor Act requires to be heard by the National Railroad Adjustment Board. We have held that a strike over a "minor dispute" may be enjoined in order to enforce compliance with the Railway Labor Act's requirement that minor disputes be heard by the Adjustment Board. *Brotherhood of Railroad Trainmen* v. *Chicago River & I. R. Co.,* 353 U. S. 30. But it is impossible to classify as a minor dispute this dispute relating to a major change, affecting jobs, in an existing collective bargaining agreement, rather than to mere infractions or interpretations of the provisions of that agreement. Particularly since the collective bargaining agreement which the union sought to change was a result of mediation under the Railway Labor Act, this is the type of major dispute that is not governed by the Adjustment Board.

In concluding that the injunction ordered by the Court of Appeals is forbidden by the Norris-LaGuardia Act, we have taken due account of the railroad's argument that the operation of unnecessary stations, services and lines is wasteful and thus runs counter to the congressional policy, expressed in the Interstate Commerce Act, to foster an efficient national railroad system. In other legislation, however, like the Railway Labor and Norris-LaGuardia Acts, Congress has acted on the assumption that collective bargaining by employees will also foster an efficient national railroad service. It passed such Acts with knowledge that collective bargaining might sometimes increase the expense of railroad operations because of increased wages and better working conditions. It goes without saying, therefore, that added railroad expenditures for employees cannot always be classified as "wasteful." It may be, as some people think, that Congress was unwise in curtailing the jurisdiction of federal courts in railroad disputes as it did in the Norris-LaGuardia Act. Arguments have even been presented here pointing to the financial debilitation of the respondent Chicago & North Western Railroad and to the absolute necessity for the abandonment of railroad stations. These arguments, however, are addressed to the wrong forum. If the scope of the Norris-LaGuardia Act is to be cut down in order to prevent "waste" by the railroads, Congress should be the body to do so. Such action is beyond the judicial province and we decline to take it.

There are other subsidiary questions raised with reference to the validity of a second 30-day restraining order issued by the district judge and an injunction pending appeal under Rule 62 (c) of the Federal Rules of Civil Procedure. But since we have determined the main controversy between the parties, we think it inadvisable to decide either of these questions now. We intimate no opinion concerning either at this time.

The judgment of the Court of Appeals is reversed and that of the District Court is affirmed insofar as it held that the court was without jurisdiction under the Norris-LaGuardia Act to enter the injunction.

It is so ordered.

MR. JUSTICE CLARK, dissenting.

The respondent, suffering from financial headaches, conducted an efficiency survey of its operations. This indicated that it was carrying considerable dead weight on its payroll in the form of local, one-man stations. Some of its local agents worked as little as 12 minutes a day and the average daily work time on its one-man stations was only 59 minutes. All drew a full day's pay. In fact, the pay for time worked, it was found, ran in some cases as high as $300 per hour. Meanwhile the railroad was facing a slow death for lack of funds—all to the ultimate but certain detriment of the public, the employees and the management. It then proposed—and, after hearings, four States approved—a consolidation of work so that an agent would have sufficient duties to perform to earn a full day's pay. This would also permit the railroad, without any curtailment of its service to the public, to reduce its employee force over its entire system by several hundred agents. It proposed to negotiate with the union as to the severance pay and other perquisites for those agents whose services would no longer be needed. This the union refused to do, demanding that before any agent's position be abolished the railroad obtain its consent. The union offered but one alternative: "comply with" its demand, or suffer a "strike." The railroad, in the face of such a ukase, brought this suit.

Today the Court tells the railroad that it must bargain with the union or suffer a strike. The latter would be

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the death knell of the railroad. Hence, for all practical purposes, the Court is telling the railroad that it must secure the union's approval before severing the hundreds of surplus employees now carried on its payroll. Everyone knows what the answer of the union will be. It is like the suitor who, when seeking the hand of a young lady, was told by her to "go to father." But, as the parody goes, "She knew that he knew that her father was dead; she knew that he knew what a life he had led; and she knew that he knew what she meant when she said 'go to father.' "

I do not believe that the Congress intended to put the railroads in such a situation. In fact, its over-all purpose has been to prevent the devastating effects of strikes from paralyzing our transportation systems, the efficient operation of which is so vital to the public welfare. As I read the Interstate Commerce Act—the provisions of which were reaffirmed as late as the Transportation Act of 1958—the Congress told the railroads to go to the States—not the union—before abandoning or consolidating its local stations. Respondent went to the States and obtained their approval. The Court today gives to the union a veto power over this action of the States. Until this power is removed, the railroads will continue to be plagued with this situation—so foreign to the concept of a fair day's pay for a fair day's work, which has been the basis of union labor's great achievements.

For this reason, as well as those so ably enumerated by my Brother WHITTAKER in his dissent, which I join, I am obliged to disagree with the Court. Perhaps the Congress will be obliged, in the face of this ruling, to place the solution of such problems within the specific power of the Interstate Commerce Commission or under the Railway Labor Act, each of which, as well as the courts, is today held impotent.

MR. JUSTICE WHITTAKER, with whom MR. JUSTICE FRANKFURTER, MR. JUSTICE CLARK and MR. JUSTICE STEWART join, dissenting.

The Court concludes, as I read its opinion, that the Union's demand for a covenant that no existing position may be abolished without its consent was a lawfully bargainable one under the Railway Labor Act; that the Union did not, by its demand, attempt unlawfully to "set itself up in defiance of" public regulatory orders; that the "union merely asked for a contractual right to bargain with the railroad about . . . abandon[ing] stations . . . and thus abolish[ing] jobs"; that "[e]ven if a Norris-LaGuardia 'labor dispute' could not arise out of an unlawful bargaining demand . . . the union's proposal here was not unlawful," and that the Norris-LaGuardia Act deprived the court of jurisdiction to enjoin the threatened strike to enforce acceptance of the Union's demand.

With all deference, I believe that these conclusions are contrary to the admitted or indubitable facts in the record, to the provisions and policies of Acts adopted by Congress, and also to principles established by many decisions of this Court; and being fearful that the innovation and reach of the Court's conclusions will be destructive of congressional policy and injurious to the public interest, I feel compelled to state my dissenting views.

Inasmuch as I read the record somewhat differently than does the Court, my first effort will be to make a plain and chronological statement of the relevant facts.

The Chicago and North Western Railway Company ("North Western") is a major interstate common carrier by railroad. The Order of Railroad Telegraphers ("Union") is a railway labor union, certified by the National Mediation Board as the representative of the

station agents and various other employees of North Western. North Western's lines extend westerly and northerly from Chicago into and serve nine largely agricultural Midwestern States. They were laid out and constructed near the middle of the last century, and, to accommodate that day's mode and conditions of rural travel, stations were established at close intervals along its lines—one every seven to 10 miles along its branch lines through rural sections—to enable its patrons to travel, by horse or horses and wagon over dirt roads, from their homes to the station and return in one day.

Although originally an efficient and profitable railroad, North Western, in more recent years, failed both to maintain and to modernize its lines, facilities and equipment, and also permitted many outmoded, inefficient and wasteful practices to continue—producing the highest ratio of wage and salary expense to the revenue dollar of all major American railroads—resulting ultimately in its inability effectively to compete with new forms of transportation, or even with modernized railroads. In consequence, its net revenues so steadily and extensively declined that it lost $8,000,000 in the first quarter of 1956, and this so reduced its cash position that its payrolls of $330,000 per day to its 18,000 employees were in jeopardy.

Alarmed by these conditions, North Western's new managers undertook a number of steps in the spring of 1956 to improve its physical condition and competitive position, including the elimination of many outmoded, costly and wasteful practices. It then had several hundred "one-man" stations, principally located on branch lines from which—due to lack of need, occasioned by the advent of paved roads and motorized vehicles—all passenger trains and many freight trains had been removed and over which the few remaining freight trains passed at hours when many of the agents were not even on

duty.[1] Its studies disclosed many instances where such agents were drawing a full day's pay for as little as 15 to 30 minutes' work. Conceiving this to be a wasteful practice and violative of the national transportation policy,[2] North Western promulgated a plan—known as its Central Agency Plan—which contemplated the discontinuance of a full-time agent at most of such stations and provided, instead, for a centrally located agent to perform the necessary agency services at the central station and also at the neighboring station or stations to either side.

Accordingly, North Western filed petitions with the Public Utility Commissions of South Dakota, Iowa, Minnesota and Wisconsin to effectuate its Central Agency Plan. The first of those petitions was filed with the South Dakota Commission on November 5, 1957, asking authority to effectuate the Central Agency Plan with respect to 69 "one-man" stations in that State. Hearings were held by that Commission beginning November 26, 1957, and ending January 17, 1958. The Union appeared in that proceeding, presented evidence, a brief and an oral argument, in opposition to the petition. It contended, among other things, that its existing bargaining agreement with North Western prohibited abolishment of any agency jobs without its consent. On May 9, 1958,

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[1] The fact that many of these agents were not on duty when the freight trains passed their stations was due to a union requirement that their day's work must begin at 8:30 a. m.

[2] Act of Sept. 18, 1940, c. 722, Title I, § 1, 54 Stat. 899—preceding Part I of the Interstate Commerce Act, 49 U. S. C. § 1—titled "National Transportation Policy." In pertinent part, it provides: "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act . . . to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers . . . ."

the Commission entered its order. It found that the workload of the agents at the stations involved varied from 12 minutes to 2 hours per day and averaged 59 minutes per day. It further found:

> "That the maintenance of full-time agency service at all of the subject stations, because of the lack of public need constitutes mismanagement and a dissipation of carrier's revenues which has and will impair its capacity to render adequate rail service to the public at reasonable rates . . . ." [3]

Thereupon, the Commission, electing to act under a South Dakota statute authorizing it to *order* changes to be made in station operations where necessary in the public interest, *directed* North Western to make the plan (establishing 16 central agency stations and abolishing 53 full-time agency positions) effective immediately.

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[3] The South Dakota Commission further found that the expenses of operating the 69 stations involved exceeded related revenues by $170,399 in 1956, and that if the Central Agency Plan had been in effect during that period there would have been a surplus of $58,884.

Hearings were afterwards conducted upon the similar petitions before the Iowa, Minnesota and Wisconsin Commissions. The Union appeared in each of those proceedings and presented evidence, briefs and arguments in opposition to the petitions, but each was granted.

The Iowa Commission found that the agents at the stations there involved worked an average of 1 hour and 14 minutes per day, a decrease of 28% since 1951, and that the estimated average workload under the Central Agency Plan would be 3 hours and 15 minutes per day. It said, *inter alia*, "Savings must be made by reducing or eliminating service no longer needed. The case before us is a proposal to reduce agency service to the level of actual need." And it found that such was necessary "to insure efficiency, economy and adequate rail transportation."

The Union appealed from the orders of the respective Commissions to the courts of the respective States, but the Commission action was affirmed in each instance.

On December 23, 1957, about six weeks after North Western filed its petition with the South Dakota Commission, the Union, purporting to act under the provisions of § 6 of the Railway Labor Act,[4] sent a letter to North Western requesting that their bargaining agreement be amended by adding the following provision:

> "No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the Organization."

North Western responded the next day, saying that it did not consider the request to be a proper subject of bargaining,[5] but it offered, without waiving its position, to meet with the Union's officers and to discuss the matter further. Conferences were thereafter held by the parties but no agreement was reached, and the Union invoked mediation under the Railway Labor Act. On February 24, 1958, the National Mediation Board began its efforts to mediate the controversy, and its representative conducted a number of meetings between the parties to that end,[6] but was not successful, and thereafter the

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[4] 48 Stat. 1197, 45 U. S. C. § 156.

[5] North Western's reply stated, *inter alia,* that, in its view, the Union's request was "not a proper subject for a Section 6 notice in that it does not in fact concern rules, rates of pay or working conditions, but instead constitutes an attempt to freeze assignments regardless of the controlling agreement and regardless of the necessity or justification for such assignments."

[6] In the mediation meetings and other meetings between the parties, North Western suggested several means of cushioning the effects of discontinuing these "one-man" agency jobs, including (1) the transfer of the agents affected to productive jobs; (2) the limiting of job abolishments to an agreed number per year; and (3) the payment of supplemental unemployment benefits to the employees affected. The Union refused to discuss these proposals.

At a meeting between North Western's chief executive officer and the Union's president and its general counsel at Madison, Wisconsin, during the period of the mediation efforts, North Western's official

Board, acting pursuant to § 5, First, of the Railway Labor Act,[7] wrote the parties on May 27, requesting them to submit the controversy to arbitration under the provisions of § 8 of the Railway Labor Act.[8] But both parties declined—the Union on May 28 and North Western on June 12—and, on June 16, the Board terminated its services and so advised the parties in writing.

On July 10, the Union sent to its members a strike ballot under an accompanying letter.[9] The vote was almost unanimous in favor of a strike, and, on August 18, the Union called a strike of its members to begin at 6 a. m. on August 21.[10] A renewed proffer of

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asked if there was any "possibility" of "working out these station closing matters and the discontinuance of the positions of these station agents" either on a South Dakota or a system basis. The Union's president asked his general counsel for his views on the matter. The latter replied "I think we are too far apart," and North Western's official then said "I want you to know that my door is always open."

The Union's president testified at the subsequent District Court trial that ". . . the only alternative which up to the present I have offered the North Western Railroad was to comply with this rule or strike."

[7] 45 U. S. C. § 155, First.

[8] 45 U. S. C. § 158.

[9] The Union's letter of July 10, 1958, after referring to the efforts of North Western to abolish many of the "one-man" agency jobs and to the Union's efforts in opposition, stated among other things:

"However, it became evident at an early date that to meet this onslaught effectively would require strengthening of our Agreements. . . . We must prevent a continuance of such a program.

"While we hope the commissions in other states will be more reasonable than the South Dakota Commission, we have no assurance that we will not soon see a repetition in other states of what has happened in South Dakota. . . ."

[10] The strike call, after referring to the Union's efforts to prevent the abolishment of jobs at "one-man" stations said, *inter alia*, that: "The need for the proposed rule has again been tragically demonstrated in the last few days. What happened in South Dakota was repeated in Iowa, except that this time 70 positions were abolished and 27 assignments enlarged."

mediation services by the Board was accepted by the parties and, through it, further efforts were made on August 19 to compose the controversy, but without success, and, on August 20, the Board again advised the parties that it had terminated its services.

On August 20, North Western filed a complaint against the Union and various of its officials in the United States District Court for the Northern District of Illinois, alleging that the Union's contract demand was not a lawfully bargainable subject under the Railway Labor Act; that the impending strike, called to force acceptance of that demand by North Western, would be illegal; that North Western had a right arising under the laws of the United States, particularly the Interstate Commerce Act and the Railway Labor Act, to be free of such an illegal strike, and it prayed that it be enjoined. The court entered a temporary restraining order on that date. Thereafter, following full hearing, the court held that the Union's demand "relates to 'rates of pay, rules and working conditions' and is a bargainable issue under the Railway Labor Act"; that a strike to force acceptance of that demand would not be unlawful; and, on September 8, 1958, the court entered its decree restraining the strike until midnight, September 19, denying any further injunctive relief,[11] and dismissing the complaint. The Court of Appeals, holding that the Union's contract demand was not a lawfully bargainable one and that its acceptance could not legally be forced by a strike, reversed and remanded with directions to enter an injunction as prayed in the complaint. 264 F. 2d 254. This Court granted certiorari, 361 U. S. 809, and now reverses the judgment of the Court of Appeals upon grounds which, with deference, I think are not only injurious to the public interest

[11] By order of Sept. 16, 1958, the District Court further restrained the impending strike pending determination of North Western's appeal.

but also demonstrably legally erroneous, as I shall endeavor to show.

Congress, in comprehensively providing for the regulation of railroads, their transportation services and their employer-employee relations, has declared its policies in several related Acts, including Part 1 of the Interstate Commerce Act,[12] the Railway Labor Act,[13] and the Norris-LaGuardia Act,[14] and, at least in cases such as this, none of them may meaningfully be read in isolation but only together as, for they are in fact, an integrated plan of railroad regulation. And if, as is frequently the case in such undertakings, there be overlappings, "[w]e must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other." *Allen Bradley Co.* v. *Local Union,* 325 U. S. 797, 806.

By Part I of the Interstate Commerce Act, Congress has provided a pervasive scheme of regulation of all common carriers engaged in transportation by railroad in interstate commerce. The declared policy of that Act was to promote economical and efficient transportation services at reasonable charges [15] and, as this Court has said, "It is a primary aim of that policy to secure the avoidance of waste. That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public." *Texas* v. *United States,* 292 U. S. 522, 530. "Congress has long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind." *Seaboard R. Co.* v. *Daniel,* 333 U. S. 118, 124–125.

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[12] 49 U. S. C. §§ 1–27.

[13] 45 U. S. C. §§ 151–164.

[14] 29 U. S. C. §§ 101–115.

[15] See note 2 for the pertinent provisions of the National Transportation Policy.

To aid in effectuating that policy, Congress has contemplated the abandonment of railroad lines, stations, depots and other facilities and services when found by designated public regulatory bodies to be burdensome and no longer required to serve the public convenience and necessity. To this end, it has empowered the Interstate Commerce Commission, upon application and after notice and public hearing, to issue a certificate authorizing the abandonment of "all or any portion of a line of railroad," and it has provided that "[f]rom and after issuance of such certificate . . . the carrier by railroad may, *without securing approval other than such certificate . . . proceed with the . . . abandonment covered thereby.*" [16] (Emphasis added.) And in the Transportation Act of 1958 (72 Stat. 568), Congress has empowered the Commission, under stated conditions, to authorize the abandonment of "any train or ferry." [17] However, Congress has not sought completely to accomplish its abandonment policies through the Commission. Rather, it has sought to make use of state regulatory commissions, as additional instruments for the effectuation of its policies, in respect to the abandonment of some railroad facilities and services. Among others, it has long left to state regulatory commissions abandonments of railroad stations and station agency service; and, in 1958, after extensive review of that subject in the process of enacting the Transportation Act of 1958, it deliberately reaffirmed that policy.[18]

[16] 49 U. S. C. §§ 1 (18), 1 (19), 1 (20).

[17] Act of Aug. 12, 1958, Pub. L. 85-625, § 5, 72 Stat. 571, 49 U. S. C. § 13a.

[18] The Transportation Act of 1958, 72 Stat. 568. See Hearings Before Subcommittee on Surface Transportation of Senate Committee on Interstate and Foreign Commerce on Problems of the Railroads, 85th Cong., 2d Sess., pp. 1816, 1817, 1821, 2027, 2028; 104 Cong. Rec., pp. 10850, 12522, 12537, 15528; S. Rep. No. 1647 on S. 3778, 85th Cong., 2d Sess.; H. R. Rep. No. 1922 on H. R. 12832, 85th Cong., 2d Sess.; H. R. Conf. Rep. No. 2274, 85th Cong., 2d Sess.

Moreover, in its report on S. 3778, which culminated in the Transportation Act of 1958, the Senate Committee on Interstate and Foreign Commerce critically attributed a major part of the financial plight of the railroads to their failure to apply to regulatory bodies for permission to abandon burdensome and needless services in accordance with congressional policy, and strongly advocated that such be done.[19]

For the fair and firm effectuation of these policies, Congress has provided that issues respecting the propriety of an abandonment shall be determined by a public regulatory body. It has contemplated that the carrier shall propose to the proper regulatory body the abandonment of particular facilities or services and that, after notice and hearing—at which all persons affected, including employees and their union representatives, may appear and be heard—the public regulatory body shall determine whether the proposal is in the public interest, and its order, unless reversed on judicial review, shall be binding upon all persons. These procedures plainly exclude any right or power of a carrier, at its will alone, to effectuate, or of a labor union representing its employees

[19] "The railroad industry has not, in the subcommittee's opinion, been sufficiently interested in self-help in such matters as consolidations and mergers of railroads; joint use of facilities in order to eliminate waste, such as multiple terminals and yards that require expensive interchange operations; reduction of duplications in freight and passenger services by pooling and joint operations; abandonment or consolidation of nonpaying branch and secondary lines; abolishing of unnecessarily circuitous routes for freight movements; improved handling of less-than-carload traffic; coordination of transportation services and facilities by establishment of through routes and joint rates with other forms of transportation; and modernization of the freight-rate structure, including revision of below-cost freight rates to levels that cover cost and yield some margin of profit as well as adjustment of rates excessively above cost to attract traffic and yield more revenue." S. Rep. No. 1647, 85th Cong., 2d Sess., p. 11.

to veto, any proposed abandonment. Although both may be heard, neither of them, nor the two in agreement, even if their agreement be evidenced by an express contract, may usurp the Commission's decisional function by dictating the result or thwarting its effect. It is obvious that any abandonment, authorized by a proper regulatory body, will result in abolishment of the jobs that were involved in the abandoned service. And inasmuch as the maintenance of these jobs constituted at least a part of the wasteful burden that necessitated the abandonment, it is equally obvious that Congress intended their abolishment. Yet, here, the Union has demanded, and threatens to force by a strike, acceptance by the carrier of a covenant that no job in existence on December 3, 1957, will be abolished without its consent. Certainly that demand runs in the teeth of the recited provisions and policies of the Interstate Commerce Act. It plainly would destroy the public regulation of abandonments, provided and contemplated by Congress in the public interest, and render them subject to the Union's will alone. A demand for such a contractual power surely is an unlawful demand.

The Union argues, and the Court seems to find, that there is a basis for the claimed legality of the Union's demand in the provision of § 5 (2)(f) of the Interstate Commerce Act [20] that the Commission in approving railroad mergers or consolidations "shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." Instead of supporting legality of the Union's demand, I think the provisions of that section and its legislative history are further proof of its illegality. While that section authorizes the Commission to require temporary mitigation of hardships to employees displaced by such unifications, nothing in it authorizes the Commission to freeze existing jobs. However, in the

[20] 49 U. S. C. § 5 (2)(f).

course of its enactment an effort was made to amend it to that end. On the floor of the House, Representative Harrington advocated the following proviso:

> "*Provided, however,* That no such transaction shall be approved by the Commission if such transaction will result in unemployment *or displacement of employees of the carrier* or carriers, or in the impairment of existing employment rights of said employees." [21] (Emphasis added.)

While the bill was in Conference, the Legislative Committee of the Interstate Commerce Commission sent a communication to Congress condemning the principle of the Harrington amendment in the following words:

> "As for the [Harrington] proviso, *the object of unifications is to save expense, usually by the saving of labor.* Employees who may be displaced should, in the case of railroad unifications, be protected by some such plan as is embodied in the so-called 'Washington agreement' of 1936 between the railroad managements and labor organizations [providing for the mitigation of hardships by the payment of certain monetary benefits for a limited period to employees whose jobs are abolished by such approved unifications]. *The proviso, by prohibiting any displacement of employees, goes much too far,* and in the long run will do more harm than good to the employees." [22] (Emphasis added.)

Congress rejected the Harrington proviso in the form proposed. Yet, the Union's demand here is designed to accomplish the very purpose that Congress rejected. Of the Harrington proviso this Court said in *Railway Labor*

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[21] 84 Cong. Rec. (1939), Pt. 9, p. 9882.

[22] Interstate Commerce Commission Report on S. 2009, Omnibus Transportation Legislation, p. 67 (76th Cong., 3d Sess., House Committee Print), transmitted Jan. 29, 1940.

Executives' Assn. v. *United States,* 339 U. S. 142, that it "threatened to prevent all consolidations to which it related [but Congress] . . . made it workable by putting a time limit upon its otherwise prohibitory effect." 339 U. S., at 151, 153. But Congress actually did more. It eliminated any power to freeze existing jobs. It is not to be doubted that a carrier and a labor union representing the carrier's employees, lawfully may bargain about and agree upon matters in mitigation of hardships to employees who are displaced by railroad unifications or abandonments; but they may not agree, nor may any regulatory body order, that no jobs shall be abolished, and thus defeat unifications or abandonments required in the public interest. *Railway Labor Executives' Assn.* v. *United States, supra; Interstate Commerce Comm'n* v. *Railway Labor Executives' Assn.,* 315 U. S. 373; *United States* v. *Lowden,* 308 U. S. 225.

There is no dispute in the record that the carrier sought to bargain and agree with the Union upon matters in mitigation of hardships to employees displaced by the station abandonments. It offered to bargain about (1) transferring the agents affected to productive jobs, (2) limiting the job abolishments to an agreed number per year, and (3) paying supplemental unemployment benefits to the employees affected.[23] Short of foregoing the station abandonments, this is all it lawfully could do. It is not suggested that it should have done more in this respect. Indeed, the Union refused even to discuss these proposals.[24] Instead, as its president testified at the trial, the only "alternative" the Union "offered the North Western Railroad was to comply with this rule or strike." [25]

This also answers the Court's argument that there is nothing in the Interstate Commerce Act "making it unlawful for unions to want to discuss with railroads

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[23] See note 6. [24] *Ibid.* [25] *Ibid.*

actions that may vitally and adversely affect the security, seniority and stability of railroad jobs." The quoted statement is literally true. But the further truth is that the carrier offered to bargain and agree with the Union about those matters, but the Union refused even to discuss them. Note 6, *ante*. The Union's demand was not for a right "to discuss" such matters with the carrier, but was, rather, that the carrier agree that no jobs in existence on December 3, 1957, be abolished without the Union's consent. And the only "alternative" it offered was: "comply with this rule or strike." *Ibid.* The foregoing likewise answers the Court's argument that the Union "merely asked for a contractual right to bargain with the railroad about any voluntary steps it might take to abandon stations . . . and thus abolish jobs." Plainly the Union's demand was not for a right "to bargain with" the carrier about "abolish[ing] jobs," but was for a unilateral right to prohibit the abolishment of any job without its consent.

The Court fails to find any testimony in the record "that this union has set itself up in defiance of any state mandatory order." Although, in my view, the question is not whether it has set itself up in defiance of any valid existing state mandatory order, but rather is whether it lawfully may demand, and force by a strike, acceptance of a covenant in derogation of the law; yet, in very truth, it "has set itself up in defiance," or, at least, in derogation, of a "state mandatory order." As earlier noted, the order of the South Dakota Commission—the validity of which cannot be questioned here—was a mandatory one. It *directed* the carrier to make the Central Agency Plan effective in that State and, thereunder, forthwith to abolish 53 full-time agency jobs. That order was entered on May 9, 1958, and if the Union's demand, that no job in existence on December 3, 1957, may be abolished without its consent, is a lawful one and may be enforced by a strike, then the South Dakota order is not only defied

but defied successfully. Moreover, while such orders of state commissions, like those of the Interstate Commerce Commission, are in the nature of things usually permissive in character, they are nevertheless binding administrative determinations made, as Congress contemplated and Mr. Justice Brandeis said, "to protect interstate commerce from undue burdens," *Colorado* v. *United States*, 271 U. S. 153, 162, and may not be overridden or thwarted by private veto.

Section 2, First, of the Railway Labor Act makes it the duty of carriers and their employees to exert every reasonable effort "to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise." [26] Here, the Union's demand was simply for a covenant that no existing jobs may be abolished without its consent. It thus seems plain that the demand did not relate to the "rates" of compensation to be paid to employees nor to their "working conditions," but, rather, it related solely to whether the employment relation, as to any existing job, might be severed altogether. It, therefore, seems clear enough that the demanded covenant was, in terms, beyond the purview of § 2, First. But even if this conclusion may be doubted, surely it must be agreed that Congress did not contemplate that agreements might be made, under the aegis of that section, in derogation of the commands, policies and purposes of related Acts which it has promulgated for the regulation of carriers and their employer-employee relations in the public interest. Here, as has been shown, the Union's demand was in derogation of the provisions and policies of the Interstate Commerce Act. It could not therefore be a lawfully bargainable subject within the purview of § 2, First, of the Railway Labor Act.

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[26] 45 U. S. C. § 152, First.

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The carrier could not lawfully accept it,[27] and hence a strike to force its acceptance would be one to force a violation of the law.

Surely, in such circumstances, the carrier, in discharging its duty to safeguard the public interest,[28] has a legal right to be free of a strike to force it to accept a demand which Congress has made unlawful. But there is no administrative remedy in such a case, and, hence, the legal right will be sacrificed, and Congress' policies will be thwarted, unless a preventive judicial remedy is available. Certainly Congress did not intend to create and "to hold out to [the carrier and the public] an illusory right for which it was denying them a remedy." *Graham* v. *Brotherhood of Firemen,* 338 U. S. 232, 240.

Nor does the Norris-LaGuardia Act render federal courts impotent to enjoin unlawful conduct or strikes to force acceptance of unlawful demands. That Act, in terms, permits federal courts to enjoin "unlawful acts [that] have been threatened and will be committed unless restrained." [29] This Court has consistently held that the Norris-LaGuardia Act does not prevent a federal court from enjoining an unlawful abuse of power conferred upon a labor union by the Railway Labor Act or a threatened strike to force acceptance of an unlawful demand.

In *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.,* 353 U. S. 30, a union threatened a strike to force a carrier to accept demands which Congress had placed within the exclusive jurisdiction of the Railroad Adjustment Board. Holding that the demands were in

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[27] *Brotherhood of Railroad Trainmen* v. *Howard,* 343 U. S. 768.

[28] *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515. "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." 300 U. S., at 552.

[29] 29 U. S. C. § 107 (a).

derogation of that Act of Congress and therefore illegal, a federal court enjoined the threatened strike to enforce them. The union contended here that the Court was without jurisdiction to issue the injunction because "the Norris-LaGuardia Act has withdrawn the power of federal courts to issue injunctions in labor disputes [and that the] limitation . . . applies with full force to all railway labor disputes." 353 U. S., at 39–40. In rejecting that contention, this Court said:

> "We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable." 353 U. S., at 40.

And finding that the union's demands violated the provisions of the Railway Labor Act, this Court held "that the specific provisions of the Railway Labor Act take precedence over the more general provisions of the Norris-LaGuardia Act," and, reaffirming its decision in *Brotherhood of Railroad Trainmen* v. *Howard,* 343 U. S. 768, it further held " 'that the District Court [had] jurisdiction and power [to enjoin the threatened strike] notwithstanding the provisions of the Norris-LaGuardia Act.' " 353 U. S., at 41–42.

There, as here, the union's demand was in derogation of the specific provisions of an Act of Congress, and here, as there, those specific provisions must "take precedence over the more general provisions of the Norris-LaGuardia Act."

In *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, this Court held that a federal court could lawfully issue an injunction in a labor dispute that was governed by the specific provisions of a federal statute,

and that "[s]uch provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act." 300 U. S., at 563.

Steele v. *Louisville & Nashville R. Co.*, 323 U. S. 192, involved the unlawful misuse by a union of the powers conferred upon it by the Railway Labor Act. Observing that "there is no mode of enforcement [of the rights that were being denied by such misuse of powers] other than resort to the courts," this Court held that a federal court had the "jurisdiction and duty to afford a remedy for a breach of statutory [rights]." 323 U. S., at 207. On almost identical facts, this Court reaffirmed that principle in *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210. In a similar factual situation, this Court held in *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U. S. 232, that a federal court may enjoin a labor union from unlawfully using or abusing powers conferred upon it by the Railway Labor Act, notwithstanding the Norris-LaGuardia Act. And, after reviewing the then-existing cases, the Court concluded:

> "If, in spite of the *Virginian*, *Steele*, and *Tunstall* cases, *supra*, there remains any illusion that under the Norris-LaGuardia Act the federal courts are powerless to enforce these rights, we dispel it now." 338 U. S., at 240.

Brotherhood of Railroad Trainmen v. *Howard*, 343 U. S. 768, was an action to enjoin a union and a carrier from enforcing the provisions of a contract, made under the threat of a strike, that unlawfully deprived a class of railroad employees of legal rights which this Court held had been impliedly vouchsafed to them by the Railway Labor Act. Finding that the questioned provisions of that contract were "unlawful" and that the injured persons "must look to a judicial remedy to prevent the sacrifice or obliteration of their rights under the [Railway Labor] Act [inasmuch as] no adequate administrative

remedy can be afforded by the National Railroad Adjustment or Mediation Board[s]," this Court concluded "that the District Court has jurisdiction and power to issue necessary injunctive orders notwithstanding the provisions of the Norris-LaGuardia Act. We need add nothing to what was said about inapplicability of that Act in the *Steele* case and in *Graham* v. *Brotherhood of Firemen,* 338 U. S. 232, 239–240." 343 U. S., at 774.

Resting upon its conclusion that the Union's demand here was a lawful one, the Court relegates the *Virginian, Steele, Tunstall, Graham* and *Howard* cases to a footnote, and says, "None of these cases, however, enjoined conduct which the Norris-LaGuardia Act withdrew from the injunctive power of the federal courts." Does the Court mean by this statement that, although it enjoined enforcement of the illegal provisions of the contract which had been forced upon the carrier by "the threat of a strike" in the *Howard* case, it would not, if asked, have enjoined the strike which forced acceptance by the carrier of that unlawful contract? At all events, it cannot be denied, and the Court concedes, that the *Chicago River* case holds that a threatened strike to force compliance with unlawful demands may be enjoined. There, just as here, a threatened strike was enjoined. There, as here, the injunction issued because the Union's demand was not a lawfully bargainable one under the Railway Labor Act. The demands in the *Chicago River* case were unlawful because jurisdiction over their subject matter had been exclusively vested by Congress in the Railroad Adjustment Board, while in this case the demand is unlawful because jurisdiction over its subject matter has been exclusively vested partly in the Interstate Commerce Commission and partly in state regulatory commissions. Today's attempted distinctions of that case were advanced in that case, but were found "inapposite," 353 U. S., at 42. Being "inapposite" there, they are so here. I submit that, on the point in

issue, the *Chicago River* case is indistinguishable from this one, and that if the Norris-LaGuardia Act did not prohibit a federal court from issuing an injunction in that case, it does not do so in this one.

It is to be noted that the Court does not say that the Norris-LaGuardia Act prohibits federal courts from enjoining threatened strikes to force acceptance of illegal demands. It says, rather, that "Even if a Norris-LaGuardia 'labor dispute' could not arise out of an unlawful bargaining demand . . . the union's proposal here was not unlawful." If it fairly may be inferred from that statement that the Court would have sustained jurisdiction had it found the demand to be unlawful, then my disagreement with the Court would be reduced to and turn on that simple issue. And as to it, I respectfully submit that the admitted facts show that the demand was in derogation of the provisions and policies of the Interstate Commerce Act. Believing that the demand was not a lawfully bargainable one under the Railway Labor Act, and that the District Court had jurisdiction to enjoin the threatened strike, called to force acceptance of that illegal demand, I would affirm the judgment of the Court of Appeals.

Memorandum of MR. JUSTICE STEWART.

I have strong doubt as to the existence of federal jurisdiction in this case, for reasons well expressed by then Circuit Judge Minton, dissenting in *Toledo, P. & W. R. Co.* v. *Brotherhood of Railroad Trainmen,* 132 F. 2d 265, 272–274. See *Brotherhood of Railroad Trainmen* v. *New York Central R. Co.,* 246 F. 2d 114, at 122 (dissenting opinion). If, however, the Federal District Court had jurisdiction, as all my Brethren seem to believe or at least assume, MR. JUSTICE WHITTAKER'S dissenting opinion convincingly demonstrates for me that the District Court had power to issue an injunction.

MARINE COOKS & STEWARDS, AFL, ET AL. *v.* PANAMA STEAMSHIP CO., LTD., ET AL.

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

No. 403. Argued March 2–3, 1960.—Decided April 18, 1960.

The Norris-LaGuardia Act deprives a Federal District Court of jurisdiction to enjoin a union of American seamen from peacefully picketing a foreign ship operated entirely by a foreign crew under foreign articles while temporarily in an American port, in protest against loss of livelihood by American seamen "to foreign flagships with substandard wages or substandard conditions," and in order to prevent the foreign ship from unloading its foreign cargo in the American port. *Benz* v. *Compania Naviera Hidalgo,* 353 U. S. 138, distinguished. Pp. 365–372.

(a) Such a controversy is a "labor dispute" within the meaning of the Norris-LaGuardia Act. P. 370.

(b) A different conclusion is not required by the fact that the picketing interfered with foreign commerce or the internal economy of a vessel registered under the flag of a friendly foreign power and prevented such vessel from unloading its cargo at an American port. Pp. 371–372.

265 F. 2d 780, reversed.

John Paul Jennings argued the cause for petitioners. With him on the brief was *J. Duane Vance.*

John D. Mosser argued the cause for respondents. With him on the brief was *Charles B. Howard.*

Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade and *Herbert E. Morris* filed a brief for the United States, as *amicus curiae.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The respondents, who are the owner, time charterer, and master of the Liberian registered vessel, S. S. *Nikolos,* brought this action in a United States District Court against the petitioner union and its members praying for

temporary and permanent injunctions to restrain, and for damages allegedly suffered from, the union's peaceful picketing of the ship in American waters and its threats to picket shore consignees of the ship's cargo should they accept delivery. The union's sole contention was that the District Court was without jurisdiction to restrain the picketing because of the Norris-LaGuardia Act which states in § 1:

> "That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act." [1]

Section 4 of that same law specifically denies jurisdiction to District Courts to issue any restraining order or temporary or permanent injunction to prohibit unions from:

> "(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence . . . ." [2]

Notwithstanding these provisions of the Norris-LaGuardia Act and despite an express finding that the union and its members had not been guilty of fraud, and had not threatened or committed any acts of physical violence to any person or any property, the District Court issued a

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[1] 47 Stat. 70, 29 U. S. C. § 101.

[2] 47 Stat. 70, 71; 29 U. S. C. § 104. Even in the limited jurisdiction the Norris-LaGuardia Act leaves to federal courts in labor controversies, other sections of the Act narrowly circumscribe the cases where, the parties against whom, and the circumstances in which, injunctions may issue. If, however, issuance of a specific injunction is prohibited by one section, such as § 4, compliance with the requirements of another section, such as § 7, does not justify the injunction.

temporary injunction to restrain the picketing.[3] The injunction prohibited picketing by the petitioner union of "the SS 'Nikolos' or any other vessel registered under a foreign flag and manned by an alien crew and owned, operated or chartered by" respondents, in the Puget Sound area. This action of the court was based on its conclusions that (a) the case did not involve or grow out of any labor dispute within the meaning of the Norris-LaGuardia Act and (b) even if there were a labor dispute within the meaning of that Act, the court had jurisdiction to restrain the picketing because it interfered in the internal economy of a vessel registered under the flag of a friendly foreign power and amounted to an "unlawful interference with foreign commerce."[4] The court's conclusion rested on the following facts, about which there was no substantial dispute.

The petitioner and other national labor organizations act as bargaining representatives for most of the unlicensed personnel of vessels that fly the American flag on the Pacific Coast. Petitioner alone, pursuant to National Labor Relations Board certification, represents employees of the stewards' department on a large majority of those vessels. The S. S. *Nikolos* is owned by a Liberian corporation, was time-chartered for this trip by another Liberian corporation, and all members of its crew were aliens working under employment contracts made outside this country. There was no labor dispute between the ship's employees and the ship. The *Nikolos* picked up a cargo of salt in Mexico and carried it to the harbor of the port of Tacoma, Washington, for delivery to an American consignee there. After the ship entered the Tacoma harbor it was met by the union's boat which began to circle around the *Nikolos* displaying signs marked

[3] *Panama Steamship Co.* v. *Marine Cooks & Stewards, AFL,* 1959 Am. Mar. Cas. 340.

[4] 1959 Am. Mar. Cas. 340, 350.

"PICKET BOAT." Later an additional sign was put on the boat reading: "AFL–CIO seamen protest loss of their livelihood to foreign flagships with substandard wages or substandard conditions." The union threatened to extend its picketing to the consignee of the salt should an attempt be made to berth and unload that cargo. Although the picketing was peaceful and there was no fraud, the result was that the ship could not deliver its cargo.

On appeal from the temporary injunction to the Court of Appeals the petitioner argued that the injunction granted by the District Court was beyond the jurisdiction of that court because of the provisions of § 4 of the Norris-LaGuardia Act previously set out,[5] but the Court of Appeals rejected that contention and upheld the injunction.[6] That court's view was based almost entirely upon our holding in *Benz* v. *Compania Naviera Hidalgo,* 353 U. S. 138. Certiorari was granted to consider the question of the applicability of the Norris-LaGuardia Act here, 361 U. S. 893, and in *Order of Railroad Telegraphers*

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[5] In the District Court respondents rested their claim for jurisdiction on 28 U. S. C. § 1331 which provides:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws or treaties of the United States."

Between the time the District Court's injunction was appealed and the time the Court of Appeals decided the appeal, this Court decided *Romero* v. *International Term. Oper. Co.,* 358 U. S. 354. That case decided that § 1331 does "not extend, and could not reasonably be interpreted to extend, to cases of admiralty and maritime jurisdiction." *Id.,* at 378. In the Court of Appeals the petitioner here broadened its challenge to the jurisdiction of the District Court in this case by invoking the interpretation of § 1331 declared in the *Romero* case. The view we take of the challenge to the court's jurisdiction under the Norris-LaGuardia Act makes it unnecessary for us to determine the entirely separate question raised under the *Romero* case.

[6] *Marine Cooks & Stewards, AFL,* v. *Panama Steamship Co.,* 265 F. 2d 780 (C. A. 9th Cir. 1959).

v. *Chicago & North Western R. Co.*, 361 U. S. 809, decided this day, *ante*, p. 330. We think neither the holding nor the opinion in the *Benz* case supports the narrow construction the Court of Appeals gave the Norris-LaGuardia Act in this case.

The *Benz* case was decided by a United States District Court sitting as a state court to enforce state law under its diversity jurisdiction. The question in the *Benz* case was whether the Labor Management Relations Act of 1947 governed the internal labor relations of a foreign ship and its foreign workers under contracts made abroad while that ship happened temporarily to be in American waters. The *Benz* case decided that the Labor Management Relations Act had no such scope or coverage and that it accordingly did not pre-empt the labor relations field so as to bar an action for damages for unlawful picketing under Oregon law. Nothing was said or intimated in *Benz* that would justify an inference that because a United States District Court has power to award damages in state cases growing out of labor disputes it also has power to issue injunctions in like situations. That question—of United States courts' jurisdiction to issue injunctions in cases like this—is to be controlled by the Norris-LaGuardia Act.

That Act's language is broad. The language is broad because Congress was intent upon taking the federal courts out of the labor injunction business except in the very limited circumstances left open for federal jurisdiction under the Norris-LaGuardia Act. The history and background that led Congress to take this view have been adverted to in a number of prior opinions of this Court in which we refused to give the Act narrow interpretations that would have restored many labor dispute controversies to the courts.[7]

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[7] See, *e. g.*, *United States* v. *Hutcheson*, 312 U. S. 219; *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products*, 311 U. S. 91; *New*

It is difficult to see how this controversy could be thought to spring from anything except one "concerning terms or conditions of employment," and hence a labor dispute within the meaning of the Norris-LaGuardia Act.[8] The protest stated by the pickets concerned "substandard wages or substandard conditions." The controversy does involve, as the Act requires, "persons who are engaged in the same industry, trade, craft, or occupation." [9] And it is immaterial under the Act that the unions and the ship and the consignees did not "stand in the proximate relation of employer and employee." [10] This case clearly does grow out of a labor dispute within the meaning of the Norris-LaGuardia Act.

Negro Alliance v. *Sanitary Grocery Co.*, 303 U. S. 552; *Lauf* v. *Shinner & Co.*, 303 U. S. 323. And see *Allen Bradley Co.* v. *Local Union No. 3, I. B. E. W.*, 325 U. S. 797, 805.

"The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction." *United States* v. *Hutcheson*, 312 U. S. 219, 235–236.

This congressional purpose, as is well known, was prompted by a desire to protect the rights of laboring men to organize and bargain collectively and to withdraw federal courts from a type of controversy for which many believed they were ill-suited and from participation in which, it was feared, judicial prestige might suffer. See Frankfurter and Greene, The Labor Injunction (1930), at 200; Gregory, Labor and the Law (1958), at 184–199.

[8] Section 13 of the Norris-LaGuardia Act, 29 U. S. C. § 113 (c), defines a labor dispute, for purposes of that Act, as follows: "The term 'labor dispute' includes any controversy *concerning terms or conditions of employment*, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*" (Emphasis supplied.)

[9] 47 Stat. 70, 73; 29 U. S. C. § 113 (a).

[10] See note 8, *supra*.

The District Court held, however, that even if this case involved a labor dispute under the Norris-LaGuardia Act the court had jurisdiction to issue the injunction because the picketing was an "unlawful interference with foreign commerce" and interfered "in the internal economy of a vessel registered under the flag of a friendly foreign power" and prevented "such a vessel from lawfully loading or discharging cargo at ports of the United States." [11] The Court of Appeals adopted this position, but cited no authority for its statement that the picketing was "unlawful," nor have the respondents in this Court pointed to any statute or persuasive authority proving that petitioner's conduct was unlawful. *Compare* § 20 of the Clayton Act, 29 U. S. C. § 52. And even if unlawful, it would not follow that the federal court would have jurisdiction to enjoin the particular conduct which § 4 of the Norris-LaGuardia Act declared shall not be enjoined. Nor does the language of the Norris-LaGuardia Act leave room to hold that jurisdiction it denies a District Court to issue a particular type of restraining order can be restored to it by a finding that the nonenjoinable conduct may "interfere in the internal economy of a vessel registered under the flag of a friendly foreign power." [12]

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[11] 1959 Am. Mar. Cas. 340, 350.

[12] Unlike the situation in the *Benz* case, in which American unions to which the foreign seamen did not belong picketed the foreign ship in sympathy with the strike of the foreign seamen aboard, the union members here were not interested in the internal economy of the ship, but rather were interested in preserving job opportunities for themselves in this country. They were picketing on their own behalf, not on behalf of the foreign employees as in *Benz*. Though the employer here was foreign, the dispute was domestic. For a thoughtful discussion of the impact of foreign employment upon American labor standards, see *Afran Transport Co.* v. *National Maritime Union*, 169 F. Supp. 416, 1959 Am. Mar. Cas. 326 (holding that the Norris-LaGuardia Act withdrew from Federal District Courts juris-

Congress passed the Norris-LaGuardia Act to curtail and regulate the jurisdiction of courts, not, as it passed the Taft-Hartley Act, to regulate the conduct of people engaged in labor disputes. As we pointed out in the *Benz* case, a ship that voluntarily enters the territorial limits of this country subjects itself to our laws and jurisdiction as they exist.[13] The fact that a foreign ship enters a United States court as a plaintiff cannot enlarge the jurisdiction of that court. There is not presented to us here, and we do not decide, whether the picketing of petitioner was tortious under state or federal law. All we decide is that the Norris-LaGuardia Act deprives the United States court of jurisdiction to issue the injunction it did under the circumstances shown.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court with directions to dismiss the petition for injunction.

It is so ordered.

MR. JUSTICE WHITTAKER, believing that the controversy in this case does not constitute a lawful "labor dispute" within the meaning of the Norris-LaGuardia Act, see his dissenting opinion in *Order of Railroad Telegraphers* v. *Chicago & North Western R. Co.*, *ante*, p. 345, dissents.

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diction to issue labor injunctions in a labor dispute strikingly like the one here involved). But see *Fianza Cia. Nav. S. A.* v. *Benz*, 1959 Am. Mar. Cas. 1758, 37 CCH Lab. Cas. ¶ 65,495.

[13] *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138, 142. See generally, Comment, The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet: Regulation of Shipboard Labor Relations and Remedies Against Shoreside Picketing, 69 Yale L. J. 498, 516–525, esp. 523–525.

Here respondents do not even claim that foreign ships seeking injunctions can obtain them without complying with the requirement of § 7 of the Norris-LaGuardia Act that the court hold a hearing and make specified findings.

MILLER MUSIC CORP. *v.* CHARLES N. DANIELS, INC.

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

No. 214. Argued February 24–25, 1960.—Decided April 18, 1960.

Under the Copyright Act, 17 U. S. C. § 24, when the author of a copyrighted musical composition dies testate, leaving no widow, widower or child, before time to apply for renewal of the copyright, his executor is entitled to the renewal rights—even though the author had previously sold and assigned his renewal rights to a music publisher. Pp. 373–378.

265 F. 2d 925, affirmed.

Julian T. Abeles argued the cause and filed a brief for petitioner.

Milton A. Rudin argued the cause for respondent. With him on the brief were *Lewis A. Dreyer, Jack M. Ginsberg* and *Payson Wolff.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner, a music publisher, sued respondent, another music publisher, for infringement of petitioner's rights through one Ben Black, as coauthor, in the renewal copyright of the song "Moonlight and Roses." Respondent's motion for summary judgment was granted, 158 F. Supp. 188, and the Court of Appeals affirmed by a divided vote. 265 F. 2d 925. The case is here on a petition for a writ of certiorari which we granted. 361 U. S. 809.

The facts are stipulated. Ben Black and Charles Daniels composed the song and assigned it to Villa Moret, Inc., which secured the original copyright. Prior to the expiration of the 28-year term, Black assigned to peti-

tioner his renewal rights in this song in consideration of certain royalties and the sum of $1,000. Black had no wife or child; and his next of kin were three brothers. Each of them executed a like assignment of his renewal expectancy and delivered it to petitioner. These assignments were recorded in the copyright office. Before the expiration of the original copyright, Black died, leaving no widow or child. His will contained no specific bequest concerning the renewal copyright. His residuary estate was left to his nephews and nieces. One of the brothers qualified as executor of the will and renewed the copyright for a further term of 28 years. The probate court decreed distribution of the renewal copyright to the residuary legatees. Respondent then obtained assignments from them.

The question for decision is whether by statute the renewal rights accrue to the executor in spite of a prior assignment by his testator. Section 23 of the Copyright Act of 1909, 35 Stat. 1075, now 17 U. S. C. § 24, after stating that "the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years," goes on to provide:

> "That . . . the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright."

An assignment by an author of his renewal rights made before the original copyright expires is valid against the world, if the author is alive at the commencement of the renewal period. *Fisher Co.* v. *Witmark & Sons,* 318 U. S. 643, so holds. It is also clear, all questions of assignment apart, that the renewal rights go by statute to an executor, absent a widow or child. *Fox Film Corp.* v. *Knowles,* 261 U. S. 326, so holds.

Petitioner argues that the executor's right under the statute can be defeated through a prior assignment by the testator. If the widow, widower, and children were the claimants, concededly no prior assignment could bar them. For they are among those to whom § 24 has granted the renewal right, irrespective of whether the author in his lifetime has or has not made any assignment of it. See *De Sylva* v. *Ballentine,* 351 U. S. 570. Petitioner also concedes—and we see no rational escape from that conclusion—that where the author dies intestate prior to the renewal period leaving no widow, widower, or children, the next of kin obtain the renewal copyright free of any claim founded upon an assignment made by the author in his lifetime. These results follow not because the author's assignment is invalid but because he had only an expectancy to assign;[1] and his death, prior to the renewal period, terminates his interest in the renewal which by § 24 vests in the named classes. The right to obtain a renewal copyright and the renewal copyright itself exist only by reason of the Act and are derived solely and directly from it.

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[1] Spring, Risks and Rights in Publishing, Television, Radio, Motion Pictures, Advertising, and the Theatre (2d rev. ed. 1956), pp. 94–95; Ball, The Law of Copyright and Literary Property (1944), § 243; Ladas, International Protection of Literary and Artistic Property (1938), Vol. II, p. 772. But see Shafter, Musical Copyright (2d ed. 1939), p. 177.

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We fail to see the difference in this statutory scheme between widows, widowers, children, or next of kin on the one hand and executors on the other. The hierarchy of people granted renewal rights by § 24 are *first,* the author if living; *second,* the widow, widower, or children, if he or she is not living; *third,* his or her executors if the author and the widow, widower, or children are not living; *fourth,* in absence of a will, the next of kin. True, these are disparate interests. Yet Congress saw fit to treat them alike. It seems clear to us, for example, that by the force of § 24, if Black had died intestate, his next of kin would take as against the assignee of the renewal right. Congress in its wisdom expressed a preference for that group against the world, if the author, the widow, the widower, or children are not living. By § 24 his executors are placed in the same preferred position, unless we refashion § 24 to suit other policy considerations. Of course an executor usually takes in a representative capacity. He "represents the person of his testator" as *Fox Film Corp.* v. *Knowles, supra,* at 330, states. And that normally means that when the testator has made contracts, the executor takes *cum onere.* Yet it is also true, as pointed out in *Fox Film Corp.* v. *Knowles, supra,* at 330, that "it is no novelty" for the executor "to be given rights that the testator could not have exercised while he lived." It is clear that under this Act the executor's right to renew is independent of the author's rights at the time of his death. What Congress has done by § 24 is to create contingent renewal rights. Congress has provided that, when the author dies before the renewal period arrives, special rules in derogation of the usual rules of succession are to apply for the benefit of three classes of people—(1) widows, widowers, and children; (2) executors; and (3) next of kin. We think we would redesign § 24 if we held that executors, named as one of the preferred classes, do not acquire the renewal rights, where

there has been a prior assignment, though widows, widowers, and children or next of kin would acquire them. Certainly *Fox Film Corp.* v. *Knowles, supra,* 329–330, states that what one of the three could have done, either of the others may do. Mr. Justice Holmes speaking for the Court said:

> "No one doubts that if Carleton had died leaving a widow she could have applied as the executor did, and executors are mentioned alongside of the widow with no suggestion in the statute that when executors are the proper persons, if anyone, to make the claim, they cannot make it whenever a widow might have made it. The next of kin come after the executors. Surely they again have the same rights that the widow would have had."

The legislative history supports that view:

> "Instead of confining the right of renewal to the author, if still living, or to the widow or children of the author, if he be dead, we provide that the author of such work, if still living, may apply for the renewal, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or, in the absence of a will, his next of kin. It was not the intention to permit the administrator to apply for the renewal, but to permit the author who had no wife or children to bequeath by will the right to apply for the renewal." [2]

The category of persons entitled to renewal rights therefore cannot be cut down and reduced as petitioner would have us do. Section 24 reflects, it seems to us, a consistent policy to treat renewal rights as expectancies until the renewal period arrives. When that time arrives,

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[2] H. R. Rep. No. 2222, 60th Cong., 2d Sess., p. 15. And see S. Rep. No. 1108, 60th Cong., 2d Sess., p. 15.

the renewal rights pass to one of the four classes listed in § 24 according to the then-existing circumstances. Until that time arrives, assignees of renewal rights take the risk that the rights acquired may never vest in their assignors. A purchaser of such an interest is deprived of nothing. Like all purchasers of contingent interests, he takes subject to the possibility that the contingency may not occur. For example, an assignment from an author and his wife will be ineffective, if on his death another woman is the widow. Examples could be multiplied. We have said enough, however, to indicate that there is symmetry and logic in the design of § 24. Whether it works at times an injustice is a matter for the Congress, not for us.

Affirmed.

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

I cannot agree to this decision, by which the assignee of an author's renewal rights in a copyrighted work is deprived of the fruits of his purchase—a purchase which, we must assume, was made in good faith and for a consideration fairly agreed upon.[1] While, for all that appears, the author in this case may not have contemplated the defeat of his assignment, the effect of the decision is to enable an author who has sold his renewal rights during his lifetime to defeat the transaction by a deliberate subsequent bequest of those rights to others in his will.

An assignee of renewal rights *inter vivos* cannot of course protect himself from such an unjust result by

[1] Today even less than when *Fisher Co.* v. *Witmark & Sons*, 318 U. S. 643, was decided, "can we be unmindful of the fact that authors have themselves devised means of safeguarding their interests." *Id.*, at 657. More particularly there is no suggestion in this case that the sale of these renewal rights was in any way improvident.

obtaining an assignment from the author's executor, who acquires his status as such only upon the author's death. Nor can he with any assurance of success seek to secure assignments from everyone who might be expected to be the fortunate legatee. In consequence, the efficacy of a good-faith attempt to accomplish a lasting conveyance of renewal rights may hereafter depend on whether a particular transaction, under the law of whichever State may ultimately govern the matter, will be deemed a contract to make a will and given effect as such. The resulting uncertainties as to construction, validity, and mode of enforcement of such transactions under the laws of the various States need hardly be spelled out. A result so unjust and unsettling, and which indeed may impair the marketability of an author's renewal rights, should be reached only if clear statutory language or evident legislative purpose fairly compels it. Far from resting on such considerations, this decision is supported only by a parlaying of an ill-considered "concession" of counsel with an exaltation of literal "symmetry and logic" (*ante,* p. 378) over what it seems to me a more penetrating inquiry into congressional aims would have revealed.

For convenience I quote the Copyright Act, 17 U. S. C. § 24, again:

> "That . . . the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright."

On its face, the section manifests no intention to deal with the problem of priority of rights as between an assignee and the persons named in the section. The discussion in the House Report quoted by the Court, *ante*, p. 377, likewise shows no advertence to the question, and we are referred to no other significant legislative history on this score. Hence, we must resolve the matter in light of the purpose disclosed by the structure of the provision.

On this basis we do not write upon a clean slate. In *Fisher Co.* v. *Witmark & Sons*, 318 U. S. 643, it was argued that the renewal provisions of the statute demonstrated a congressional determination "to treat the author as though he were the beneficiary of a spendthrift trust." Brief for petitioners, No. 327, O. T. 1942, p. 36. The Court, finding no support in the evolutionary history of the legislation and its structure, rejected that view, and held that an author could, during the original term of his copyright, validly assign his right to apply for the renewal, and that having done so he could not, upon the arrival of the renewal year, himself claim that right. The Court seems to regard that case as entirely inapplicable in a situation where, as here, the author has not survived the beginning of the renewal year. But had the statute conferred renewal rights on "the author, if still living, or if the author be not living, on his executors or administrators," I have little doubt that the *Fisher* decision would control this case and require its reversal. The important question, then, is to determine the extent to which Congress has seen fit to depart from the ordinary rules of succession. In reaching its conclusion, the Court has, I think, overlooked critical distinctions between the different clauses of the statute.

The evolution of § 24 was exhaustively described and analyzed in *Fisher*, and need not be recanvassed here. See also *De Sylva* v. *Ballentine*, 351 U. S. 570, 574–576.

Briefly, the clause regarding widows, widowers, and children originated with the 1831 Act, 4 Stat. 436, while that dealing with executors and next of kin was added in 1909, 35 Stat. 1081. The retention, at that latter date, of the provision for widows, widowers, and children, and its position in the amended statute, can only be taken as expressive of a desire to regard them, in the words of the Court, as a "preferred class," and to ensure that the author could not by bequest confer on another the benefits of the renewal term. Cf. *De Sylva* v. *Ballentine, supra,* at 582. For it would indeed be anomalous to say that an author could convey for a consideration during his lifetime what he is not permitted to bequeath at death. Hence I agree that the provision for a "compulsory bequest," *ibid.,* to the author's widow and children should be held to bar effective assignment of renewal rights as against them.

But I cannot perceive the applicability of this reasoning to the executor. There is simply no warrant for regarding him as in any way one of a "preferred class." The executor himself manifestly could not have been the object of such congressional solicitude, since he takes nothing beneficially, but only as a fiduciary for those benefited by the will. As to the latter, a legatee can be any person, corporation, or association capable of taking property by bequest. Surely we cannot infer legislative concern over the protection of the interest of whosoever, of the large indeterminate class of potential legatees, should prove in fact to be chosen by the author. The evident purpose of the clause regarding executors was merely "to permit the author who had no wife or children to bequeath by will the right to apply for the renewal." H. R. Rep. No. 2222, 60th Cong., 2d Sess., p. 15. The Court gave full effect to that purpose in *Fox Film Corp.* v. *Knowles,* 261 U. S. 326, when it held that an executor acquired the right to apply for renewal, even though the author's death

occurred prior to the renewal year, when the author himself first could have renewed his copyright. It goes beyond that purpose, and beyond anything at issue in *Fox Film,* to read into the statute a desire to protect legatees from the claims of an assignee of the author.

The Court's treatment of the rights of an author's next of kin is especially curious. With no more authority than what appears to me to have been a demonstrably unnecessary "concession" of counsel,[2] the Court regards it as "clear" that the next of kin take over an assignee. From this dubious premise, the Court reasons that the executor, being thus surrounded in the "hierarchy of people granted renewal rights" by persons whose rights are superior to those of an assignee, must be "placed in the same preferred position." This reasoning, I submit, ignores the legislative purpose evidenced by the statute. There is no basis whatever for supposing that next of kin were sought to be protected from loss of rights arising out of the author's acts, in the sense that widows and children were. For the obvious fact is that under the statute next of kin, though related—albeit often distantly [3]—to the author, may be deprived of any interest in the renewal rights by a bequest of those rights by the author to another—even to one who is a total stranger.

It is thus apparent that Congress had no intention of protecting next of kin from defeasance of their expectancy.

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[2] It is not difficult to understand why a publisher would be content with a rule preferring the next of kin—who can ordinarily be determined with reasonable accuracy during the assignor's lifetime, and from whom an assignment can often be purchased, as indeed was done in this instance—and at the same time regard application of a similar principle to the executor as unworkable. Yet it need hardly be said that such practical considerations do not relieve this Court of the duty of construing the statute for itself.

[3] Our reference in the *De Sylva* case, *supra,* at 582, to the "family" of the author was of course to the immediate family, the spouse and children, and not to all those related, however remotely, to the author.

Its purpose was more limited. Having determined that, despite an author's death without a surviving spouse or child prior to the renewal year, his work should not pass into the public domain, Congress sought to ensure that the failure of the author to leave a will would not bring this result about. The decision to give the renewal rights directly to the next of kin, rather than to an administrator, may well have been due to a desire to save authors' estates—which not infrequently might contain no other asset of substance—the expense of going through administration. Be that as it may, it seems to me abundantly clear that the result now reached by the Court was never intended.

To construe the statute as I have is not to "refashion" it, but only to appraise the competing claims of the author's assignee and those named in § 24 in light of the policy indicated by the manner in which the various interests involved are dealt with by the statute. The "symmetry and logic" of the provision is a dynamic, not a static or syntactical, symmetry and logic. Consistently with *Fisher,* the assignment is given effect as against those whose claims must rest on the voluntary decision of the author to benefit them; as to the surviving spouse and children, however, the legislative care taken to make their rights independent of the author's desires leads to a contrary result. It is only to that extent that Congress has departed from the ordinary rules of succession, in accord, it may be noted, with modern legislative trends precluding disinheritance of widows and children. We should not, by failing to heed the limits of that departure, foster an unjust and disruptive result. By undermining the sales value of renewal rights at the expense of the author and his immediate family this decision impinges on the very interests which the Copyright Act was designed to protect.

I would reverse.

MACKEY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL. *v.* MENDOZA-MARTINEZ.

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

No. 29. Argued November 10, 1959.—Decided April 18, 1960.

In this suit by appellee for a declaratory judgment that he is a citizen of the United States, the underlying issue as to the constitutionality of § 401 (j) of the Nationality Act of 1940 being clouded by an issue as to whether collateral estoppel prevents the Government from challenging appellee's citizenship, the case is remanded to the District Court with permission to the parties to amend the pleadings, if they so desire, to put in issue the question of collateral estoppel and to obtain an adjudication upon it. Pp. 384–387.

Cause remanded.

Oscar H. Davis argued the cause for appellants. With him on the brief were *Solicitor General Rankin* and *Assistant Attorney General Wilkey.*

Thomas R. Davis argued the cause for appellee. With him on the brief were *John W. Willis* and *Vincent P. DiGiorgio.*

Jack Wasserman, David Carliner and *Osmond K. Fraenkel* filed a brief for the American Civil Liberties Union, as *amicus curiae,* in support of appellee.

PER CURIAM.

This is a suit by appellee for a declaratory judgment that he is a citizen of the United States. The District Court sustained the contention of the United States that appellee had lost his citizenship by reason of § 401 (j) [1]

[1] Section 401 (j) reads as follows:

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

. . . . . .

"(j) Departing from or remaining outside of the jurisdiction of

of the Nationality Act of 1940, 54 Stat. 1137, as amended, 58 Stat. 746, 8 U. S. C. § 1481 (a)(10), and the Court of Appeals affirmed. 238 F. 2d 239. Meanwhile we had decided *Trop* v. *Dulles,* 356 U. S. 86; and when certiorari was sought here we granted the petition and remanded the cause to the District Court for reconsideration in light of that decision. 356 U. S. 258. On remand the District Court held that § 401 (j) was unconstitutional. The case is here on direct appeal (28 U. S. C. § 1252) from the judgment of the District Court holding that appellee is therefore a citizen of the United States. We noted probable jurisdiction. 359 U. S. 933.

After the case was argued the Court, *sua sponte,* put to the parties the following questions based on appellee's conviction for draft evasion: [2]

> "(1) Was the judgment of conviction of appellee for draft evasion premised in any respect upon his

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

[2] The facts stipulated in the present case and relevant to that conviction are:

"III. Plaintiff was born in the United States on March 3, 1922, and thus was a citizen of the United States at birth.

"IV. Under the laws of Mexico plaintiff is now, and ever since his birth has been, a citizen and national of the Republic of Mexico.

"V. During 1942 plaintiff departed from the United States and went to Mexico for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

"VI. Plaintiff remained in Mexico continuously from sometime during 1942 until on or about November 1, 1946 for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

"VII. On June 23, 1947, plaintiff upon his plea of guilty was convicted in the United States District Court for the Southern District of California for violation of Section 11 of the Selective Service and Training Act of 1940. He was sentenced to imprisonment for a period of one year and one day."

citizenship status after the date of enactment of Section 401 (j)?

"(2) If so, does the judgment of conviction for any reason foreclose litigation of the appellee's citizenship in the present case?

"(3) Are the foregoing questions appropriate for the Court's consideration?"

The parties have filed supplemental briefs and from them it appears that the offense charged, and to which appellee pleaded guilty, was departing from the United States November 15, 1942, to evade service in the Armed Forces and remaining away until November 1, 1946. The statute under which he was convicted placed the duty of service on "every male citizen of the United States, and of every other male person residing in the United States." 54 Stat. 885, as amended, 55 Stat. 844, 50 U. S. C. App. 303 (a) (1940 ed. Supp. I).

Appellee contends that while that Act requires service of aliens residing here, it is inapplicable to nonresident aliens; and that therefore the charge in the indictment that appellee remained away could be applicable only if appellee were a citizen. Indeed the facts stipulated in the present case state that he was a citizen by birth. It follows, appellee argues, that the judgment of conviction for draft violation necessarily included an adjudication of citizenship, and that that judgment brings into play the doctrine of collateral estoppel (*Washington Packet Co.* v. *Sickles,* 5 Wall. 580; *Emich Motors Corp.* v. *General Motors Corp.,* 340 U. S. 558) since the conviction of draft evasion was subsequent to September 27, 1944, the date of the enactment of § 401 (j). The Solicitor General argues, *inter alia,* that the issue of citizenship was not necessarily involved in the conviction for draft evasion since a charge of evasion by an alien would be made out even though he had left the country provided the duty to serve had attached when he resided here. The Solicitor

General suggests, however, that the avoidance of a constitutional issue when not clearly necessary and the importance of citizenship to the appellee are important factors to be considered in disposing of the case. He is of the view that "there is so little ground for saying that appellee's citizenship status has already been definitively decided, we believe that this issue should not and need not be canvassed by the Court." Yet with his customary candor the Solicitor General says, "But if the Court should be convinced on this record that appellee's citizenship was authoritatively determined in his favor in the 1947 criminal proceeding, we would not oppose a resolution of the case on that basis."

The issue of collateral estoppel is a question that clouds the underlying issue of constitutionality. Since the issue of collateral estoppel may be dispositive of the case, we remand the cause to the District Court with permission to the parties to amend the pleadings, if they so desire, to put in issue the question of collateral estoppel and to obtain an adjudication upon it.

It is so ordered.

Separate memorandum of MR. JUSTICE FRANKFURTER.

The Solicitor General's acquiescence in having this case disposed of by avoiding decision of the important constitutional question concerning the validity of § 401 (j) of the Nationality Act of 1940, which is the only one presented by the record, probably reflects an understandable desire on the part of the Government to have this Court adjudicate that issue unembarrassed by an extraneous problem that did not come to the surface until this appeal had been submitted. I do not think that this new matter—a claim of collateral estoppel—should be considered here as though this were a court of first instance. No matter how sympathetic one may be towards liberalization of pleading and informality in judicial proceedings,

the intrinsic demands of orderliness in the judicial process require that the issues on which this Court is to render judgment should be appropriately defined through pleadings and proceedings in the lower courts and not be initially shaped for adjudication in this Court. Apart from all else, since taking testimony before this Court has long since ceased to be feasible, we would necessarily have to act on the merits of a claim, based on the rather opaque law of collateral estoppel, resting on documentary submissions not subject to the test of testimonial examination.

I am prepared, therefore, to accede to the Solicitor General's suggestion, but to do so by wiping the slate clean. This calls for an appropriate order vacating the proceedings in this Court and in the District Court for the Southern District of California as well as the deportation proceedings which derived from a finding that the appellee has lost his citizenship by reason of § 401 (j) of the Nationality Act, a conclusion which is the very issue in controversy. I would do so without summarizing the positions of the parties on the claim of collateral estoppel which is not relevantly before us on this record, and, above all, without any intimation regarding the seriousness of such a claim.

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

This case having now been in the courts for some six years, we think that proper judicial administration would require the Court to decide the question of collateral estoppel, raised belatedly and *sua sponte*. As we see it, if the Court can raise that issue here, certainly we can decide it without the additional delay of having the parties go through the motions of amending the pleadings, as suggested. The Court could then pass upon the constitutional issue and advise the Congress of its power in this important field, in which it legislated some 16 years ago.

YANCY *v.* UNITED STATES.

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

No. 47. Argued December 8–9, 1959.—Decided April 18, 1960.

252 F. 2d 554, affirmed by an equally divided Court.

Seymour B. Goldman argued the cause and filed a brief for petitioner.

John L. Murphy argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Wilkey, Robert S. Erdahl* and *J. F. Bishop.*

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.

NIUKKANEN, ALIAS MACKIE, *v.* McALEXANDER, ACTING DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE.

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

No. 130. Argued March 21, 1960.—Decided April 18, 1960.

On the record in this case, the evidence was sufficient to support the conclusion of the District Court, affirmed by the Court of Appeals, that petitioner, an alien, had become a member of the Communist Party after entering the United States and, therefore, was deportable under the Act of October 16, 1918, as amended by § 22 of the Internal Security Act of 1950. Pp. 390–391.

265 F. 2d 825, affirmed.

Joseph Forer and *Nels Peterson* argued the cause for petitioner. With *Mr. Peterson* on the brief was *Reuben Lenske.*

Oscar H. Davis argued the cause for respondent. On the brief were *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Julia Cooper.*

Blanch Freedman filed a brief for the American Committee for Protection of Foreign Born, as *amicus curiae,* urging reversal.

PER CURIAM.

The petitioner sought relief from an order directing his deportation on the ground that as an alien he had become, after entering the United States, a member of the Communist Party within the meaning of the Act of October 16, 1918, as amended by § 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006. The District Court, after hearing, denied the petition, 148 F. Supp. 106, and the

Court of Appeals affirmed. 241 F. 2d 938. Invoking *Rowoldt* v. *Perfetto,* 355 U. S. 115, decided after the order for his deportation, petitioner sought an administrative reconsideration of his status. Upon its denial by the Board of Immigration Appeals he began the judicial proceeding immediately before us for review. After a hearing, the District Court again denied his petition for relief and the Court of Appeals affirmed the order of the District Court. 265 F. 2d 825. The ultimate question is whether petitioner is subject to deportation under *Galvan* v. *Press,* 347 U. S. 522, or is saved from it under *Rowoldt* v. *Perfetto, supra.* The determination of this issue turns on evaluation of the testimony before the District Court, in light of *Galvan* v. *Press, supra,* and *Rowoldt* v. *Perfetto, supra.* Such assessment largely depends on the credibility of the testimony on which the district judge based his judgment, particularly that of the petitioner himself, whom the judge saw and heard. An able judge found that petitioner in denying membership in the Communist Party, unlike Rowoldt who admitted membership, see 355 U. S., at 116–117, but accounted for its innocence, "perjured himself before, and I believe that he perjured himself today." We cannot say that his findings, affirmed by the Court of Appeals, were clearly erroneous and do not support the conclusion of both the lower courts.

Judgment affirmed.

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

Petitioner was born in Finland in 1908, came here when he was less than a year old and has resided here ever since. He is married to a native-born citizen; he served honorably in our Army; and he has no criminal record of any kind except for a petty offense, back in 1930.

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The evidence against petitioner was given by two witnesses who had once been Communists, one of whom petitioner swore he never knew. They testified that petitioner was a member of the Communist Party from 1937 to 1939 in Portland, Oregon. One of them testified that petitioner had assisted in the circulation of a paper, Labor New Dealer, which apparently was an organ of the Party. There was evidence he paid dues to the Party of 25 cents a month and that he attended both open and closed meetings of the Party. But even these two ex-Communists who appeared against petitioner said that there was no discussion of ways and means to overthrow the Government at those meetings, that only problems such as labor conditions, relief, and the like were discussed. One also swore that petitioner never advocated the overthrow of the Government. Petitioner's interest in the Party, according to one of these hostile witnesses, was as a result of "the sufferings of the people in the depression"; and he was "very sympathetic toward their welfare." This witness agreed that petitioner was not an intellectual interested in "theory" or "political discussion." His interests were "in bread and butter topics of the day, what to do for unemployment and relief." Nor had petitioner ever taught the Communist doctrine nor distributed its literature, except for the Labor New Dealer.

These two ex-Communists testified that petitioner attended dances that the Party arranged in Portland. But they said he never held an office in the Party; nor was ever employed by the Party; nor was ever a "functionary" in the sense of representing the Party. He attended a regional meeting at Aberdeen, Washington, where various speakers, according to one ex-Communist, gave "glowing accounts" of their work for the Party, "more or less fabricating" their achievements.

We know from petitioner's lips that he was not acquainted with the conventional Communist literature;

and nothing came from the lips of his accusers that denied it. One who reads the whole of this record cannot put it down without feeling that here is a man neither conspiratorial, dangerous, cunning, nor knowledgeable. Petitioner—a painter by trade—represents a microscopic element in the ranks of our labor force who was caught up in a movement whose ideology he did not understand and whose leaders spoke in terms of bread for the hungry, and jobs for the unemployed. He has recently earned about $4,000 a year; he bought a home for $3,100 (which is now worth from $6,000 to $6,500 subject to a $2,500 mortgage); and he has personal property, including a car, worth $2,000.

This is the background against which the following testimony can be best understood.

> "Q. In the Finnish Hall or anywhere else did you attend Communist Party meetings?
>
> "A. Well, if I said yes and if I said no maybe I wouldn't be telling the truth, because I really couldn't tell one way or the other. I went to meetings there. Sometimes maybe they were Communist, and maybe they wasn't. It could have been and maybe they wasn't.
>
> . . . . .
>
> "Q. Have you been a member of the Communist Party of the United States or any branch or affiliate or organization by that name or any similar name?
>
> "A. Knowingly, I haven't, no.
>
> . . . . .
>
> "Q. Do you believe that membership in the Communist Party now is a lawful political purpose?
>
> "A. No. I can't answer questions about that because I don't know. If Congress says it is unlawful, it is unlawful. If it isn't, it isn't. I don't know. If I got the question right, I don't know.

"Q. I am not trying to confuse you, . . . I am trying to find out your feelings toward Communism.

"A. Naturally I don't—Communism or socialism, I don't care what party it is here or any place else, if it has anything to do with overthrowing the government by force and violence I don't agree with it, no.

. . . . . .

"Q. What was your impression of what the Communist Party was trying to do?

"A. Well, the only thing I heard in those days was more relief and more work, and I never heard anything else; no violent overthrow of the Government, or anything of that sort, but anyplace I went to meetings was always more work and more food.

"Q. As far as you know, that was what the Communist Party stood for during that period?

"A. I don't know if they stood for that, but I never heard anything against it."

The case is on all fours with *Rowoldt* v. *Perfetto,* 355 U. S. 115. The "solidity of proof" (*id.,* at 120) required for the severe consequences of the deportation of a man who came here when he was less than one year old, whose only memory of life is in this land, and who has lived here over 50 years has not been met. The "meaningful association" with the Party which the *Rowoldt* case requires (*id.,* at 120) simply has not been established here. In this case, as in *Rowoldt,* petitioner's association with the Party was "wholly devoid of any 'political' implications." *Id.,* at 120.

The testimony of the two ex-Communists upon which petitioner is being banished has never been heard by a court. The only testimony taken by the District Court was that of the petitioner and his character witnesses. The district judge believed the witnesses against Niuk-

kanen by virtue of having read the same record that is now before this Court. His impression of their credibility can be no more reliable than our own. Certainly then his conclusion that petitioner "perjured himself before, and . . . perjured himself today" does not preclude this Court's review of the evidence against him. Apart from that, the evidence would be far too meagre to establish the "meaningful association" which we required in the *Rowoldt* case.

The unanimity of all the finders of fact in the *Rowoldt* case (*id.*, at 119) that Rowoldt was a "member" of the Party and his refusal to answer when asked in the deportation proceedings whether he had ever been a member of the Communist Party, did not stop us from declaring that "the record before us is all too insubstantial to support the order of deportation." *Id.*, at 121. The unanimity of the finders of fact in the present case should likewise be no barrier to our entry of a just decree. A man who has lived here for every meaningful month of his entire life should not be sent into exile for acts which this record reveals were utterly devoid of any sinister implication.

WARD *v.* ATLANTIC COAST LINE RAILROAD CO.

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

No. 485. Argued March 31, 1960.—Decided April 18, 1960.

In this action under the Federal Employers' Liability Act to recover from a railroad damages for injuries sustained by petitioner while working on a private siding owned by one of the railroad's customers, the trial court erred in instructing the jury as to the factors to be considered in determining whether petitioner was an "employee" of the railroad, within the meaning of the Act, during the performance of the work; and affirmance of a judgment entered on the jury's verdict for the railroad is reversed. Pp. 396–400.

265 F. 2d 75, reversed.

Neal P. Rutledge argued the cause and filed a brief for petitioner.

Sam T. Dell, Jr. argued the cause for respondent. On the brief were *L. William Graham, Norman C. Shepard* and *Frank G. Kurka.*

PER CURIAM.

In this action under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. §§ 51–60, the Court of Appeals for the Fifth Circuit, by a divided court, affirmed a judgment in favor of the respondent railroad entered on a jury verdict in the District Court for the Northern District of Florida. 265 F. 2d 75. We granted certiorari, 361 U. S. 861, to consider the issues presented in the light of our decisions in *Sinkler* v. *Missouri Pacific R. Co.*, 356 U. S. 326, and *Baker* v. *Texas & Pacific R. Co.*, 359 U. S. 227. The latter is an intervening decision.

The railroad employed the petitioner as a laborer in a section gang with a regular work-week from Monday through Friday. The petitioner was injured on a Saturday, ordinarily the gang's day off, when the gang, super-

vised by their foreman, using the work tools supplied by the railroad, and following standard railroad methods for doing the work, were replacing ties under a siding track which ran off the railroad's main line tracks to the plant of the M. & M. Turpentine Company. That company had an agreement with the railroad calling for the railroad to make periodic inspections of the track and for the repairs disclosed to be necessary by such inspections to be made by and at the expense of the Turpentine Company "to the satisfaction of the [railroad's] Chief Engineer." When an inspection revealed the need for the work in question, the Turpentine Company engaged the petitioner's foreman to recruit his crew to do the work on their day off under his direction. The foreman offered the crew railroad overtime rates of pay for doing the work, but there is a sharp conflict in the evidence whether he told the crew that they would not be working for the railroad but for someone else. The foreman paid the wages with funds supplied to him by the Turpentine Company.

The petitioner contends that the proofs require a holding as a matter of law that the Turpentine Company, in the maintenance of the siding, was the "agent" of the respondent railroad within the meaning of § 1 of the Federal Employers' Liability Act, 45 U. S. C. § 51, as we construed that term in *Sinkler* v. *Missouri Pacific R. Co., supra.* We find no merit in this contention. Indeed, we do not think that the proofs presented a jury question whether the Turpentine Company was the railroad's "agent" within the meaning of the Act. This was not a situation, as in *Sinkler,* in which the railroad engaged an independent contractor to perform operational activities required to carry out the franchise. This was a siding privately owned by the Turpentine Company and established to service it alone. In maintaining it, we do not see how it can be said under the proofs that the Turpen-

tine Company was "engaged in furthering the operational activities of respondent." *Sinkler* v. *Missouri Pacific R. Co., supra,* at 331. Even the use of the siding by local farmers in harvest time to load respondent's cars with watermelons, a fact heavily relied upon by the petitioner, was, according to uncontradicted testimony, not at the instance of the railroad but because the President of the Turpentine Company "leased this track—I guess that is what you would call it—anyhow, he let those farmers load watermelons out there on that track and he always repaired it every year before watermelon time."

However, we agree with the petitioner's alternative contention that the trial judge erred in refusing to instruct the jury as requested by the petitioner,[1] and in giving the

[1] The requested instructions were the following:

"One of the issues to be decided in this case is whether or not the plaintiff, Raymond P. Ward, was employed by the defendant railroad at the time he was injured. This issue must be determined from all of the circumstances of the case. The primary factor to be considered is whether or not the railroad had the power to direct, control, and supervise the plaintiff in the performance of his work at the time he was injured. Other relevant factors to be considered are: who selected and engaged the plaintiff to perform the work; who furnished the tools with which the work was performed; who paid the plaintiff his wages for the performance of the work; the amount of scale of such wages; and who had the power to fire or dismiss the plaintiff from the work.

"If you find that the railroad, through its foreman, I. H. Keen, had the power to direct, control and supervise the plaintiff in the performance of the work he was doing at the time he was injured, then you should find that the plaintiff was employed by the defendant railroad at the time he was injured.

"The fact that the money used to pay the plaintiff Ward for the work he was doing at the time he was injured came originally from some third person with whom the railroad or the owner of the spur track had made an arrangement, does not remove the defendant railroad from its employer-employee relationship with the plaintiff Ward and does not relieve the defendant railroad of liability for

instructions he did,[2] as to the factors to be considered by the jury in determining whether the petitioner was an "employee" of the railroad during the performance of the work within the meaning of the Act. The instructions given in effect limited inquiry to the question whether the petitioner was aware that the railroad considered him not to be working for it but for some third

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injuries suffered by the plaintiff during the course of his railroad employment as a result of the defendant railroad's negligence.

"The accident here involved occurred upon a spur track which was partly owned by the M. & M. Turpentine Co. The fact that the M. & M. Turpentine Co. had contracted with the defendant railroad to maintain all or a portion of this spur track does not relieve the defendant railroad of its liability to the plaintiff if the plaintiff was injured during the course of his employment with the defendant railroad on the spur track as a direct consequence, in whole or in part, of the defendant railroad's negligence."

[2] The pertinent portion of the court's charge was as follows:

"That the Railroad Company was liable unless the defendant's foreman made it clear to him before he started to work that morning that they were not working for the Railroad, but working on a private track to make some extra money. I think I put it just about that simply, didn't I, to make some extra money. I told you that if the foreman failed to make that disclosure to him, ordered him to go out there and go to work, and put him to work on that private track, the Railroad Company would be liable. I don't see how I can say it any plainer. Do you have a word that you think I could use to make it any plainer?

"Mr. Rutledge: Your Honor, to make it clear he was working for some third person and not working for the Railroad.

"The Court: Yes sir, that is the word I believe he suggested—that he was working for some third person. The foreman had to make it clear to him that he was working for some third person and not the Railroad. I thought I said it, but I guess I didn't spell it out as much as he wanted, but I want to make that clear to you. If you find from this evidence he was so advised before he went out there to work, and he went out on his own volition and joined the others to make some extra money, then he was not an employee of the Railroad Company and they would not be liable."

party. But neither the railroad's communication of its concept of petitioner's status to petitioner, nor his acquiescence therein, if shown, is determinative of the issue. Cf. *Cimorelli* v. *New York Central R. Co.,* 148 F. 2d 575, 578. The parties' characterization is but one factor to be considered among others, see Restatement, Agency 2d, § 220 (2)(i), and the issue is one for determination by the jury on the basis of all the relevant factors. *Baker* v. *Texas & Pacific R. Co., supra.*

Reversed.

MR. JUSTICE FRANKFURTER would dismiss this writ of certiorari as improvidently granted. As the Court's opinion demonstrates, the case solely presents the appropriateness of instructions given by a trial court and the refusal of requested instructions in the light of the unique circumstances of a particular situation. As such it falls outside the considerations which, according to Rule 19 of this Court, govern the granting of a petition for certiorari. See *Ferguson* v. *Moore-McCormack Lines,* 352 U. S. 521, 524 (dissenting).

MR. JUSTICE HARLAN, with whom MR. JUSTICE WHITTAKER joins, dissenting.

Since I consider that, except as to the one issue submitted to the jury, there is no evidence in the record tending to establish any of the usual criteria showing an employment relationship between the petitioner and the respondent in connection with this work, I dissent. See Restatement, Agency 2d, § 227, Comment a.

BURLINGTON-CHICAGO CARTAGE, INC., *v.* UNITED STATES ET AL.

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

No. 726. Decided April 18, 1960.

178 F. Supp. 857, affirmed.

John E. Lesow for appellant.

Solicitor General Rankin, Acting Assistant Attorney General Beck, Robert W. Ginnane and *Carroll T. Prince, Jr.* for the United States and the Interstate Commerce Commission, appellees.

PER CURIAM.

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

BOGLE ET AL. *v.* JAKES FOUNDRY CO.

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

No. 760. Decided April 18, 1960.

Certiorari granted and judgment reversed insofar as it awards a permanent injunction.

Reported below: —— Tenn. App. ——, 329 S. W. 2d 364.

Cecil D. Branstetter for petitioners.

Judson Harwood for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is reversed insofar as it awards a permanent injunction. *Teamsters, Chauffeurs, Helpers & Taxicab Drivers, Local Union No. 327* v. *Kerrigan Iron Works, Inc.*, 353 U. S. 968; *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236.

DUSKY *v.* UNITED STATES.

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

No. 504, Misc. Decided April 18, 1960.

Certiorari granted.

Since the record in this case does not sufficiently support the findings of petitioner's competency to stand trial, the judgment affirming his conviction is reversed and the case is remanded to the District Court for a hearing to determine his present competency to stand trial, and for a new trial if he is found competent. Pp. 402–403.

271 F. 2d 385, reversed.

James W. Benjamin for petitioner.

Solicitor General Rankin for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. Upon consideration of the entire record we agree with the Solicitor General that "the record in this case does not sufficiently support the findings of competency to stand trial," for to support those findings under 18 U. S. C. § 4244 the district judge "would need more information than this record presents." We also agree with the suggestion of the Solicitor General that it is not enough for the district judge to find that "the defendant [is] oriented to time and place and [has] some recollection of events," but that the "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."

In view of the doubts and ambiguities regarding the legal significance of the psychiatric testimony in this case and the resulting difficulties of retrospectively determining the petitioner's competency as of more than a year ago, we reverse the judgment of the Court of Appeals affirming the judgment of conviction, and remand the case to the District Court for a new hearing to ascertain petitioner's present competency to stand trial, and for a new trial if petitioner is found competent.

It is so ordered.

IZZO *v.* ILLINOIS.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 772, Misc. Decided April 18, 1960.

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.

NEW HAMPSHIRE FIRE INSURANCE CO. *v.* SCANLON, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL.

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

No. 339. Argued March 22, 1960.—Decided April 25, 1960.

Acting under statutory authority to levy, distrain or seize property or rights to property belonging to a delinquent taxpayer, a District Director of Internal Revenue served notices of levy on a city demanding that it pay to him money alleged to be due from the city to a contractor for construction work. The surety on the contractor's performance and payment bonds then instituted a summary proceeding in a Federal District Court to have the levy quashed, claiming that the money was due to it, instead of to the contractor, since the surety had been compelled to complete performance of the contract when the contractor defaulted. *Held:* The District Court was without jurisdiction to determine the rights of the parties in a summary proceeding. Pp. 405–410.

(a) Especially when a controversy like this is begun by peremptory seizure without an initial determination of the taxpayer's liability, there is neither justification nor authority for carving out an exception to the uniform and regular civil procedure laid down by the Federal Rules, either for the benefit of the party from whom the property was seized or for any other claimant. Pp. 406–408.

(b) Such a summary trial of a claim for property seized by Internal Revenue officers is not authorized by 28 U. S. C. § 2463. Pp. 408–410.

267 F. 2d 941, affirmed.

Jack Hart argued the cause for petitioner. With him on the brief was *Myron Engelman.*

Richard M. Roberts argued the cause for respondents. On the brief for respondent Scanlon were *Solicitor General Rankin, Howard A. Heffron, Wayne G. Barnett, Robert N. Anderson* and *Joseph Kovner.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Acting pursuant to statutory authority to levy, distrain or seize property or rights to property belonging to a delinquent taxpayer,[1] respondent Scanlon, District Director of Internal Revenue, served notices of levy on the City of New York demanding that it pay to the Director money alleged to be due from the city to respondent Acme Cassa, Inc., under a contract for the construction of a school playground. The purpose of this distraint was to secure payment of taxes owing by taxpayer Acme Cassa to the Federal Government. The petitioner, New Hampshire Fire Insurance Co., then brought this summary proceeding, by a "petition" in a United States District Court, seeking to have the levy quashed. The "petition" alleged that the indebtedness of the city for the construction work was not owing to Acme Cassa but to the petitioner because, under its obligation as surety for Cassa's faithful performance of the construction contract, the insurance company had been compelled to complete the playground after Cassa got into financial difficulties and defaulted on the job. Pointing out that petitioner could institute a plenary suit for recovery on the indebtedness if it chose, the District Court held that it was without jurisdiction to determine the respective rights of the parties in a summary proceeding, and accordingly dismissed the petition.[2] The Court of Appeals for the Second Circuit affirmed upon the opinion of the District Court.[3] Because the Court of Appeals for the Third Circuit had previously held that a

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[1] I. R. C. of 1954 §§ 6331, 6332.

[2] *New Hampshire Fire Ins. Co.* v. *Scanlon,* 172 F. Supp. 392. The District Court relied on two Second Circuit cases, *Goldman* v. *American Dealers Service,* 135 F. 2d 398, and *In re Behrens,* 39 F. 2d 561, holding that parties from whom property was seized could not avail themselves of summary proceedings for its recovery.

[3] *New Hampshire Fire Ins. Co.* v. *Scanlon,* 267 F. 2d 941.

claimant of property so distrained for tax delinquencies need not resort to a plenary action but could adjudicate the controversy summarily, *Ersa, Inc.* v. *Dudley,* 234 F. 2d 178, 180, *Raffaele* v. *Granger,* 196 F. 2d 620; *Rothensies* v. *Ullman,* 110 F. 2d 590, we granted certiorari to resolve the intercircuit conflict. 361 U. S. 881.

Summary trial of controversies over property and property rights is the exception in our method of administering justice. Supplementing the constitutional, statutory, and common-law requirements for the adjudication of cases or controversies, the Federal Rules of Civil Procedure provide the normal course for beginning, conducting, and determining controversies. Rule 1 directs that the Civil Rules shall govern all suits of a civil nature, with certain exceptions stated in Rule 81 none of which is relevant here. Rule 2 directs that "There shall be one form of action to be known as 'civil action.' " Rule 3 provides that "A civil action is commenced by filing a complaint with the court." Rule 56 sets forth an expeditious motion procedure for summary judgment *in an ordinary, plenary civil action.* Other rules set out in detail the manner, time, form and kinds of process, service, pleadings, objections, defenses, counterclaims and many other important guides and requirements for plenary civil trials. The very purpose of summary rather than plenary trials is to escape some or most of these trial procedures. Summary trials, as is pointed out in the petitioner's brief, may be conducted without formal pleadings, on short notice, without summons and complaints, generally on affidavits, and sometimes even *ex parte.*[4] Such summary trials, it

[4] See *Central Republic Bank & Trust Co.* v. *Caldwell,* 58 F. 2d 721, 731–732, from which petitioner's brief quoted the following:

"The main characteristic differences between a summary proceeding and a plenary suit are: The former is based upon petition, and proceeds without formal pleadings; the latter proceeds upon formal

has been said, were practically unknown to the English common law and it may be added that they have had little acceptance in this country.[5] In the absence of express statutory authorization,[6] courts have been extremely reluctant to allow proceedings more summary than the full court trial at common law.[7] Especially when a con-

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pleadings. In the former, the necessary parties are cited in by order to show cause; in the latter, formal summons brings in the parties other than the plaintiff. In the former, short time notice of hearing is fixed by the court; in the latter, time for pleading and hearing is fixed by statute or by rule of court. In the former, the hearing is quite generally upon affidavits; in the latter, examination of witnesses is the usual method. In the former, the hearing is sometimes ex parte; in the latter, a full hearing is had."

[5] See, *e. g., United States* v. *Casino,* 286 F. 976; *Clarke* v. *City of Evansville,* 75 Ind. App. 500, 505, 131 N. E. 82, 84 ("No cause can be tried summarily (otherwise than in due course), except perhaps cases of contempt of court; for our Code, as well as the common law, is a stranger to such a mode of trial"); *Billings Hotel Co.* v. *City of Enid,* 53 Okla. 1, 5, 154 P. 557, 558. Cf. *Western & Atlantic R. Co.* v. *Atlanta,* 113 Ga. 537, 38 S. E. 996; *State* v. *Howse,* 134 Tenn. 67, 183 S. W. 510.

[6] For examples of such authorization, see §§ 67a (4) & f (4) of the Bankruptcy Act, 11 U. S. C. §§ 107 (a) (4) & (f) (4). See also § 2a (7), 11 U. S. C. § 11 (a) (7); *Thompson* v. *Magnolia Co.,* 309 U. S. 478, 481; *Harris* v. *Brundage Co.,* 305 U. S. 160, 162–164.

[7] See Judge Learned Hand's opinion in *United States* v. *Casino,* 286 F. 976, at 978–979: "It is clear that the owner of property unlawfully seized has without statute no summary remedy for a return of his property. . . . He may have trespass, or, if there be no statute to the contrary, replevin; but, just as in our law no public officer has any official protection, so no individual has exceptional remedies for abuse of power by such officers. We know no 'administrative law' like that of the Civilians."

See also, for example, *United States* v. *Gowen,* 40 F. 2d 593, 598; *Weinstein* v. *Attorney General,* 271 F. 673; *United States* v. *Farrington,* 17 F. Supp. 702; *In re Allen,* 1 F. 2d 1020; *Sims* v. *Stuart,* 291 F. 707; *Lewis* v. *McCarthy,* 274 F. 496; *United States* v. *Hee,* 219 F. 1019; *In re Chin K. Shue,* 199 F. 282. Cf. *Taubel-Scott-Kitz-*

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troversy like this is begun by peremptory seizure without an initial determination of the taxpayer's liability, there is neither justification nor authority for carving out an exception to the uniform and regular civil procedure laid down by the Federal Rules, either for the benefit of the party from whom the property was seized or for any other claimant.

Petitioner contends, however, that there is express statutory approval for summary trial of a claim for property seized by Internal Revenue officers. For this contention petitioner relies on 28 U. S. C. § 2463 which reads as follows:

> "All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof."

Petitioner's argument is that this section puts property seized by revenue officers in the custody of the courts and that it necessarily follows that a court having such custody has power to dispose of the issue of ownership summarily. We cannot agree with either contention.

Property seized by a revenue officer for delinquent taxes is lawfully held by that officer in his administrative capacity and he has broad powers over such property. See *Murray* v. *Hoboken Land & Improvement Co.*, 18 How. 272, and *Phillips* v. *Commissioner*, 283 U. S. 589, 595–597. The history of § 2463 plainly indicates a congressional purpose to protect that property in the revenue officer's custody and not to transfer that custody either actually or fictionally into the custody of the federal courts. The section was originally adopted in 1833 to meet a particular

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miller Co. v. *Fox*, 264 U. S. 426, 431; *Applybe* v. *United States*, 32 F. 2d 873, opinion denying rehearing, 33 F. 2d 897. And see the Second Circuit cases cited in note 2, *supra*.

necessity brought about by South Carolina's adoption of an "Ordinance of Nullification." [8] That state ordinance authorized state officials to seize property that had been distrained or levied on by federal officers and provided that South Carolina state courts could issue writs of replevin to take such property out of the hands of federal officials. The plain object of the 1833 Act was to counteract this state ordinance and it therefore specifically provided that property held under United States revenue laws should not be "repleviable." This statute went on to say that property so seized should be considered as "in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof." 4 Stat. 633. This law, originally passed to protect the custody of property seized by federal revenue officers against more or less summary state court action, should not now be construed as justifying summary proceedings for determining the rights of *any* litigant to property seized by federal officers. In placing these cases exclusively within the jurisdiction of the federal courts, Congress did not indicate any intention to relax or alter the safeguards of plenary proceedings generally applicable to property controversies in federal courts.

Even if § 2463 could somehow be construed as transferring custody of property seized by revenue officers into the hands of officers of the federal courts it would by no means follow that cases and controversies involving ownership of that property should be tried in summary fashion. It is true that courts have sometimes passed on ownership of property in their custody without a plenary proceeding where, for illustration, such a proceeding was

[8] "An Ordinance, To Nullify certain Acts of the Congress of the United States, Purporting to be Laws, laying Duties and Imposts on the Importation of Foreign Commodities." 1 Statutes at Large of South Carolina 329 ff.

ancillary to a pending action or where property was held in the custody of court officers, subject to court orders and court discipline. See, *e. g., Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 355.[9] But here there is no situation kindred to that in *Go-Bart.* What is at issue here is an ordinary dispute over who owns the right to collect a debt—an everyday, garden-variety controversy that regular, normal court proceedings are designed to take care of. As the District Court pointed out in its opinion, there is ample authority for petitioner to have its claim adjudicated by the Federal District Court but that should be done in a plenary not in a summary proceeding.

Affirmed.

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[9] See also *Cogen* v. *United States,* 278 U. S. 221, 225 (motion procedure upheld as ancillary to criminal action); *Weeks* v. *United States,* 232 U. S. 383, 398 (property, allegedly unlawfully seized, in possession of an "officer of the court"); *United States* v. *McHie,* 194 F. 894, 898 (property seized under purported authority of the court's own process, a search warrant).

Those cases that have required the Government to bring a plenary action in forfeiture proceedings promptly after seizing property, on pain of an order to abandon the seizure and return the property, are plainly inapplicable here. See, *e. g., Goldman* v. *American Dealers Service,* 135 F. 2d 398; *Church* v. *Goodnough,* 14 F. 2d 432. In all these cases, stemming from a dictum in *Slocum* v. *Mayberry,* 2 Wheat. 1, 9–10, the threat of summary order was invoked under the equitable powers of the courts, not to adjudicate claims to the property but to compel the Government to bring an ordinary civil action, the only proceeding authorized in those cases, without unreasonable delay.

LOCAL LODGE NO. 1424, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 44. Argued January 11, 1960.—Decided April 25, 1960.

At a time when the union represented less than a majority of the employees, a company and a union entered into a collective bargaining agreement containing a "union security" clause, by which all employees were required, after a 45-day grace period, to become and remain members of the union as a condition of employment. More than six months later, the General Counsel of the National Labor Relations Board filed and served on the company and the union complaints charging that continued enforcement of the agreement (within the preceding six months) was an unfair labor practice in violation of the National Labor Relations Act. *Held:* The complaints were barred by the six-month statute of limitations contained in § 10 (b) of the Act, as amended. Pp. 411–429.

105 U. S. App. D. C. 102, 264 F. 2d 575, reversed.

Bernard Dunau argued the cause for petitioners. With him on the brief were *Plato E. Papps, Louis P. Poulton* and *Frank L. Gallucci.*

Norton J. Come argued the cause for respondent. On the brief were *Solicitor General Rankin, Stuart Rothman, Thomas J. McDermott* and *Dominick L. Manoli.*

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

MR. JUSTICE HARLAN delivered the opinion of the Court.

The question we decide in this case is whether unfair labor practice complaints, whose charges against these petitioners were sustained by the National Labor Rela-

tions Board, were barred by the six-month statute of limitations contained in § 10 (b) of the National Labor Relations Act, as amended, 61 Stat. 146, 29 U. S. C. § 160 (b). That section reads in pertinent part:

> "*Provided* . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ."

On August 10, 1954, petitioners Bryan Manufacturing Company and the International Association of Machinists, AFL, entered into a collective bargaining agreement for a unit of Bryan's employees. The agreement, as later supplemented in certain respects not material to this litigation, contained the conventional provisions, of which two are relevant here: the "recognition" clause, by which the Union was recognized as "the sole and exclusive bargaining agency for all employees" in the unit; and the "union security" clause, by which all employees were required, subject to a 45-day grace period, to become and remain members of the Union. On August 30, 1955, a new agreement was entered into, with Bryan, the Union, and petitioner Local Lodge No. 1424, IAM, as signatories, replacing the old agreement and applying additionally to employees at a newly opened plant as well as to those covered by the original agreement.

When the original agreement was executed on August 10, 1954, the Union did not represent a majority of the employees covered by it.[1] Under §§ 7 and 8 of the Act[2]

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[1] It was so found by the Board, and petitioners have not challenged that finding.

[2] Section 7 (61 Stat. 140, 29 U. S. C. § 157) provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through repre-

the Board has evolved the principle, not drawn in question here, that it is an unfair labor practice for an employer and a labor organization to enter into a collective bargaining agreement which contains a union security clause, if at the time of original execution the union does not represent a majority of the employees in the

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sentatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

Section 8 (61 Stat. 140, as amended, 29 U. S. C. § 158) provides:

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

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

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: . . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, . . . if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; . . .

. . . . . .

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: . . .

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) . . . ."

unit.[3] The maintaining of such an agreement in force is a continuing violation of the Act, and the "majority status" of the union at any subsequent date—including the date of execution of any renewals of the original agreement—is immaterial, for it is presumed that subsequent acquisition of a majority status is attributable to the earlier unlawful assistance received from the original agreement.[4]

In June and August 1955, 10 months and 12 months after the execution of the original agreement, charges were filed with the Board and served upon the petitioners, alleging the Union's lack of majority status at the time of execution and the consequent illegality of the continued enforcement of the agreement. Complaints were thereafter issued by the Board's General Counsel against the Union and the Company. Petitioners contended before the Board that the complaints were barred by the limitations proviso of § 10 (b), set forth above. The Board, two members dissenting, held that the complaints were not barred by limitations, 119 N. L. R. B. 502, and the Court of Appeals affirmed, one judge dissenting. 105 U. S. App. D. C. 102, 264 F. 2d 575. We granted certiorari, 360 U. S. 916, because of the importance of the question in the proper administration of the National Labor Relations Act. For reasons given in this opinion

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[3] The same doctrine is applied to an agreement containing only a "recognition" clause making a union the exclusive bargaining agent for all employees in the unit covered by the agreement. See *Bernhard-Altmann Texas Corp.*, 122 N. L. R. B. 1289; *Charles W. Carter Co.*, 115 N. L. R. B. 251, 262; *International Metal Products Co.*, 104 N. L. R. B. 1076; *John B. Shriver Co.*, 103 N. L. R. B. 23, 38; and see the Trial Examiner's discussion in the present case, 119 N. L. R. B. 502, 555, n. 98. The agreement now in question contained both a union security and a recognition clause, but for convenience we shall deal with the matter in terms of the union security clause alone.

[4] See 119 N. L. R. B., at 546, 548.

we hold that the complaints against these petitioners are barred by time.[5]

We first note the opposing contentions of the parties. The Board starts with the premise that a collective bargaining agreement which contains a union security clause valid on its face, but which was entered into when the Union did not have a majority status, gives rise to two independent unfair labor practices, one being the execution of the agreement, the other arising from its continued enforcement. Conceding that a complaint predicated on the *execution* of the agreement here challenged was barred by limitations, the Board contends that its complaint was nonetheless timely since it was "based upon" the parties' continued *enforcement,* within the period of limitations, of the union security clause. It is then said that even though the former was itself time-barred, the unlawful execution of the agreement was nevertheless "relevant in determining whether conduct within the 6-month period was unlawful," 119 N. L. R. B., at 504; and that evidence as to it was admissible because § 10 (b) is a statute of limitations, and not a rule of evidence.

On the other hand, petitioners contend that, standing alone, the union security clause and its enforcement were wholly innocent; that they were tainted only by virtue of the original unlawful execution of the agreement; and that since a complaint based upon that unfair labor practice was barred by limitations, that event itself could not be utilized to infuse with illegality the otherwise legal union security clause or its enforcement. They say, in short, that to apply in this situation the doctrine that § 10 (b) is a statute of limitations, and not a rule of evidence, is to circumvent the purposes of the section, and

[5] The petition for certiorari also raised an issue as to the propriety of the relief ordered by the Board. Because of our view of the case it becomes unnecessary to reach that question.

that acceptance of the Board's position would mean that the statute of limitations would never run in a case of this kind. We think petitioners' position represents the correct view of the matter.

It is doubtless true that § 10 (b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of § 10 (b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10 (b) ordinarily does not bar such evidentiary use of anterior events.[6] The second situation is that where con-

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[6] The most frequently cited Board expression of this principle is that found in *Axelson Mfg. Co.*, 88 N. L. R. B. 761, 766:

"As I interpret the statute however, Section 10 (b) enacts a statute of limitations and not a rule of evidence. It forbids the issuance of complaints and, consequently, findings of violation of the statute in conduct not within the 6 months' period. But it does not, as I construe it, forbid the introduction of relevant evidence bearing on the issue as to whether a violation has occurred during the 6 months' period. Events obscure, ambiguous, or even meaningless when viewed in isolation may, like the component parts of an equation, become clear, definitive, and informative when considered in relation to other action. Conduct, like language, takes its meaning from the circumstances in which it occurs. Congress can scarcely have intended that the Board, in the performance of its duty to decide the validity of conduct within the 6 months' period, should ignore reliable, probative, and substantial evidence as to the meaning and the nature of the conduct. Had such been the intent, it seems reasonable to assume that it would have been stated."

The Board, however, has developed certain limits on the applicability of this principle. See p. 421, *post*, and note 13.

duct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

The situation before us is of this latter variety, for the entire foundation of the unfair labor practice charged was the Union's time-barred lack of majority status when the original collective bargaining agreement was signed. In the absence of that fact enforcement of this otherwise valid union security clause was wholly benign.[7] The

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[7] It was the view of one member of the Board majority that a presumption of illegality should attend the enforcement of a union security clause, so that sufficient proof of violation results merely from a showing that such a clause is operative, thus putting on the parties to the agreement the burden to defend by proving compliance with the requirements of the proviso to § 8 (a) (3) of the Act, 61 Stat. 140, as amended, 29 U. S. C. § 158 (a) (3), see note 2, *ante*, including majority status at the time of execution. 119 N. L. R. B., at 510. While acceptance of this view would concededly support the result reached below, it was not adopted by the Board, as the concurring member acknowledged. *Id.*, at 511. We too reject it. It rests on the mistaken judgment that the proviso to § 8 (a) (3) permits the inclusion of union security provisions "in derogation of the rights guaranteed employees in the definitive statement of national policy contained in Section 7," *id.*, at 510, and on the principle that, exoneration of certain types of union security clauses having been granted in a proviso, the burden of proving the proviso's applicability rests on him asserting it. The latter principle need not detain us; insights derived from syntactical analysis form a hazardous basis for the explication of major legislative enactments. As to the argument drawn from § 7, it would be enough to note that that very provision is in terms limited by the scope of the § 8 (a) (3) proviso. (See note 2,

Trial Examiner, whose findings were adopted by the Board, observed:

> "The General Counsel concedes that the 6-month limitation of Section 10 (b) of the Act precludes currently finding the *execution* [8] of the 1954 agreement to be an unfair labor practice, and also precludes currently finding its *enforcement* to be an unfair labor practice . . . at any time prior to the . . . periods beginning 6 months prior to the . . . charges . . . . However, this concession in no way detracts from the crucial nature of the earlier events, because at the core of the General Counsel's contentions as to all of the unfair labor practices is his fundamental position that, *because of the circumstances prevailing when made,* the original union-security agreement of 1954 has never been valid or legal, since it has never met certain overriding requirements of Section 8 (a)(3) of the Act." 119 N. L. R. B., at 530. (Emphasis added, except as indicated.) [9]

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ante.) More to the heart of the matter, it is the entire Act, and not merely one portion of it, which embodies "the definitive statement of national policy." It is well known, and the legislative history of the 1947 Taft-Hartley amendments plainly shows, that § 8 (a)(3)—including its proviso—represented the Congressional response to the competing demands of employee freedom of choice and union security. Had Congress thought one or the other overriding, it would doubtless have found words adequate to express that judgment. It did not do so; it accommodated both interests, doubtless in a manner unsatisfactory to the extreme partisans of each, by drawing a line it thought reasonable. It is not for the administrators of the Congressional mandate to approach either side of that line grudgingly.

[8] Emphasis here by the Trial Examiner.

[9] These observations were accepted both by the Board and the Court of Appeals. 119 N. L. R. B., at 503–504; 105 U. S. App. D. C., at 106, 264 F. 2d, at 579. See also *Lively Photos, Inc.*, 123 N. L. R. B. 1054.

Where, as here, a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint, we think that permitting resort to the principle that § 10 (b) is not a rule of evidence, in order to convert what is otherwise legal into something illegal, would vitiate the policies underlying that section. These policies are to bar litigation over past events "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused," H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 40,[10] and of course to stabilize existing bargaining relationships.

Our view of the matter is lent support by the attitude of the Board itself, whose previous decisions, albeit not always with unanimity among its members or even perhaps with perfect consistency, have recognized that evidentiary rules as to past events must be regarded differently in the two situations we have already depicted. Compare, *e. g., Potlatch Forests, Inc.,* 87 N. L. R. B. 1193, where evidence as to events during the barred period was used to illuminate current conduct claimed in itself to be

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[10] The Examiner's Report shows the pertinency of this statutory purpose in the present case. In his analysis of the evidence, he observed:

"It is evident that with many witnesses testifying as to numerous different matters, it would protract this report greatly to summarize all of the testimony, or to spell out fully the confusion and inconsistencies therein, much of which is not too surprising, in view of the fact that, with respect to the events of August 1954 [the events "at the core" of the allegations of illegality], there had been a lapse of almost 15 months before testimony was given in November 1955." 119 N. L. R. B., at 529.

an unfair labor practice,[11] with *Bowen Products Corp.*, 113 N. L. R. B. 731, and *Greenville Cotton Oil Co.*, 92 N. L. R. B. 1033, aff'd *sub nom. American Federation of Grain Millers, A. F. L.* v. *Labor Board,* 197 F. 2d 451, where the gravamen of the unfair labor practice complained of lay in a fact or event occurring during the barred period.[12]

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[11] In that case, in explaining his consideration of "relevant evidence" antedating the six-month period, the Trial Examiner, whose report was confirmed by the Board, said: "The Respondent's earlier conduct has been considered here merely for the purpose of bringing into clearer focus the conduct in issue. Even without such consideration, however, the allegations of discrimination would have been found amply supported by such undisputed record facts as bear directly upon the layoffs of [the employees involved within the six-month period]." 87 N. L. R. B., at 1211. See also *Local 1418, International Longshoremen's Assn.*, 102 N. L. R. B. 720, 729–730, relied on by the Board, and *Labor Board* v. *General Shoe Corp.*, 192 F. 2d 504; *Labor Board* v. *Clausen,* 188 F. 2d 439; and *Superior Engraving Co.* v. *Labor Board,* 183 F. 2d 783, cited by a dissenting opinion here.

[12] In *Bowen Products* an employee recalled from layoff was discriminatorily placed at the bottom of the relevant seniority list. He unsuccessfully attempted to obtain his proper seniority rating, and several months later was included in an economic reduction in force. Had his seniority originally been properly computed, he would not have been laid off at that time. The charge was filed and served within six months of the layoff, but more than six months after the original determination of seniority status. Finding that the only basis for a holding of unlawful layoff would be a finding that that determination had been a violation of the Act, the Board dismissed the complaint.

Greenville Cotton Oil (*American Federation of Grain Millers*) dealt with an alleged discriminatory refusal to reinstate strikers. Conceding that the respondent had engaged permanent replacements, the strikers demanded reinstatement on the ground that the strike had been caused or prolonged by an unfair labor practice committed by the employer prior to the hiring of the replacements. The acts alleged to have constituted such unfair practices having taken place more than six months prior to the filing and service of the charge, the Board held § 10 (b) a bar to an order of reinstatement.

Indeed, some Board cases have gone even further and held § 10 (b) a bar in circumstances when, although none of the material elements of the charge in a timely complaint need necessarily be proved through reference to the barred period—so that utilization of evidence from that period is ostensibly only for the purpose of giving color to what is involved in the complaint—yet the evidence in fact marshalled from within the six-month period is not substantial, and the merit of the allegations in the complaint is shown largely by reliance on the earlier events. See, *e. g., News Printing Co.,* 116 N. L. R. B. 210, 212; *Universal Oil Products Co.,* 108 N. L. R. B. 68; *Tennessee Knitting Mills, Inc.,* 88 N. L. R. B. 1103.[13]

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[13] The complaint in *News Printing Co.* alleged that a refusal to grant wage increases to certain employees had been motivated by displeasure at their union activities. As a substantive matter, this allegation turned on the respondent's motive at the time of the refusal, which was within the limitations period. However, the General Counsel was unable to produce sufficient evidence, from within that period, to prove discriminatory motive, and the Board refused to permit reliance on evidence relating to acts occurring prior to the six-month period. The contention that such earlier acts could be referred to in order to justify the inference that the "pattern of unlawful conduct . . . continued on into the present situation" was rejected. 116 N. L. R. B., at 211. Compare *Paramount Cap Mfg. Co.,* 119 N. L. R. B. 785, 786, 799, enforcement granted, 260 F. 2d 109, where the presence of substantial post-limitations evidence was held to justify resort to evidence of earlier conduct.

The *Universal Oil Products* and *Tennessee Knitting Mills* cases concerned allegations that respondent employers had dominated or assisted labor organizations. Here again, the material issue was as to the relationship of the respondents to the unions involved, as of the date of the charge. Yet in both cases, because the evidence from within the statutory period was too sketchy to warrant a finding of unlawful conduct, the Board refused to permit reference to evidence from the earlier period, declining to rely on an inference that earlier unlawful relationships continued.

While it is true that in *Paint, Varnish & Lacquer Makers Union* (*Andrew Brown Co.*), 120 N. L. R. B. 1425, the Board found union

However, we express no view on the problem raised by such cases, for here we need not go beyond saying that a finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the § 10 (b) proviso.[14]

The applicability of these principles cannot be avoided here by invoking the doctrine of continuing violation. It may be conceded that the continued enforcement, as well as the execution, of this collective bargaining agreement constitutes an unfair labor practice, and that these are two logically separate violations, independent in the sense that they can be described in discrete terms.

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picketing during the six-month period to have been undertaken for the unlawful purpose of obtaining recognition, although the only affirmative evidence of such purpose was based on acts done prior to that period, the decision is not inconsistent, so far as presently relevant, with the cases discussed above. Substantial evidence of purpose from within the limitations period was found in reliance on the inference that the earlier motive had continued unchanged. *Id.*, at 1428, 1438. While the permissibility of an inference of this nature was rejected in the preceding cases, we need not now inquire into this seeming disparity of treatment, for it affects the minor premise only, and does not impair the accuracy of the proposition that, however marshalled, acts within the limitations period must under Board doctrine yield some substantial evidence of unlawful conduct.

[14] *Katz* v. *Labor Board*, 196 F. 2d 411, and *Labor Board* v. *Gaynor News Co.*, 197 F. 2d 719, relied on below and in dissent here, arose under provisions of the Act (§ 8 (a) (3), 61 Stat. 140) since repealed (65 Stat. 601), which permitted union security agreements only with unions which possessed a Board certificate that a union security clause had been authorized at a special election of the employees involved. While the language, and perhaps the approach, of these cases may be considered inconsistent with the principles we deem governing here, the decisions on their facts present no such difficulty. Proof of the nonexistence of such a certificate, which of course was a continuing fact, plainly did not require resort to testimony about past events; rather the issue was much like one arising out of an agreement illegal on its face, the only difference being that a separate instrument was involved.

Nevertheless, the vice in the enforcement of this agreement is manifestly not independent of the legality of its execution, as would be the case, for example, with an agreement invalid on its face or with one validly executed, but unlawfully administered. As the dissenting Board members in this case recognized, in dealing with an agreement claimed to be void by reason of the union's lack of majority status at the time of its execution,

> ". . . the circumstances which cause the agreement to be invalid existed only at the point in time in the past when the agreement was executed and are not thereafter repeated. For this reason, therefore, the continuing invalidity of the agreement is directly related to and is based solely on its initial invalidity, and has no continuing independent basis." 119 N. L. R. B., at 516.

In any real sense, then, the complaints in this case are "based upon" the unlawful execution of the agreement, for its enforcement, though continuing, is a continuing *violation* solely by reason of circumstances existing only at the date of execution. To justify reliance on those circumstances on the ground that the maintenance in effect of the agreement is a continuing violation is to support a lifting of the limitations bar by a characterization which becomes apt only when that bar has already been lifted. Put another way, if the § 10 (b) proviso is to be given effect, the enforcement, as distinguished from the execution, of such an agreement as this constitutes a *suable* unfair labor practice only for six months following the making of the agreement.[15]

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[15] We think the rule in conspiracy cases, where the statute of limitations only begins to run upon the commission of the last overt act in furtherance thereof, does not furnish a useful analogy in this case. The statute in question here bars issuance of a complaint "based upon any unfair labor practice" which occurred more than six months

The Board's ruling is further sought to be supported on the ground that it did not rest on a formal finding that the execution of the 1954 agreement constituted an unfair labor practice. The Court of Appeals, while stating that the Board could not draw "any legal conclusion with regard to events outside the statutory period," distinguished the decision here as resting on the "mere *existence* [of the facts surrounding the making of the 1954 contract] rather than on ascribing legal significance to those facts standing alone." 105 U. S. App. D. C., at 108, 264 F. 2d, at 581 (emphasis by the court). This distinction sacrifices the policy of the Act to procedural formalities. If, as is not disputable, the § 10 (b) limitation was prompted by "complaint that people were being brought to book upon stale charges," *Labor Board* v. *Pennwoven, Inc.*, 194 F. 2d 521, 524, it is a particular *use* of the pre-limitations facts or conduct at which the section is aimed, and it can hardly be thought relevant that the proscribed

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prior to the filing of the charge; it does not merely bar proceedings against an unfair labor practice which are not commenced within six months after that unfair labor practice has been committed. Cf. 18 U. S. C. § 3282. Our conclusion that the complaints giving rise to the judgment under review are of necessity "based upon" the unfair labor practice of execution of the agreement, and are barred by time, has drawn on this statute's purpose and history, and we do not assert the universal applicability of our resolution of the particular question presented for decision. In any event, the commission of an overt act pursuant to a conspiratorial agreement represents a renewed affirmation of the unlawful purpose of the conspiracy. The acts constituting enforcement of a collective bargaining agreement cannot well be so characterized. Beyond that, one may question the appropriateness of analogizing this situation, where proper application of a particular statute of limitations involves taking into account competing values, to one which involves an unlawful agreement of a kind unreservedly condemned, and the entire undoing of which is the undiluted purpose of the criminal law. Indeed, the rule advanced in dissent cannot be squared with the Board's own approach to the statute. See the cases discussed in notes 12 and 13, *ante*.

use has not been labeled as such. The applicability of the policy of § 10 (b) in the *Grain Millers* case, *supra,* where in the particular circumstances of that case, and not because of anything arising from § 10 (b), the challenged acts within the limitations period could not be condemned as unlawful without an express declaration that earlier conduct constituted an unfair labor practice (see note 12, *ante*), was not greater than it is here, where although there was no "finding" that execution of the agreement constituted an unfair labor practice, it is manifest that were that not in fact the case enforcement of the agreement would carry no taint of illegality. The availability of the repose sought to be assured by § 10 (b) cannot turn on the vagaries of any such hypertechnical distinctions, bearing no relation to the purpose of the legislation.

It is apparently not disputed that the Board's position would withdraw virtually all limitations protection from collective bargaining agreements attacked on the ground asserted here. For, once the principle on which the decision below rests is accepted, so long as the contract—or any renewal thereof—is still in effect, the six-month period does not even begin to run. Cf. *Bowen Products Corp., supra,* at 732. In *Lively Photos, Inc.,* 123 N. L. R. B. 1054, the Board unhesitatingly applied the doctrine of the case at bar to an attack upon an agreement executed more than three and one-half years prior to the filing of the charge. The cease-and-desist order entered in that case directed the severance of a bargaining relationship which had been initiated five years earlier. A doctrine which does such disservice to stability of bargaining relationships could be upheld, in light of the language and evident purpose of § 10 (b), only by a convincing showing that Congress did not intend that provision to be applied so as to bar attacks on collective agreements with unions lacking majority status unless brought within six months of their execution. Far

from providing such a showing, the legislative history contains affirmative evidence that Congress was specifically advertent to the problem of agreements with minority unions, had previously been at pains to protect such agreements from belated attack, and manifested an intention, in enacting § 10 (b), not to withdraw that protection.

Four years prior to the enactment of the Taft-Hartley amendments, of which the § 10 (b) limitations proviso was one, Congress barred the Board from proceeding, under certain conditions not here relevant, in cases "arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed." National Labor Relations Board Appropriation Act, 1944, 57 Stat. 515. This legislation was enacted with specific reference to agreements with minority unions,[16] and was re-enacted in each succeeding session through 1947.[17] At the time the Senate Committee on Labor and Public Welfare reported S. 1126 (the Senate version of the proposed legislation enacted as the Labor Management Relations Act, 1947), a rider to the appropriations bill for the fiscal year 1948

[16] The immediate impetus to the legislation was the pendency of an N. L. R. B. proceeding involving a closed-shop agreement in effect at the Kaiser shipbuilding yards at Portland, Oregon. The agreement, though executed at a time when only 66 workers were employed, was being applied to a 20,000-man work force. The debates show that the issue of representation by minority unions was in the forefront of legislative concern. See 89 Cong. Rec. 6950 (remarks of Reps. Smith and Tarver), 6953 (Rep. Tarver), 7029 (Sens. Truman and Ball), 7031–7032 (Sen. Wagner).

[17] The National Labor Relations Board Appropriation Act, 1945, 58 Stat. 568, made several amendments in the limitations provisions, the principal of which were designed to render the rider inapplicable to agreements with company-dominated unions, and to provide an additional three-month period at the commencement of any renewal of an agreement in which a complaint could be filed. See 9 N. L. R. B. Ann. Rep. (1944), pp. 5–6. Subsequent re-enactments were without relevant change. 59 Stat. 378, 60 Stat. 698.

(H. R. 2700, 80th Cong., 1st Sess.) was pending before the Senate Appropriations Committee, having been previously reported by the House Appropriations Committee in language identical with that of its predecessors. The Labor Committee's discussion of the proposed § 10 (b) amendment is illuminating:

> "The principal substantive change in this section is a provision for a 6-month period of limitations upon the filing of charges. The Board itself by adopting a doctrine of laches has to some extent discouraged dilatory filing of charges, and a rider to the current appropriations bill (*which if this amendment was adopted would no longer be necessary*) contains a 3-month period of limitations with respect to certain kinds of unfair labor practices." S. Rep. No. 105, 80th Cong., 1st Sess., p. 26. (Emphasis added.)

This language cannot be squared with an interpretation of § 10 (b) which would ascribe to Congress, in enacting for the first time a general limitations provision, a purpose to eliminate the then-existing all-embracing limitation specifically applicable to agreements with minority unions.[18]

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[18] This conclusion seems to us not vitiated by the fact that the Senate Appropriations Committee, subsequent to the issuance of the Labor Committee Report, amended the appropriations rider in a manner perhaps susceptible of an interpretation which would render it inapplicable to agreements with minority unions. S. Rep. No. 146, 80th Cong., 1st Sess., pp. 6, 13. Nor is it sufficient to attempt to explain away the language of the Committee Report by reliance on the fact that, while the appropriations riders immunized agreements invalid on their face as well as those invalid for lack of majority status, see 8 N. L. R. B. Ann. Rep. (1943), pp. 7–8, § 10 (b) is more narrowly framed, and concededly does not protect an agreement invalid on its face from attack six months after its execution. Under the broad union security proviso to § 8 (3) of the original Act, 49 Stat. 452, invalidity of an agreement on its face was not a common problem, and we should not have expected Congressional discussion to have

In sustaining the Board's position, the Court of Appeals also relied on the public character of the right sought to be vindicated by the Board, and the limited scope of judicial review of Board determinations. Observing that "in interpreting, applying and administering a statute of limitations prescribed by Congress in this context [the field of labor relations], the Board—and the courts—are not confronted by precisely the same considerations as apply to statutes of limitations affecting the private rights of two individual litigants," the Court reasoned that "[t]he Board may have thought that the interests of [employee] self determination outweighed otherwise important competing considerations of burying stale disputes." 105 U. S. App. D. C., at 108–109, 264 F. 2d, at 581–582. We think this analysis inadmissible here, for the reason that the accommodation between these competing factors has already been made by Congress. It is a commonplace, but one too easily lost sight of, that labor legislation traditionally entails the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable. The "policy of the Act" is embodied in the totality of that adjustment, and not necessarily in any single demand which may have figured, however weightily, in it. Cf. note 7, *ante*. It may be asserted, without fear of contradiction, that the interest in employee freedom of choice is one of those given large recognition by the Act as amended. But neither can one disregard the interest in "industrial peace which it is the overall purpose of the Act to secure." *Labor Board* v. *Childs Co.*, 195 F. 2d 617, 621–622 (concurring opinion of L. Hand, J.). Cf. *Colgate Co.* v. *Labor*

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been primarily concerned with it. As we have seen, however, agreements with minority unions were specifically the focus of Congressional attention in this period, and the direct relevance of the Committee's discussion to the history of that problem is evident.

Board, 338 U. S. 355, 362–363. As expositor of the national interest, Congress, in the judgment that a six-month limitations period did "not seem unreasonable," H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 40, barred the Board from dealing with past conduct after that period had run, even at the expense of the vindication of statutory rights.[19] "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy . . . ." *Colgate Co.* v. *Labor Board, supra,* at 363. Cf. *Southern S. S. Co.* v. *Labor Board,* 316 U. S. 31, 47.

Reversed.

MR. JUSTICE FRANKFURTER, dissenting.

While agreeing with my Brother WHITTAKER'S grounds for dissenting, I should like to add confirming considerations for his conclusion. At a time when the union did not represent a majority of employees, union and employer entered into a collective bargaining agreement, containing a "union security" clause compelling all employees to become members of the union. Under principles accepted by the Court, this constituted an "unfair labor practice," for it tended "to restrain or coerce employees" in the exercise of their right "to bargain collectively through representatives of their own choosing." Union and employer continued to carry out the terms of

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[19] Adoption of a six-month period of limitations, criticized by opponents of the legislation as "the shortest statute of limitations known to the law," S. Rep. No. 105 (pt. II), 80th Cong., 1st Sess., p. 5 (Minority Report), was resisted on the ground that it gave "unjust assistance to employers or unions which commit those types of practices which are easily concealed and difficult to detect." 93 Cong. Rec. 4905 (remarks of Sen. Murray).

It need hardly be pointed out that we are not dealing with a case of fraudulent concealment alleged to toll the statute. See 105 U. S. App. D. C., at 110, 264 F. 2d, at 583 (dissenting opinion).

this illicit agreement. Specifically, the union purported to act as an authorized bargaining agent, union dues were collected through a "check-off" by the employer, and employees were compelled to become members of the union within forty-five days. The Court's opinion recognizes that all this constituted continuing interference with the employees' free choice and was therefore a continuing unfair labor practice.

Ten months after the collective agreement was first entered into, but while its terms continued to be actively carried out, an unfair labor practice charge against the union and employer was filed with the Board. Plainly, the continuing unfair labor practice of maintaining the collective agreement illegally entered into did occur within six months of the filing of the charge. The Court accepts this as true. But the Court holds that a charge based upon that continuing unfair practice is time-barred.

The applicable statute of limitations provides: "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." The Court relies on the fact that the active carrying out of the agreement, concededly an unfair practice occurring within six months, is revealed as unlawful only by reason of the unlawful character of the agreement at its inception, specifically, the fact that the union did not represent a majority of employees at that time. The Court concludes that the action is barred because the inception of the unlawful agreement was outside of the statutory period.

Such an interpretation, I respectfully submit, is not to enforce congressional legislation, which is our task, but is to fashion linguistic legislation and then apply it. Instead of barring only those complaints "based upon any unfair labor practice *occurring* more than six months prior to the filing of the charge," the statute is made to read "based upon any unfair labor practice *having had its inception*

more than six months prior to the filing of the charge." Thus the complaint is held barred, even though an unfair practice did *occur,* with due regard to the thought conveyed by that word. That is, we have here not mere inert continuity of consequences through antecedent action; events were brought to pass through conscious human intervention within six months of the filing of the charge.

I see no justification for such rewriting of what Congress wrote. The legislative history recited by the Court makes no such demand. Congress no doubt wanted to put stale claims to rest, and it did so by a relatively short statute of limitations for permitting claims to be brought to litigation. If six months are allowed to pass by without a charge against an unfair labor practice being filed, Congress said that is an end of the matter, and a charge cannot be filed thereafter. But Congress did not say that if a charge is filed within six months of the occurrence of an unfair practice, that cannot be halted, that cannot be proceeded against, if such labor practice had its inception more than six months before. On the contrary, what I deem a controlling analogy leads me to apply the statute as I find it, and to bar complaints only when based upon active occurrences not falling within the six-month period. I find that analogy in the treatment of the same kind of problem in cases where a conspiracy is entered into before a statutory period but is actively kept alive within that period.

The essence of the unfair labor practice involved in this case is the making and maintaining of an illegal agreement between union and employee. Suppose that Congress, having defined such an agreement to be an unfair labor practice, had subjected it not only to civil remedies but had also made it a misdemeanor. That is by no means a fanciful supposition. The federal antitrust statutes are a prominent instance of the use of the criminal law,

and in particular the law of conspiracy, as part of a scheme of industrial regulation. Suppose a six-month statutory limitations period for the criminal charge, as we now have for the civil, and suppose the very facts of this case. Specifically, suppose it had been charged that during the prior six months, by maintaining their collective agreement, entered into when the union did not represent a majority of employees, the union and employer had conspired to deprive employees of their rights freely to choose bargaining representatives, and that during those six months overt acts had been committed in pursuance of the unlawful agreement.

To find a cognate statute of limitations to be a bar to such a case would be to ignore the applicable precedents. The rules set out by this Court for applying statutes of limitations to conspiracy cases are clearly otherwise. See *United States* v. *Kissel,* 218 U. S. 601; *Hyde* v. *United States,* 225 U. S. 347, 367–370; *Brown* v. *Elliott,* 225 U. S. 392, 400–401; *Fiswick* v. *United States,* 329 U. S. 211, 216; *Grunewald* v. *United States,* 353 U. S. 391, 396–397. "The statute of limitations, unless suspended, runs from the last overt act during the existence of the conspiracy." *Fiswick* v. *United States, supra,* at 216. And these cases show that this principle applies even when, as here, the overt acts within the statutory period derive their illegal significance only when interpreted in light of an illegal agreement which was initiated prior to the statutory period for bringing a charge. Certainly, the illegalities committed within the six-months period in this case, to the same degree as overt acts in pursuance of a conspiracy already formed, represent "a renewed affirmation of the unlawful purpose," expressed in an agreement which Congress has outlawed as an unfair labor practice. A conspiracy is kept alive by an overt act within the period of the statute of limitations not by reason of some dogmatic postulate relevant to conspiracies, but as a result

of judicial reasoning in applying statutes of limitations. This reasoning is equally applicable to the matter in hand.

I am baffled to understand why the present case should be different from what it would be were it a prosecution for criminal conspiracy, rather than a civil proceeding based on an agreement giving rise to an unfair labor practice.

MR. JUSTICE WHITTAKER, with whom MR. JUSTICE FRANKFURTER joins, dissenting.

The Court correctly recognizes (1) that it is violative of employees' rights guaranteed by § 7, and an unfair labor practice by an employer under § 8 (a) and by a labor union under § 8 (b), of the National Labor Relations Act, for an employer and a labor union to enter into a contract providing either for the recognition by the employer of the union as the representative of its employees or that its employees must become and remain members of the union, unless the union, at that time, represented a majority of the employees in the unit, (2) that "The maintaining of such an agreement in force is a continuing violation of the Act," and (3) that the bargaining contract involved in this case not only recognized the union as the exclusive bargaining representative of the employees, but also required the employees to become and remain members of the union, although the union did not then represent a majority of the employees in the unit.*

Despite the foregoing, the Court holds, I think, with deference, quite inconsistently and erroneously, that § 10 (b) of the Act barred the issuance of a complaint,

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*In fact, the undisputed testimony was that the union did not then represent a single one of the employees, and that the employer acceded to the union's demand for recognition and entered into the contract simply because the union had it "over a barrel."

upon an employee's charge filed with and served by the Board 10 months after the making of the contract, based not upon the making of the contract, but alleging that, within and throughout the period of six months preceding the filing and service of the charge, the employer and the union required the employees to become and remain members of the union, and, once in each of those six months, caused certain sums to be deducted from the employees' wages and paid over to the union, all without the authorization of the employees.

The Court, noting the employer-union contention that the contract was "tainted" only by its "unlawful execution," and that "since a complaint based upon *that* unfair labor practice [would be] barred" by § 10 (b), *that event* could not be utilized "to *infuse with illegality* the *otherwise legal* union security clause or its enforcement," adopts that argument as presenting the "correct view." (Emphasis added.)

Surely the fact that a prosecution for the *making* of a "tainted" contract is barred by limitations does not "infuse" the "tainted" contract with *legality*. Moreover, I respectfully submit that the complaint here was not based upon the "tainted" contract, and that its unlawful *execution* was not utilized "to infuse [the always illegal contract] with illegality." Rather, the complaint here was based upon and limited to independent acts of the employer and the union, committed within six months preceding the filing and service of the charge, that deprived the employees of rights guaranteed to them by § 7, resulting in unfair labor practices under § 8; and the fact that prosecution for the illegal *execution* of the "tainted" contract is time-barred, as an independent wrong, may not be utilized "to infuse with" *legality* the illegal "union security clause or its enforcement."

It is important carefully to note what it is that § 10 (b) bars. It says, in relevant part, that "*no complaint* shall

issue *based upon* any unfair labor practice *occurring more* than six months prior to the filing of the charge . . . ." (Emphasis added.) The bar is, then, against the issuance of a "complaint" that is "based upon" acts "occurring more" than six months prior to the filing of the charge. In the plainest possible sense, then, it does not bar the *issuance of a complaint based upon acts occurring within six months of the filing of the charge.* The complaint that was issued here was based upon acts occurring within six months of the filing of the charge. And the Board rested its decision solely on those acts.

But the Court holds that, although § 10 (b) is only a statute of limitations, evidence of the illegality of the contract is inadmissible, in the circumstances of this case, because it would serve "to cloak with illegality that which was otherwise lawful," and would permit a time-barred event "to be so used [as to revive] a legally defunct unfair labor practice." This conclusion gives hip rather than heed to the conceded rule that "the maintaining of such an agreement in force is a continuing violation of the Act," for it makes incompetent all relevant evidence that may be adduced to prove the "continuing violation." Moreover, such a rule is contrary to the decisions of this Court and to every decision of the Courts of Appeals upon the point to which our attention has been directed.

In *Federal Trade Comm'n* v. *Cement Institute,* 333 U. S. 683, this Court held it to be:

> "well within the established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny. *Standard Oil Co.* v. *United States,* 221 U. S. 1, 46–47; *United States* v. *Reading Co.,* 253 U. S. 26, 43–44." 333 U. S., at 705.

To the same effect, but directly dealing with unfair labor practices, are *Paramount Cap Mfg. Co.* v. *Labor Board,* 260 F. 2d 109, 112–113 (C. A. 8th Cir.); *Labor Board* v. *Gaynor News Co.,* 197 F. 2d 719, 722 (C. A. 2d Cir.), aff'd *sub nom., Radio Officers* v. *Labor Board,* 347 U. S. 17; *Katz* v. *Labor Board,* 196 F. 2d 411, 415 (C. A. 9th Cir.); *Labor Board* v. *General Shoe Corp.,* 192 F. 2d 504, 507 (C. A. 6th Cir.); *Labor Board* v. *Clausen,* 188 F. 2d 439, 443 (C. A. 3d Cir.); *Superior Engraving Co.* v. *Labor Board,* 183 F. 2d 783, 791 (C. A. 7th Cir.).

In the *Katz* case, almost identical with this one on the point in issue, the Court specifically rejected the contention that, inasmuch as more than six months had expired from the date of the *execution* of the tainted contract, the complaint, based upon acts occurring within six months of the charge, was barred by § 10 (b), saying:

> "While . . . the mere execution of the agreement on December 17, 1948, constituted an unfair labor practice, there is no doubt but that the continuous enforcement of the agreement thereafter within the six months period prior to the filing of the charge, was an unfair labor practice, and with respect to this continued and continuous enforcement of the illegal union shop agreement, the prosecution of the proceeding was not barred by limitations." 196 F. 2d, at 415.

In the *Gaynor* case, the Court, after pointing out that although the tainted contract had been executed more than six months prior to the filing of the charge, and its *execution* was therefore barred as an independent subject of punishment by § 10 (b), observed that enforcement of the contract was "a continuing offense," and held that the complaint, based only on acts occurring within six months

of the filing of the charge, was lawfully issued and "in all respects valid." 197 F. 2d, at 722.

Although still recognizing that enforcement of a tainted labor contract "is a continuing violation" of the law, the Court further says that this is true "solely by reason of circumstances existing only at the date of execution"; and it therefore concludes that evidence of the taint is inadmissible in a proceeding to punish unlawful conduct occurring from enforcement of the contract within six months of the filing of a charge. I respectfully submit it is plain that this reasoning negates the conceded rule that enforcement of a tainted contract is "a continuing offense." The Court's reasoning, inconsistently, would at once both recognize, and deny any means of proving, the "continuing offense."

Analytical curiosity provokes the query whether such an *illegal* contract, openly posted in the plant but not made effective in practice until the first day of the seventh month, would then become so "infused" with *legality* as to be unassailable by the employees—not because its enforcement is not "a continuing offense," but, rather, because, under the Court's rule, there can be no competent evidence of its illegality. If so, the rule of "continuing offense" is utterly destroyed. If not, the Court's rule that there can be no competent evidence of the continuing violation must give way. The two theories are diametrically opposed and self-destructive. Section 10 (b) does not at all deal with the competency or admissibility of evidence. Surely, as the cited cases hold, any evidence which shows that continuing enforcement of the contract is or is not an offense under the Act is competent under the law.

But there is even a more fundamental consideration which, for me, settles this issue beyond all controversy. While it is the burden of the General Counsel of the Board

to prove his case, all he need do, initially at least, is to make a prima facie case. He may do this, in a case like the present, simply by putting on evidence showing that the employer and the union, within six months preceding the filing of the charge, required the employees to become and remain members of the union and to submit to deduction of dues from their wages without asking them for authorization and without any election, or Board certification of the union. That evidence alone would raise prima facie the issue: By what right was this done? That issue would call for a defense, and the burden of producing the defense would necessarily fall upon the employer and the union. Surely it will not be said that anything in § 10 (b), or elsewhere in the law, makes incompetent all evidence that might be adduced by the employer and the union to meet their burden and justify their action. If, as I submit cannot be denied, such evidence is competent when offered by the employer and the union, it must likewise be competent when, if he so elects, it is offered by the General Counsel of the Board. Here, at the very least, the General Counsel made a prima facie case of continuing violations of the law within the six months preceding the filing of the charge, the employer and the union made no effort to show the legality of their conduct in the period complained of.

The Court attributes to its rule the virtues of quieting "stale claims" and of "stabiliz[ing] existing bargaining relationships." I cannot agree that it would do either, for employee rights, occurring within six months of the filing of the charge, are not "stale claims," and deprivation of those rights which, as the Court of Appeals said, "rankles at least once a month in the mind of [the employees] offended," is not conducive to industrial peace and would not—certainly not legally—"stabilize existing bargaining relationships." At all events, and however this may be, these matters were for Congress; and the cardinal pur-

poses of the National Labor Relations Act, contained in § 7, were to guarantee to employees the right to join or assist labor organizations "of their own choosing" or to refrain from such activities. Surely, the continuing offense of enforcing a contract, made by an employer with a union which was not of the employees' "own choosing," was not intended by Congress to be left without a remedy. Congress did not intend to create and "to hold out to [employees] an illusory right for which it was denying them a remedy." *Graham* v. *Brotherhood of Firemen,* 338 U. S. 232, 240. Certainly, "any limitation on the employees' right[s] [under] §§ 7 and 8 . . . must be more explicit and clear than it is here in order to restrict them at the very time they may be most needed." *Mastro Plastics Corp.* v. *Labor Board,* 350 U. S. 270, 287. See also *Labor Board* v. *Lion Oil Co.,* 352 U. S. 282, 289.

Believing that the Board and the Court of Appeals correctly decided this case, I would affirm the judgment.

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HURON PORTLAND CEMENT CO. *v.* CITY OF DETROIT ET AL.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 86. Argued February 29, 1960.—Decided April 25, 1960.

The criminal provisions of the Smoke Abatement Code of the City of Detroit are constitutional, as applied to prosecution for the emission of dense black smoke by appellant's ships while docked at the Port of Detroit, even though such ships operate in interstate commerce and have been inspected, approved and licensed by the Federal Government for that purpose in accordance with a comprehensive system of regulation enacted by Congress. Pp. 440–448.

(a) The federal inspection laws, which are designed to afford protection from the perils of maritime navigation, do not so preempt the field as to prevent local regulation to protect the health and enhance the cleanliness of the local community; and the local regulation here involved does not unconstitutionally burden the federal licenses issued to these vessels. Pp. 444–448.

(b) The criminal provisions of the Smoke Abatement Code, as applied to appellant's ships, do not impose an undue burden on interstate commerce. P. 448.

355 Mich. 227, 93 N. W. 2d 888, affirmed.

Alfred E. Lindbloom argued the cause for appellant. With him on the brief were *Charles Wright, Jr.* and *Laurence A. Masselink.*

John F. Hathaway argued the cause for appellees. With him on the brief were *Nathaniel H. Goldstick, John D. O'Hair* and *Roger P. O'Connor.*

MR. JUSTICE STEWART delivered the opinion of the Court.

This appeal from a judgment of the Supreme Court of Michigan draws in question the constitutional validity of certain provisions of Detroit's Smoke Abatement Code as applied to ships owned by the appellant and operated in interstate commerce.

The appellant is a Michigan corporation, engaged in the manufacture and sale of cement. It maintains a fleet of five vessels which it uses to transport cement from its mill in Alpena, Michigan, to distributing plants located in various states bordering the Great Lakes. Two of the ships, the S. S. *Crapo* and the S. S. *Boardman,* are equipped with hand-fired Scotch marine boilers. While these vessels are docked for loading and unloading it is necessary, in order to operate deck machinery, to keep the boilers fired and to clean the fires periodically. When the fires are cleaned, the ship's boiler stacks emit smoke which in density and duration exceeds the maximum standards allowable under the Detroit Smoke Abatement Code. Structural alterations would be required in order to insure compliance with the Code.

Criminal proceedings were instituted in the Detroit Recorder's Court against the appellant and its agents for violations of the city law during periods when the vessels were docked at the Port of Detroit. The appellant brought an action in the State Circuit Court to enjoin the city from further prosecuting the pending litigation in the Recorder's Court, and from otherwise enforcing the smoke ordinance against its vessels, "except where the emission of smoke is caused by the improper firing or the improper use of the equipment upon said vessels." The Circuit Court refused to grant relief, and the Supreme Court of Michigan affirmed, 355 Mich. 227, 93 N. W. 2d 888. An appeal was lodged here, and we noted probable jurisdiction, 361 U. S. 806.

In support of the claim that the ordinance cannot constitutionally be applied to appellant's ships, two basic arguments are advanced. First, it is asserted that since the vessels and their equipment, including their boilers, have been inspected, approved and licensed to operate in interstate commerce in accordance with a comprehensive system of regulation enacted by Congress, the City of

Detroit may not legislate in such a way as, in effect, to impose additional or inconsistent standards. Secondly, the argument is made that even if Congress has not expressly pre-empted the field, the municipal ordinance "materially affects interstate commerce in matters where uniformity is necessary." We have concluded that neither of these contentions can prevail, and that the Federal Constitution does not prohibit application to the appellant's vessels of the criminal provisions of the Detroit ordinance.[1]

The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government. *Gibbons* v. *Ogden,* 9 Wheat. 1; *Cooley* v. *Board of Wardens of Port of Philadelphia,* 12 How. 299; *The Steamboat New York* v. *Rea,* 18 How. 223; *Morgan* v. *Louisiana,* 118 U. S. 455; *The Minnesota Rate Cases,* 230 U. S. 352; *Wilmington Transp. Co.* v. *California Railroad Comm.,*

[1] The Detroit legislation also contains provisions making it unlawful to operate any combustion equipment in the city without a certificate, § 2.16, providing for an annual inspection of all such equipment used in the city, § 2.17, and further providing for the sealing of equipment in the event that the inspection requirements are repeatedly ignored, § 2.20. There is nothing in the record to indicate that the city has at any time attempted to enforce these provisions with respect to the appellant's ships. Accordingly, we do not reach the question of the validity of the inspection sections as they might be applied to appellant, but limit our consideration solely to what is presented upon this record—the enforcement of the criminal provisions of the Code for violation of the smoke emission provisions.

236 U. S. 151; *Vandalia R. Co.* v. *Public Service Comm.*, 242 U. S. 255; *Stewart & Co.* v. *Rivara*, 274 U. S. 614; *Welch Co.* v. *New Hampshire*, 306 U. S. 79.

The basic limitations upon local legislative power in this area are clear enough. The controlling principles have been reiterated over the years in a host of this Court's decisions. Evenhanded local regulation to effectuate a legitimate local public interest is valid unless preempted by federal action, *Erie R. Co.* v. *New York*, 233 U. S. 671; *Oregon-Washington Co.* v. *Washington*, 270 U. S. 87; *Napier* v. *Atlantic Coast Line*, 272 U. S. 605; *Missouri Pacific Co.* v. *Porter*, 273 U. S. 341; *Service Transfer Co.* v. *Virginia*, 359 U. S. 171, or unduly burdensome on maritime activities or interstate commerce, *Minnesota* v. *Barber*, 136 U. S. 313; *Morgan* v. *Virginia*, 328 U. S. 373; *Bibb* v. *Navajo Freight Lines*, 359 U. S. 520.

In determining whether state regulation has been preempted by federal action, "the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State." *Savage* v. *Jones*, 225 U. S. 501, 533. See also *Reid* v. *Colorado*, 187 U. S. 137; *Asbell* v. *Kansas*, 209 U. S. 251; *Welch Co.* v. *New Hampshire*, 306 U. S. 79; *Maurer* v. *Hamilton*, 309 U. S. 598.

In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when "conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of

the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution." *Sherlock* v. *Alling,* 93 U. S. 99, 103; *Austin* v. *Tennessee,* 179 U. S. 343; *Louisville & Nashville R. Co.* v. *Kentucky,* 183 U. S. 503; *The Minnesota Rate Cases,* 230 U. S. 352; *Boston & Maine R. Co.* v. *Armburg,* 285 U. S. 234; *Collins* v. *American Buslines, Inc.,* 350 U. S. 528. But a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary. *Hall* v. *DeCuir,* 95 U. S. 485; *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761; *Bibb* v. *Navajo Freight Lines,* 359 U. S. 520.

Although verbal generalizations do not of their own motion decide concrete cases, it is nevertheless within the framework of these basic principles that the issues in the present case must be determined.

I.

For many years Congress has maintained an extensive and comprehensive set of controls over ships and shipping. Federal inspection of steam vessels was first required in 1838, 5 Stat. 304, and the requirement has been continued ever since. 5 Stat. 626; 10 Stat. 61; 14 Stat. 227; 16 Stat. 440; 22 Stat. 346; 28 Stat. 699; 32 Stat. 34; 34 Stat. 68; 60 Stat. 1097; 73 Stat. 475. Steam vessels which carry passengers must pass inspection annually, 46 U. S. C. § 391 (a), and those which do not, every two years. 46 U. S. C. § 391 (b). Failure to meet the standards invoked by law results in revocation of the inspection certificate, or refusal to issue a new one, 46 U. S. C. § 391(d). It is unlawful for a vessel to operate without such a certificate. 46 U. S. C. § 390c (a).

These inspections are broad in nature, covering "the boilers, unfired pressure vessels, and appurtenances

thereof, also the propelling and auxiliary machinery, electrical apparatus and equipment, of all vessels subject to inspection . . . ." 46 U. S. C. § 392 (b). The law provides that "No boiler . . . shall be allowed to be used if constructed in whole or in part of defective material or which because of its form, design, workmanship, age, use, or for any other reason is unsafe." 46 U. S. C. § 392 (c).

As is apparent on the face of the legislation, however, the purpose of the federal inspection statutes is to insure the seagoing safety of vessels subject to inspection. Thus 46 U. S. C. § 392 (c) makes clear that inspection of boilers and related equipment is for the purpose of seeing to it that the equipment "may be safely employed in the service proposed." The safety of passengers, 46 U. S. C. § 391 (a), and of the crew, 46 U. S. C. § 391 (b), is the criterion. The thrust of the federal inspection laws is clearly limited to affording protection from the perils of maritime navigation. Cf. *Ace Waterways* v. *Fleming,* 98 F. Supp. 666. See also *Steamship Co.* v. *Joliffe,* 2 Wall. 450.

By contrast, the sole aim of the Detroit ordinance is the elimination of air pollution to protect the health and enhance the cleanliness of the local community. Congress recently recognized the importance and legitimacy of such a purpose, when in 1955 it provided:

> "[I]n recognition of the dangers to the public health and welfare, injury to agricultural crops and livestock, damage to and deterioration of property, and hazards to air and ground transportation, from air pollution, it is hereby declared to be the policy of Congress to preserve and protect the primary responsibilities and rights of the States and local governments in controlling air pollution, to support and aid technical research to devise and develop methods of abating such pollution, and to provide Federal tech-

> nical services and financial aid to State and local government air pollution control agencies and other public or private agencies and institutions in the formulation and execution of their air pollution abatement research programs." 69 Stat. 322; 42 U. S. C. § 1857.

Congressional recognition that the problem of air pollution is peculiarly a matter of state and local concern is manifest in this legislation. Such recognition is underlined in the Senate Committee Report:

> "The committee recognizes that it is the primary responsibility of State and local governments to prevent air pollution. The bill does not propose any exercise of police power by the Federal Government and no provision in it invades the sovereignty of States, counties or cities." S. Rep. No. 389, 84th Cong., 1st Sess. 3.

We conclude that there is no overlap between the scope of the federal ship inspection laws and that of the municipal ordinance here involved.[2] For this reason we cannot find that the federal inspection legislation has pre-empted local action. To hold otherwise would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists. *Savage* v. *Jones,* 225 U. S. 501; *Welch Co.* v. *New Hampshire,* 306 U. S. 79; *Maurer* v. *Hamilton,* 309 U. S. 598.

An additional argument is advanced, however, based not upon the mere existence of the federal inspection standards, but upon the fact that the appellant's vessels were actually licensed, 46 U. S. C. § 263, and enrolled,

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[2] Compare, *Napier* v. *Atlantic Coast Line R. Co.,* where the Court concluded that "the [Locomotive] Boiler Inspection Act . . . was intended to occupy the field." 272 U. S. 605, 613.

46 U. S. C. §§ 259–260, by the national government. It is asserted that the vessels have thus been given a dominant federal right to the use of the navigable waters of the United States, free from the local impediment that would be imposed by the Detroit ordinance.

The scope of the privilege granted by the federal licensing scheme has been well delineated. A state may not exclude from its waters a ship operating under a federal license. *Gibbons* v. *Ogden,* 9 Wheat. 1. A state may not require a local occupation license, in addition to that federally granted, as a condition precedent to the use of its waters. *Moran* v. *New Orleans,* 112 U. S. 69. While an enrolled and licensed vessel may be required to share the costs of benefits it enjoys, *Huse* v. *Glover,* 119 U. S. 543, and to pay fair taxes imposed by its domicile, *Transportation Co.* v. *Wheeling,* 99 U. S. 273, it cannot be subjected to local license imposts exacted for the use of a navigable waterway, *Harman* v. *Chicago,* 147 U. S. 396. See also *Sinnot* v. *Davenport,* 22 How. 227.

The mere possession of a federal license, however, does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce. Thus, a federally licensed vessel is not, as such, exempt from local pilotage laws, *Cooley* v. *Board of Wardens of Port of Philadelphia,* 12 How. 299, or local quarantine laws, *Morgan's Steamship Co.* v. *Louisiana Board of Health,* 118 U. S. 455, or local safety inspections, *Kelly* v. *Washington,* 302 U. S. 1, or the local regulation of wharves and docks, *Packet Co.* v. *Catlettsburg,* 105 U. S. 559. Indeed this Court has gone so far as to hold that a state, in the exercise of its police power, may actually seize and pronounce the forfeiture of a vessel "licensed for the coasting trade, under the laws of the United States, while engaged in that trade." *Smith* v. *Maryland,* 18 How. 71, 74. The present case obvi-

ously does not even approach such an extreme, for the Detroit ordinance requires no more than compliance with an orderly and reasonable scheme of community regulation. The ordinance does not exclude a licensed vessel from the Port of Detroit, nor does it destroy the right of free passage. We cannot hold that the local regulation so burdens the federal license as to be constitutionally invalid.

II.

The claim that the Detroit ordinance, quite apart from the effect of federal legislation, imposes as to the appellant's ships an undue burden on interstate commerce needs no extended discussion. State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand. *Hennington* v. *Georgia,* 163 U. S. 299; *Lake Shore & Mich. South. R. Co.* v. *Ohio,* 173 U. S. 285; *Pennsylvania Gas Co.* v. *Public Service Comm.,* 252 U. S. 23; *Milk Board* v. *Eisenberg Co.,* 306 U. S. 346; *Bob-Lo Excursion Co.* v. *Michigan,* 333 U. S. 28.

It has not been suggested that the local ordinance, applicable alike to "any person, firm or corporation" within the city, discriminates against interstate commerce as such. It is a regulation of general application, designed to better the health and welfare of the community. And while the appellant argues that other local governments might impose differing requirements as to air pollution, it has pointed to none. The record contains nothing to suggest the existence of any such competing or conflicting local regulations. Cf. *Bibb* v. *Navajo Freight Lines,* 359 U. S. 520. We conclude that no impermissible burden on commerce has been shown.

The judgment is affirmed.

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

The Court treats this controversy as if it were merely an inspection case with the City of Detroit supplementing a federal inspection system as the State of Washington did in *Kelly* v. *Washington,* 302 U. S. 1. There a state inspection system touched matters "which the federal laws and regulations" left "untouched." *Id.,* at 13. This is not that type of case. Nor is this the rare case where state law adopts the standards and requirements of federal law and is allowed to exact a permit in addition to the one demanded by federal law. *California* v. *Zook,* 336 U. S. 725, 735. Here we have a criminal prosecution against a shipowner and officers of two of its vessels for using the very equipment on these vessels which the Federal Goverment says may be used. At stake are a possible fine of $100 on the owner and both a fine and a 30-day jail sentence on the officers.

Appellant has a federal certificate for each of its vessels—S. S. *John W. Boardman,* S. S. *S. T. Crapo,* and others. The one issued on March 21, 1956, by the United States Coast Guard for S. S. *S. T. Crapo* is typical. The certificate states "The said vessel is permitted to be navigated for one year on the Great Lakes." The certificate specifies the boilers which are and may be used—"Main Boilers Number 3, Year built 1927, Mfr. Manitowoc Boiler Wks." It also specifies the fuel which is used and is to be used in those boilers—"Fuel coal."

Appellant, operating the vessel in waters at the Detroit dock, is about to be fined criminally for using the precise equipment covered by the federal certificate because, it is said, the use of that equipment will violate a smoke ordinance of the City of Detroit.

The federal statutes give the Coast Guard the power to inspect "the boilers" of freight vessels every two

years,[1] and provide that when the Coast Guard approves the vessel and her equipment throughout, a certificate to that effect shall be made.[2]

The requirements of the Detroit smoke ordinance are squarely in conflict with the federal statute. Section 2.2A of the ordinance prohibits the emission of the kind of smoke which cannot be at all times prevented by vessels equipped with hand-fired Scotch marine boilers such as appellant's vessels use. Section 2.16 of the ordinance makes it unlawful to use any furnace or other combustion equipment or device in the city without a certificate of operation which issues only after inspection. Section 2.17 provides for an annual inspection of every furnace or other combustion equipment used within the city. Section 2.20 provides that if an owner has been previously notified of three or more violations of the ordinance within any consecutive 12-month period he shall be notified to show cause before the Commissioner why the equipment should not be sealed. At the hearing, if the Commissioner finds that adequate corrective means have not been employed to remedy the situation, the equipment shall be sealed. Section 3.2 provides for a fine of not more than $100 or imprisonment for not more than 30 days or both upon conviction of any violation of any provision of the ordinance, and each day a violation is permitted to exist constitutes a separate offense.

Thus it is plain that the ordinance requires not only the inspection and approval of equipment which has been

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[1] 46 U. S. C. § 392.

[2] 46 U. S. C. § 399 provides in part:

"When the inspection of a steam vessel is completed and the Secretary of the Department in which the Coast Guard is operating approves the vessel and her equipment throughout, he shall make and subscribe a certificate to that effect."

inspected and approved by the Coast Guard but also the sealing of equipment, even though it has been approved by the Coast Guard. Under the Detroit ordinance a certificate of operation would not issue for a hand-fired Scotch marine boiler, even though it had been approved by the Coast Guard.[3] In other words, this equipment approved and licensed by the Federal Government for use on navigable waters cannot pass muster under local law.

If local law required federally licensed vessels to observe local speed laws, obey local traffic regulations, or dock at certain times or under prescribed conditions, we would have local laws not at war with the federal license, but complementary to it. In *Kelly* v. *Washington, supra,* at 14–15, the Court marked precisely that distinction. While it allowed state inspection of hull and machinery of tugs over and above that required by federal statutes, it noted that state rules which changed the federal

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[3] The trial court in its opinion said:

"It is agreed it is impossible to prevent emission of the kind of smoke prohibited by the smoke ordinance if the vessel is equipped with hand-fired scotch marine boilers. The Boardman has two boilers each with two doors and one steam air jet over each door. The Crapo has three boilers, each with two doors and one steam air jet over each door. The steam jets being installed at the suggestion of Benjamin Linsky, former Chief of the Bureau of Smoke Abatement for the City.

"Testimony showed also that the plaintiff used a chemical in an attempt to reduce the smoke. Plaintiff urges it has done everything that it could possibly do with the equipment it has to prevent the emission of smoke. It was shown on trial that the fleet is subject to periodic inspection by the coast guard, which issues a search [*sic*] of inspection. The Crapo in 1955, docked at Detroit twenty-two times for an average docking time of 23.9 hours and the Boardman docked at Detroit 25 times that year with an average stay of 16.2 hours. Both vessels were constantly engaged in interstate and foreign commerce during this period."

standards "for the structure and equipment of vessels" would meet a different fate:

> "The state law is a comprehensive code. While it excepts vessels which are subject to inspection under the laws of the United States, it has provisions which may be deemed to fall within the class of regulations which Congress alone can provide. For example, Congress may establish standards and designs for the structure and equipment of vessels, and may prescribe rules for their operation, which could not properly be left to the diverse action of the States. The State of Washington might prescribe standards, designs, equipment and rules of one sort, Oregon another, California another, and so on. But it does not follow that in all respects the state Act must fail."

This case, like *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605, involves the collision between a local law and a federal law which gives a federal agency the power to specify or approve the equipment to be used by a federal licensee. In that case one State required automatic fire doors on locomotives of interstate trains and another State required cab curtains during the winter months. The Interstate Commerce Commission, though it had the power to do so under the Boiler Inspection Act, had never required a particular kind of fire door or cab curtain. The Court, speaking through Mr. Justice Brandeis, said, at 612–613:

> "The federal and the state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the Commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the Commission has power to prescribe an automatic firebox door and a cab

> curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field."

Here the Coast Guard would be entitled to insist on different equipment. But it has not done so. The boats of appellant, therefore, have credentials good for any port; and I would not allow this local smoke ordinance to work in derogation of them. The fact that the Federal Government in certifying equipment applies standards of safety for seagoing vessels, while Detroit applies standards of air pollution seems immaterial. Federal pre-emption occurs when the boilers and fuel to be used in the vessels are specified in the certificate. No state authority can, in my view, change those specifications. Yet that is in effect what is allowed here.

As we have seen, the Detroit ordinance contains provisions making it unlawful to operate appellant's equipment without a certificate from the city and providing for the sealing of the equipment in case of three or more violations within any 12-month period. The Court says that those sanctions are not presently in issue, that it reserves decision as to their validity, and that it concerns itself only with "the enforcement of the criminal provisions" of the ordinance. Yet by what authority can a local government fine people or send them to jail for using in interstate commerce the precise equipment which the federal regulatory agency has certified and approved? The burden of these criminal sanctions on the owners and officers, particularly as it involves the risk of imprisonment, may indeed be far more serious than a mere sealing

of the equipment. Yet whether fine or imprisonment is considered, the effect on the federal certificate will be crippling. However the issue in the present case is stated it comes down to making criminal in the Port of Detroit the use of a certificate issued under paramount federal law. *Mintz* v. *Baldwin,* 289 U. S. 346, upheld the requirement of a state inspection certificate where a federal certificate might have been, but was not, issued. Cf. *California* v. *Thompson,* 313 U. S. 109, 112. Never before, I believe, have we recognized the right of local law to make the use of an unquestionably legal federal license a criminal offense.

What we do today is in disregard of the doctrine long accepted and succinctly stated in the 1851 Term in *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 13 How. 518, 566, "No State law can hinder or obstruct the free use of a license granted under an act of Congress." [4] The confusion and burden arising from the imposition by one

[4] *Smith* v. *Maryland,* 18 How. 71, is not to the contrary. There a vessel enrolled under the laws of the United States was allowed to be forfeited by Maryland for dredging for oysters in violation of Maryland law. But the enrollment of vessels serves only a limited purpose. *Smith* v. *Maryland, supra,* was explained in *Stewart & Co.* v. *Rivara,* 274 U. S. 614. The Court said, "The purpose of the enrollment of vessels is to give to them the privileges of American vessels as well as the protection of our flag." *Id.,* at 618. Enrollment without more did not give the enrolled vessel a license to disregard the variety of pilotage, health and other such local laws which the opinion of the Court in the famous case of *Cooley* v. *Board of Port Wardens,* 12 How. 299 (written by Mr. Justice Curtis who also wrote for the Court in *Smith* v. *Maryland*), had left to the States to be obeyed by all vessels. The local regulations approved in the *Cooley* case never qualified the license to ply as a vessel nor penalized its movement on navigable waters. The federal license in the instant case, however, specifically describes the only equipment and fuel which these vessels are allowed to use, and Detroit is permitted to make their use criminal.

State of requirements for equipment which the Federal Government has approved was emphasized in *Kelly* v. *Washington, supra,* in the passage already quoted. The requirements of Detroit may be too lax for another port. Cf. *People* v. *Cunard White Star, Ltd.,* 280 N. Y. 413, 21 N. E. 2d 489. The variety of requirements for equipment which the States may provide in order to meet their air pollution needs underlines the importance of letting the Coast Guard license serve as authority for the vessel to use, in all our ports, the equipment which it certifies.

PHILLIPS *v.* NEW YORK.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 497. Argued April 18, 1960.—Decided April 25, 1960.

Certiorari dismissed as improvidently granted.
Reported below: 6 N. Y. 2d 788, 159 N. E. 2d 677.

Henry W. Schober argued the cause for petitioner. With him on the brief were *Anthony T. Antinozzi* and *Frank A. Fritz, Jr.*

Joseph I. Heneghan argued the cause for respondent. With him on the brief was *Manuel W. Levine.*

PER CURIAM.

After hearing oral argument and fully examining the record which was only partially set forth in the petition for certiorari, we conclude that the totality of circumstances as the record makes them manifest did not warrant bringing the case here. Accordingly, the writ is dismissed as improvidently granted.

CERMINARO *v.* URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH ET AL.

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

No. 654, Misc. Decided April 25, 1960.

Appeal dismissed.
Reported below: —— F. Supp. ——.

Louis C. Glasso for appellant.

Theodore L. Hazlett, Jr. and *David Stahl* for appellees.

PER CURIAM.

The appeal is dismissed.

CLEVELAND ELECTRIC ILLUMINATING CO. *v.* CITY OF EUCLID, OHIO, ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 740. Decided April 25, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 170 Ohio St. 45, 162 N. E. 2d 125.

John Lansdale for appellant.

Paul H. Torbet and *John F. Ray, Jr.* for appellees.

PER CURIAM.

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

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., *v.* UNITED STATES.

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

No. 62. Argued January 19–20, 1960.—Decided May 2, 1960.*

The United States brought a civil antitrust action against an agricultural cooperative marketing association composed of about 2,000 Maryland and Virginia dairy farmers supplying about 86% of the milk purchased by all milk dealers in the Washington, D. C., metropolitan area. The complaint charged that the association had (1) monopolized and attempted to monopolize interstate trade and commerce in fluid milk in Maryland, Virginia and the District of Columbia, in violation of § 2 of the Sherman Act; (2) through contracts and agreements combined and conspired with Embassy Dairy and others to eliminate and foreclose competition in the same milk market area, in violation of § 3 of the Sherman Act; and (3) bought all assets of Embassy Dairy (the largest milk dealer in the area which competed with the association's dealers), the effect of which might be to substantially lessen competition or tend to create a monopoly in violation of § 7 of the Clayton Act. The District Court dismissed the charge under § 2 of the Sherman Act; but it found for the Government on the charges under § 3 of the Sherman Act and § 7 of the Clayton Act and granted part, but not all, of the relief sought by the Government with respect to those charges. *Held:*

1. Section 2 of the Capper-Volstead Act, which authorizes the Secretary of Agriculture to issue a cease-and-desist order upon finding that a cooperative has monopolized or restrained trade to such an extent that the price of an agricultural commodity has been "unduly enhanced," does not exclude all prosecutions under the Sherman Act. *United States* v. *Borden Co.*, 308 U. S. 188. Pp. 462–463.

2. Neither § 6 of the Clayton Act nor § 1 of the Capper-Volstead Act leaves agricultural cooperatives free to engage in practices against others which are designed to monopolize trade or to restrain and suppress competition. Pp. 463–468.

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*Together with No. 73, *United States* v. *Maryland and Virginia Milk Producers Association, Inc.*, also on appeal from the same Court.

3. The allegations of the complaint and the statement of particulars in this case charge anticompetitive activities which are so far outside the legitimate objects of a cooperative that, if proved, they would constitute clear violations of § 2 of the Sherman Act; and the District Court erred in dismissing the charge of violating § 2. P. 468.

4. On the record in this case, the District Court properly found that the acquisition of Embassy Dairy by the association tended to create a monopoly or to substantially lessen competition, in violation of § 7 of the Clayton Act. Pp. 468–469.

5. The acquisition of Embassy Dairy by the association was not exempted from the provisions of § 7 of the Clayton Act by the last paragraph of that section, since there is no "statutory provision" that vests power in the Secretary of Agriculture to approve a transaction and thereby exempt a cooperative from the antitrust laws under the circumstances of this case, which involves no agricultural marketing agreement with the Secretary. Pp. 469–470.

6. The privilege the Capper-Volstead Act grants producers to conduct their affairs collectively does not include a privilege to combine with competitors so as to use a monopoly position as a lever further to suppress competition by and among independent producers and processors; and the record sustains the District Court's finding that the association had violated § 3 of the Sherman Act. Pp. 470–472.

7. Having entered a decree ordering the association to divest itself of all assets acquired from Embassy Dairy and to cancel all contracts ancillary to their acquisition, and having retained jurisdiction to grant such further relief as might be appropriate, the District Court did not err in denying part of the relief sought by the Government. Pp. 472–473.

167 F. Supp. 45, reversed.

167 F. Supp. 799, 168 F. Supp. 880, affirmed.

Herbert A. Bergson and *William J. Hughes, Jr.* argued the cause for the Maryland and Virginia Milk Producers Association, Inc. With them on the brief were *Daniel J. Freed, Howard Adler, Jr.* and *Daniel H. Margolis.*

Philip Elman argued the cause for the United States. On the brief were *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Charles H. Weston, Irwin A. Seibel* and *Joseph J. Saunders.*

MR. JUSTICE BLACK delivered the opinion of the Court.

This is a civil antitrust action brought by the United States in a Federal District Court against an agricultural cooperative, the Maryland and Virginia Milk Producers Association, Inc. The Association supplies about 86% of the milk purchased by all milk dealers in the Washington, D. C., metropolitan area, and has as members about 2,000 Maryland and Virginia dairy farmers. The complaint charged that the Association had: (1) attempted to monopolize and had monopolized interstate trade and commerce in fluid milk in Maryland, Virginia and the District of Columbia in violation of § 2 of the Sherman Act; [1] (2) through contracts and agreements combined and conspired with Embassy Dairy and others to eliminate and foreclose competition in the same milk market area in violation of § 3 of that Act; [2] and (3) bought all the assets of Embassy Dairy, the largest milk dealer in the area which competed with the Association's dealers, the effect of which acquisition might be substantially to lessen competition or to tend to create

[1] Sherman Act § 2: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 26 Stat. 209 (1890), as amended, 15 U. S. C. § 2.

[2] Sherman Act § 3: "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia . . . or between the District of Columbia and any State or States or foreign nations, is declared illegal. . . ." 26 Stat. 209 (1890), as amended, 15 U. S. C. § 3. Section 1 declares the same prohibition as to commerce "among the several States." Although there was also a charge against the Association under § 1 there was no judgment against it on this section, and that charge is no longer relevant here.

a monopoly in violation of § 7 of the Clayton Act.[3] The chief defense set up by the Association was that, because of its being a cooperative composed exclusively of dairy farmers, § 6 of the Clayton Act[4] and §§ 1 and 2 of the Capper-Volstead Act[5] completely exempted and immunized it from the antitrust laws with respect to the charges made in the Government's complaint. The District Court concluded after arguments that

> "an agricultural cooperative is entirely exempt from the provisions of the antitrust laws, both as to its very existence as well as to all of its activities, provided it does not enter into conspiracies or combinations with persons who are not producers of agricultural commodities." 167 F. Supp. 45, 52.

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[3] Clayton Act § 7: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

. . . . . .

"Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the . . . [independent regulatory commissions] or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board." 38 Stat. 731 (1914), as amended, 15 U. S. C. § 18.

[4] 38 Stat. 731 (1914), 15 U. S. C. § 17, set forth in note 11, *infra*.

[5] Capper-Volstead Act § 1: "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes . . . ." 42 Stat. 388 (1922), 7 U. S. C. § 291. Section 2 is set forth in note 7, *infra*.

Accordingly the court dismissed the Sherman Act § 2 monopolization charge, where the Association was not alleged to have acted in combination with others, but upheld the right of the Government to go to trial on the Sherman Act § 3 and Clayton Act § 7 charges because they involved alleged activities with the owners of Embassy and other persons who were not agricultural producers. After trial the court found for the United States on the latter two charges and entered a decree ordering the Association to divest itself within a reasonable time of all assets acquired from Embassy and to cancel all contracts ancillary to the acquisition. 167 F. Supp. 799, 168 F. Supp. 880. The court refused to grant additional relief the United States asked for. It is from this refusal and the dismissal of its Sherman Act § 2 monopolization charge that the Government appealed directly to this Court under the Expediting Act.[6] The Association similarly appealed to review the judgments against it on the Sherman Act § 3 charge and the Clayton Act § 7 charge. We noted probable jurisdiction, 360 U. S. 927, and treat both appeals in this opinion.

The Association's chief argument for antitrust exemption is based on § 2 of the Capper-Volstead Act, which authorizes the Secretary of Agriculture to issue a cease-and-desist order upon a finding that a cooperative has monopolized or restrained trade to such an extent that the price of an agricultural commodity has been "unduly enhanced."[7] The contention is that this provision was

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[6] 32 Stat. 823 (1903), as amended, 15 U. S. C. § 29.

[7] Capper-Volstead Act § 2: "If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof [after a "show cause" hearing he may direct] such association to cease and desist from monopolization or restraint of

intended to give the Secretary of Agriculture primary jurisdiction, and thereby exclude any prosecutions at all under the Sherman Act. This Court unequivocally rejected the same contention in *United States* v. *Borden Co.*, 308 U. S. 188, 206, after full consideration of the same legislative history that we are now asked to review again. We adhere to the reasoning and holding of the *Borden* opinion on this point.

The Association also argues that without regard to § 2 of the Capper-Volstead Act, § 1 of that Act and § 6 of the Clayton Act demonstrate a purpose wholly to exempt agricultural associations from the antitrust laws. In the *Borden* case this Court held that neither § 6 of the Clayton Act nor the Capper-Volstead Act granted immunity from prosecution for the combination of a cooperative and others to restrain trade there charged as a violation of § 1 of the Sherman Act. Although the Court was not confronted with charges under § 2 of the Sherman Act in that case we do not believe that Congress intended to immunize cooperatives engaged in competition-stifling practices from prosecution under the antimonopolization provisions of § 2 of the Sherman Act, while making them responsible for such practices as violations of the anti-trade-restraint provisions of §§ 1 and 3 of that Act. These sections closely overlap, and the same kind of predatory practices may show violations of all.[8] The reasons underlying the Court's holding in the *Borden* case that the cooperative there was not completely exempt under § 1 apply equally well to §§ 2 and 3. The Clayton

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trade. . . ." This order may be enforced by the Attorney General if not obeyed by the association. 42 Stat. 388 (1922), 7 U. S. C. § 292.

[8] *Klor's, Inc.*, v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207, 211; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 226, n. 59; *Standard Oil Co. of New Jersey* v. *United States*, 221 U. S. 1, 59–60.

and Capper-Volstead Acts, construed in the light of their background, do not lend themselves to such an incongruous immunity-distinction between the sections as that urged here.

In the early 1900's, when agricultural cooperatives were growing in effectiveness, there was widespread concern because the mere organization of farmers for mutual help was often considered to be a violation of the antitrust laws. Some state courts had sustained antitrust charges against agricultural cooperatives,[9] and as a result eventually all the States passed Acts authorizing their existence.[10] It was to bar such prosecutions by the Federal Government as to interstate transactions that Congress in 1914 inserted § 6 in the Clayton Act exempting agricultural organizations, along with labor unions, from the antitrust laws. This Court has held that the provisions of that section, set out below,[11] relating to labor

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[9] See, *e. g.*, *Reeves* v. *Decorah Farmers' Cooperative Society*, 160 Iowa 194, 140 N. W. 844 (1913); *Burns* v. *Wray Farmers' Grain Co.*, 65 Colo. 425, 176 P. 487 (1918); *Ford* v. *Chicago Milk Shippers' Assn.*, 155 Ill. 166, 39 N. E. 651 (1895). Contra, *Burley Tobacco Society* v. *Gillaspy*, 51 Ind. App. 583, 100 N. E. 89 (1912). Hanna, Antitrust Immunities of Cooperative Associations, 13 Law and Contemp. Prob. 488–490 (1948); Hanna, Cooperative Associations and the Public, 29 Mich. L. Rev. 148, 163–165 (1930); Jensen, The Bill of Rights of U. S. Cooperative Agriculture, 20 Rocky Mt. L. Rev. 181, 184–189 (1948). See generally Att'y Gen. Nat'l Comm. Antitrust Rep. (1955), 306–313; Note, 57 Mich. L. Rev. 921 (1959).

[10] See statutes collected in Jensen, The Bill of Rights of U. S. Cooperative Agriculture, 20 Rocky Mt. L. Rev. 181, 191, n. 29 (1948); Note, 38 Harv. L. Rev. 87, 89, n. 17 (1924). See *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 556–558 (1902), holding Illinois exemption statute unconstitutional, and see dissent per McKenna, J., at 565, 571; overruled by *Tigner* v. *Texas*, 310 U. S. 141 (1940).

[11] Clayton Act § 6: "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the

unions do not manifest "a congressional purpose wholly to exempt" them from the antitrust laws,[12] and neither the language nor the legislative history of the section indicates a congressional purpose to grant any broader immunity to agricultural cooperatives. The language shows no more than a purpose to allow farmers to act together in cooperative associations without the associations as such being "held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws," as they otherwise might have been. This interpretation is supported by the House and Senate Committee Reports on the bill.[13] Thus, the full effect of § 6 is that a group of farmers acting together as a single entity in an association cannot be restrained "from lawfully carrying out *the legitimate objects* thereof" (emphasis supplied), but the section cannot support the contention that it gives such an entity full freedom to

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purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 38 Stat. 730 (1914), 15 U. S. C. § 17.

[12] *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797, 805; *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 468–469. Cf. *United States* v. *Hutcheson,* 312 U. S. 219.

[13] "In the light of previous decisions of the courts and in view of a possible interpretation of the law which would empower the courts to order the dissolution of such organizations and associations, your committee feels that all doubt should be removed as to the *legality of the existence and operations* of these organizations and associations, and that the law should not be construed in such a way as to authorize their *dissolution* by the courts under the antitrust laws or to forbid the individual members of such associations from carrying out the *legitimate and lawful objects* of their associations." (Emphasis supplied.) H. R. Rep. No. 627, 63d Cong., 2d Sess. 16; S. Rep. No. 698, 63d Cong., 2d Sess. 12.

engage in predatory trade practices at will. See *United States* v. *King,* 229 F. 275, 250 F. 908, 910. Cf. *United States* v. *Borden Co.,* 308 U. S. 188, 203–205.

The Capper-Volstead Act of 1922 extended § 6 of the Clayton Act exemption to capital stock agricultural cooperatives which had not previously been covered by that section.[14] Section 1 of the Capper-Volstead Act also provided that among "the legitimate objects" of farmer organizations were "collectively processing, preparing for market, handling, and marketing" products through common marketing agencies and the making of "necessary contracts and agreements to effect such purposes." We believe it is reasonably clear from the very language of the Capper-Volstead Act, as it was in § 6 of the Clayton Act, that the general philosophy of both was simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities. As the House Report on the Capper-Volstead Act said:

> "Instead of granting a class privilege, it aims to equalize existing privileges by changing the law applicable to the ordinary business corporations so the farmers can take advantage of it." [15]

This indicates a purpose to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperative will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws. It does not suggest

[14] Some Congressmen opposed § 6 of the Clayton Act because it did not include agricultural associations with capital stock. "Under the provisions of section 7 [now § 6] of this bill farmers' organizations with capital stock, organized for profit, would be left subject to the provisions of the Sherman antitrust law." H. R. Rep. No. 627, Pt. 4, 63d Cong., 2d Sess. 4. And see *id.,* Pt. 3, 10.

[15] H. R. Rep. No. 24, 67th Cong., 1st Sess. 2.

a congressional desire to vest cooperatives with unrestricted power to restrain trade or to achieve monopoly by preying on independent producers, processors or dealers intent on carrying on their own businesses in their own legitimate way. In the Senate hearings on the Capper-Volstead Act the Secretary of Agriculture, who was given a large measure of authority under this Act, and the Solicitor of his Department, testified that the Act would not authorize cooperatives to engage in predatory practices in violation of the Sherman Act.[16] And the House Committee Report assured the Congress that:

> "In the event that associations authorized by this bill shall do anything forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by that law." [17]

Although contrary inferences could be drawn from some parts of the legislative history, we are satisfied that the part of the House Committee Report just quoted correctly interpreted the Capper-Volstead Act, and that the Act did not leave cooperatives free to engage in practices against other persons in order to monopolize trade, or restrain and suppress competition with the cooperative.

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[16] The Solicitor of the Department of Agriculture testified that it was his "opinion that if the farmers want to create monopolies or want to engage in unfair practices in commerce, this bill certainly would not give them the right to do it, and they would have to get another bill. . . . [T]hese organizations would not be allowed to adopt any illegal means or methods of conducting their business," and if they "engaged in some practice that prevented other people from selling their milk . . . they would be subject to the antitrust laws. . . . It does not say . . . that they may adopt any unfair methods of competition." The Secretary of Agriculture testified to the same effect. Hearings before a Subcommittee of the Senate Judiciary Committee on H. R. 2373, 67th Cong., 1st Sess. 203, 204, 205.

[17] *Op. cit., supra,* note 15, at 3.

Therefore, we turn now to a consideration of the District Court's judgments in this case.

Sherman Act § 2 Dismissal.—The complaint charging monopolization alleged that the Association had "[t]hreatened and undertaken diverse actions to induce or compel dealers to purchase milk from the defendant [Association], and induced and assisted others to acquire dealer outlets" which were not purchasing milk from the Association. It also alleged that the Association "[e]xcluded, eliminated, and attempted to eliminate others, including producers and producers' agricultural cooperative associations not affiliated with defendant, from supplying milk to dealers." Supporting this charge the statement of particulars listed a number of instances in which the Association attempted to interfere with truck shipments of nonmembers' milk, and an attempt during 1939–1942 to induce a Washington dairy to switch its non-Association producers to the Baltimore market. The statement of particulars also included charges that the Association engaged in a boycott of a feed and farm supply store to compel its owner, who also owned an Alexandria dairy, to purchase milk from the Association, and that it compelled a dairy to buy its milk by using the leverage of that dairy's indebtedness to the Association. We are satisfied that the allegations of the complaint and the statement of particulars, only a part of which we have set out, charge anticompetitive activities which are so far outside the "legitimate objects" of a cooperative that, if proved, they would constitute clear violations of § 2 of the Sherman Act by this Association, a fact, indeed, which the Association does not really dispute if it is subject to liability under this section. It was error for the District Court to dismiss the § 2 charge.

Clayton Act § 7 Judgment.—In 1954 the Association purchased the assets of Embassy Dairy in Washington. The complaint charged that this acquisition constituted

a violation of § 7 of the Clayton Act, which prohibits a corporation engaged in commerce from acquiring all or any part of the assets of another corporation so engaged where the effect may be to tend to create a monopoly or substantially lessen competition. A trial was had before the District Court on this charge and the court found that the motive for and result of the Embassy acquisition was to: eliminate the largest purchaser of non-Association milk in the area; force former Embassy non-Association producers either to join the Association or to ship to Baltimore, thus both bringing more milk to the Association and diverting competing milk to another market; eliminate the Association's prime competitive dealer from government contract milk bidding; and increase the Association's control of the Washington market. On these findings, amply supported by evidence, the District Court could properly conclude, as it did, that the Embassy acquisition tended to create a monopoly or substantially lessen competition, and was therefore a violation of § 7.[18]

This leaves the contention that the acquisition of Embassy was protected by the last paragraph of § 7 of the Clayton Act which in pertinent part provides that:

> "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by . . . the Secretary of Agriculture under any statutory provision vesting such power in such . . . Secretary . . . ." [19]

The Association contends that its purchase of Embassy Dairy was "consummated pursuant to authority given by . . . the Secretary of Agriculture." The trouble with this contention is that there is no "statutory provision" that vests power in the Secretary of Agriculture to approve a transaction and thereby exempt a cooperative

[18] 167 F. Supp. 799, 807–808.

[19] See note 3, *supra*.

from the antitrust laws under the circumstances of this case. While there is a "statutory provision" vesting power in the Secretary of Agriculture to enter into agricultural marketing agreements which "shall be deemed to be lawful" and "not . . . be in violation of any of the antitrust laws of the United States," no such marketing agreement is involved here.[20]

Sherman Act § 3 Judgment.—The complaint charged that the Association, Embassy and others had violated § 3 of the Sherman Act by engaging in a combination and conspiracy to eliminate and foreclose competition with the Association and with dealers purchasing milk from the Association. The District Court, with the consent of the parties, considered and decided this § 3 charge on the evidence offered on the § 7 Clayton Act charge. A crucial element in this charge of concerted action was the Association's purchase of Embassy's assets under a contract containing an agreement by the former owners of Embassy not to compete with the Association in the milk business in the Washington area for 10 years, and to attempt to have all former Embassy producers either join the Association or ship their milk to the Baltimore market. Also, particularly pertinent to the charge of a § 3 combination, was evidence showing a long and spirited business rivalry between the Association and its producers on the one hand and Embassy and its independent producers on the other. The Association had been "unhappy" about Embassy's price cutting and its generally "disruptive" competitive practices that had made Embassy a "thorn in the side of the Association for many years." There was also evidence emphasized by the court in its

[20] Agricultural Adjustment Act, § 8b, as amended, 7 U. S. C. § 608b. *United States* v. *Borden Co.*, 308 U. S. 188, 198–202; *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 560; *United States* v. *Maryland & Virginia Milk Producers' Assn., Inc.*, 90 F. Supp. 681, 688.

Clayton Act § 7 opinion that "the price paid by the Association for the transfer was far in excess of the actual and intrinsic value of the property purchased." 167 F. Supp. 799, 806. After readopting its Clayton Act § 7 findings regarding the anticompetitive motives and results of the Embassy acquisition, see p. 469, *supra,* the District Court made the three following additional findings on the Sherman Act § 3 charge: (1) "that the result of the transaction complained of was a foreclosure of competition," (2) "that the transaction complained of was entered into with the intent and purpose of restraining trade," [21] and (3) "that an unreasonable restraint of trade, violative of the Sherman Act, has resulted from the acquisition of Embassy Dairy by the defendant [Association]." On the basis of its findings and opinion the court then concluded that "the transaction involving the acquisition of Embassy Dairy by the defendant constitutes a violation of Section 3 of the Sherman Act." 168 F. Supp. 880, 881, 882.

The facts found by the court show a classic combination or conspiracy to restrain trade, unless, as the Association contends, "the transaction involving the acquisition of Embassy" upon which the judgment against it was based is protected against Sherman Act prosecutions by the Capper-Volstead Act's provisions that cooperatives can lawfully make "the necessary contracts and agreements" to process, handle and market milk for their producer-members. The Embassy assets the Association acquired are useful in processing and marketing milk, and we may assume, as it is contended, that their purchase simply for business use, without more, often would be permitted and would be lawful under the Capper-Volstead

[21] See *United States* v. *Griffith,* 334 U. S. 100, 105. Cf. *United States* v. *Columbia Steel Co.,* 334 U. S. 495, 525; *United States* v. *Paramount Pictures, Inc.,* 334 U. S. 131, 173.

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Act. But even lawful contracts and business activities may help to make up a pattern of conduct unlawful under the Sherman Act.[22] The contract of purchase here, viewed in the context of all the evidence and findings, was not one made merely to advance the Association's own permissible processing and marketing business; it was entered into by both parties, according to the court's findings as we understand them, because of its usefulness as a weapon to restrain and suppress competitors and competition in the Washington metropolitan area. We hold that the privilege the Capper-Volstead Act grants producers to conduct their affairs collectively does not include a privilege to combine with competitors [23] so as to use a monopoly position as a lever further to suppress competition by and among independent producers and processors.

Adequacy of Relief.—The Government's appeal in this case is directed in part at the relief granted it by the District Court. The judgment requires the Association to "dispose of as a unit and as a going dairy business all [Embassy] assets . . . tangible or intangible, which it acquired on July 26, 1954, and replacements therefor," and to do so in "good faith" to preserve the business in "as good condition as possible." The District Court refused to go further and require the Association to dispose of "all assets used" in the Embassy operation, to prohibit the Association from operating as a dealer in the Washington market for a period after divestiture, to prevent the future acquisition of distributors without prior approval of the Government, and to grant the Government general "visitation rights" as to the Association's records and employees. The District Court was of the view that the Government would either be ade-

[22] See *Schine Chain Theatres, Inc.*, v. *United States*, 334 U. S. 110, 119.

[23] See *United States* v. *Maryland Cooperative Milk Producers, Inc.*, 145 F. Supp. 151.

quately protected as to these matters by the "good faith" requirement or by subsequent orders of the District Court when the occasion necessitated. The formulation of decrees is largely left to the discretion of the trial court, and we see no reason to reject the judgment of the District Court that the relief it granted will be effective in undoing the violation it found in view of the fact that it also retains the cause for future orders, including the right of visitation if deemed appropriate. See *Associated Press* v. *United States,* 326 U. S. 1, 22–23.

Accordingly, the judgment of the District Court finding violations of § 7 of the Clayton Act and § 3 of the Sherman Act is affirmed, and its dismissal of the charges under § 2 of the Sherman Act is reversed and remanded for a trial.

Affirmed in part, reversed and remanded in part.

NOSTRAND ET AL. *v.* LITTLE ET AL.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 342. Argued March 30–31, 1960.—Decided May 2, 1960.

In a declaratory judgment action, a State Supreme Court sustained the validity of a state statute providing for the immediate dismissal of any employee of the State or any of its political subdivisions who refuses to swear that he is not presently a member of the Communist Party or any other subversive organization. In this Court, appellants contended that no hearing is afforded at which an employee can explain or defend his refusal to take the oath and that this violates the Due Process Clause of the Fourteenth Amendment; but the State Supreme Court had not passed on the question whether such a hearing is afforded. *Held:* The judgment is vacated and the case is remanded to the State Supreme Court for further consideration. Pp. 474–476.

53 Wash. 2d 460, 335 P. 2d 10, judgment vacated and case remanded.

Francis Hoague and *Solie M. Ringold* argued the cause and filed a brief for appellants.

Herbert H. Fuller, Chief Assistant Attorney General of Washington, argued the cause for appellees. With him on the brief was *John J. O'Connell,* Attorney General.

PER CURIAM.

Washington requires every public employee to subscribe to an oath that he is "not a subversive person or a member of the Communist Party or any subversive organization, foreign or otherwise, which engages in or advocates, abets, advises, or teaches the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the State of Washington, or of any political subdivision of either of them, by revolution, force or violence; . . ." Refusal so to do "on any

grounds shall be cause for immediate termination of such employee's employment." *

Appellants brought this declaratory judgment action claiming the Act to be violative of due process as well as other provisions of the Federal Constitution. One of the claims is that no hearing is afforded at which the employee can explain or defend his refusal to take the oath. The Supreme Court of Washington did not pass on this point. The Attorney General suggests in his brief that prior to any decision thereon here, "the Supreme Court of Washington should be first given the opportunity to consider and pass upon" it. Moreover, appellants point to a recent case of the Washington Supreme Court, *City of Seattle* v. *Ross,* 54 Wash. 2d 655, 344 P. 2d 216 (1959), as analogous. There that court overturned an ordinance because it established a presumption of guilt without affording the accused an opportunity of a hearing to rebut the same. In the light of these circumstances we cannot say how the Supreme Court of Washington would construe this statute on the hearing point.

The declaratory nature of the case, the fact that the State's statute here under attack supplements previous

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*Chapter 377, Laws of Washington 1955. The pertinent part of that statute reads:

"Sec. 1. Every person and every board, commission, council, department, court or other agency of the state of Washington or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees . . . shall require every employee . . . to state under oath whether or not he or she is a member of the communist party or other subversive organization, and refusal to answer on any grounds shall be cause for immediate termination of such employee's employment . . . ."

The Washington Supreme Court construed this statute as requiring the element of *scienter.*

statutory provisions raising questions concerning the applicability of the latter, and the principle of comity that should be afforded the State with regard to the interpretation of its own laws, bring us to the conclusion that we must remand the case for further consideration. Cf. *Williams* v. *Georgia,* 349 U. S. 375 (1955).

Vacated and remanded.

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

I think the remand in the present case is a useless act. The Supreme Court of Washington has cleared up any ambiguity that could be relevant to the issues posed here.

The present statute says that the refusal to take the oath "on any grounds" shall be cause for "immediate termination" of employment. The Supreme Court of Washington has held that the oath stating whether the employee is or is not a member of a "subversive organization" includes "the element of *scienter.*" * Yet neither knowing members nor innocent members are excused from taking the oath. A hearing "at which the employee can explain or defend his refusal to take the oath," to use the words of the Court, would seem therefore to serve no function under this type of statute. If the present

*The oath which was prepared by the Washington Attorney General and tendered to appellants, however, contains no qualifications. It reads, in material part, as follows:

"(2) That I am not a subversive person or a member of the Communist Party or any subversive organization, foreign or otherwise, which engages in or advocates, abets, advises, or teaches the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the State of Washington, or of any political subdivision of either of them, by revolution, force or violence;

"That this statement is voluntarily made by me, pursuant to the provisions of Chapter 377, Laws of 1955, with full knowledge that the same is subject to the penalties of perjury."

statute is taken as it is written, I think this case is ripe for decision.

City of Seattle v. *Ross,* 54 Wash. 2d 655, 344 P. 2d 216, does not seem to me to be relevant. The ordinance there involved read:

> "It is unlawful for anyone not lawfully authorized to frequent, enter, be in, or be found in, any place where narcotics, narcotic drugs or their derivatives are unlawfully used, kept or disposed of."

The defendant in question entered the premises innocently and lawfully without knowledge of the presence of narcotics. He was convicted, the trial court overruling the defense of innocence.

The Supreme Court of Washington reversed the judgment of conviction, holding the ordinance was unconstitutional as applied. The court said, 54 Wash. 2d, at 658, 344 P. 2d, at 218:

> "*The respondent would have us rewrite the statute to exclude persons upon the premises for lawful purposes, as well as those who are authorized or commissioned to go there. This the court cannot do.* Where the language of a statute is plain, unambiguous, and well understood according to its natural and ordinary sense and meaning, the statute itself furnishes a rule of construction beyond which the court cannot go. Parkhurst v. City of Everett, 51 Wash. 2d 292, 318 P. 2d 327. The trial court had no difficulty in discerning the meaning of the words used in this ordinance. A person 'lawfully authorized,' the court decided and we agree, is a person carrying some express authority to go upon the premises, as a law enforcement officer, narcotic agent, or the like, and not one who goes upon some lawful business but without express authority." (Italics added.)

A hearing under the present statute would obviously be important to a determination of the existence of "scienter" for prosecution of one who took the oath for perjury. But such a hearing is not germane to the question whether under this statute a teacher has the right to refuse to take the oath that is tendered. The command of the statute is clear: refusal to take the oath "on any grounds" is cause for discharge. That command poses the critical issue for us. A remand for a determination of whether there will be a hearing therefore seems to me to be a remand for an irrelevancy in the setting of this case.

COMMUNICATIONS WORKERS OF AMERICA, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 418. Argued April 18, 1960.—Decided May 2, 1960.

The National Labor Relations Board found that, during the course of a strike, petitioner unions had violated § 8 (b) (1) (A) of the National Labor Relations Act by coercing employees of a telephone company in the exercise of their right to refrain from or discontinue participation in the strike, and it entered an order requiring the unions to cease and desist from restraining or coercing employees of the telephone company "or any other employer" in the exercise of rights guaranteed in § 7 of the Act, though it had not found that the unions had engaged in violations against the employees of any employer other than the telephone company. *Held:* The order is modified by striking therefrom the words "or any other employer," and, as so modified, the judgment of the Court of Appeals enforcing the order is affirmed. Pp. 479–481.

266 F. 2d 823, modified and affirmed.

J. R. Goldthwaite, Jr. argued the cause for petitioners. With him on the brief were *Al Philip Kane, Charles V. Koons* and *Thomas S. Adair.*

Dominick L. Manoli argued the cause for respondent. With him on the brief were *Stuart Rothman* and *Herman M. Levy.*

PER CURIAM.

The Board found that the petitioner unions, during the course of a strike, coerced employees of the Ohio Consolidated Telephone Company in the exercise of their right to refrain from or discontinue participation therein, in violation of § 8 (b) (1) (A) of the National Labor Rela-

tions Act.[1] It entered an order requiring the unions to cease and desist "from *in any manner* restraining or coercing employees of Ohio Consolidated Telephone Company *or any other employer* in the exercise of the rights guaranteed in Section 7 of the Act." (Emphasis supplied.) The Court of Appeals enforced the order after deleting the words "in any manner." 266 F. 2d 823. Because of an asserted conflict with the decision of the Court of Appeals for the Fifth Circuit in *Labor Board* v. *Local 926, Int. Union of Operating Engrs.*, 267 F. 2d 418, we brought the case here. 361 U. S. 893. The only challenge here to the order as so amended is to its validity as extended to "any other employer," as well as the telephone company.

Petitioners were not found to have engaged in violations against the employees of any employer other than Ohio Consolidated and we find neither justification nor necessity for extending the coverage of the order generally by the inclusion therein of the phrase "any other employer." "It would seem . . . clear that the authority conferred on the Board to restrain the practice which it has found . . . to have [been] committed is not an authority to restrain

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[1] That section reads in pertinent part:

SEC. 8 (b). "It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . . ." 61 Stat. 141.

Section 7 provides:

"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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)." 61 Stat. 140.

generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct." *Labor Board* v. *Express Pub. Co.*, 312 U. S. 426, 433 (1941). See also *May Stores Co.* v. *Labor Board*, 326 U. S. 376 (1945). That loaned employees of other affiliated companies were included within the ambit of petitioners' coercive acts plainly does not evidence such a generalized scheme against all telephone employers, for it was only the employment of such employees at the struck plant that brought them within the scope of the unions' activities.[2] We therefore conclude that the inclusion in the order of the words "or any other employer" was unwarranted and the order is modified by striking the same therefrom. As so modified, the judgment is affirmed.

Modified and affirmed.

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[2] In the Court of Appeals, the Board sought to justify the breadth of its order by relying on two compromise settlement agreements involving activities of the International and other locals against other employers. Neither the opinion of the Board nor that of the Court of Appeals in this case indicates that any reliance was placed on such agreements, and in this Court the Board disclaims any such reliance.

UNITED STATES *v.* REPUBLIC STEEL CORP. ET AL.

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

No. 56. Argued January 12–13, 1960.—
Decided May 16, 1960.

In a suit by the United States, the District Court found that respondents, who operate mills for the production of iron and related products, had, without first obtaining permits from the Chief of Engineers of the Army providing conditions for their removal, discharged through sewers into a navigable river of the United States industrial waste solids which, on settling out, had substantially reduced the depth of the channel; and it enjoined them from continuing to do so and ordered them to restore the depth of the channel by removing the deposits. *Held:* On the findings of the District Court, the deposit of industrial solids in the river by respondents created an "obstruction" to the "navigable capacity" of the river forbidden by § 10 of the Rivers and Harbors Act of 1899; they were discharges forbidden by, and not exempt under, § 13; and the District Court was authorized to grant injunctive relief. Pp. 483–493.

(a) The discharge into a navigable river of industrial solids which reduce the depth of the channel creates an "obstruction" to the "navigable capacity" of the river within the meaning of § 10 of the Act. Pp. 486–489.

(b) The discharge of such industrial solids suspended in water flowing into a river through sewers is a discharge forbidden by § 13 and is not exempted as "refuse matter . . . flowing from . . . sewers and passing therefrom in a liquid state." Pp. 489–491.

(c) The District Court was authorized to grant injunctive relief in a suit by the United States. Pp. 491–492.

264 F. 2d 289, reversed.

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

Raymond T. Jackson argued the cause for Interlake Iron Corporation, respondent. With him on the brief were *Warren Daane* and *Henry E. Seyfarth.*

Paul R. Conaghan argued the cause and filed a brief for Republic Steel Corporation, respondent.

Peter A. Dammann and *W. S. Bodman* filed a brief for International Harvester Company, respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a suit by the United States to enjoin respondent companies from depositing industrial solids in the Calumet River (which flows out of Lake Michigan and connects eventually with the Mississippi) without first obtaining a permit from the Chief of Engineers of the Army providing conditions for the removal of the deposits and to order and direct them to restore the depth of the channel to 21 feet by removing portions of existing deposits.

The District Court found that the Calumet was used by vessels requiring a 21-foot draft, and that that depth has been maintained by the Corps of Engineers. Respondents, who operate mills on the banks of the river for the production of iron and related products, use large quantities of the water from the river, returning it through numerous sewers. The processes they use create industrial waste containing various solids. A substantial quantity of these solids is recovered in settling basins but, according to the findings, many fine particles are discharged into the river and they flocculate into larger units and are deposited in the river bottom. Soundings show a progressive decrease in the depth of the river in the vicinity of respondents' mills. But respondents have refused, since 1951, the demand of the Corps of Engineers

that they dredge that portion of the river. The shoaling conditions being created in the vicinity of these plants were found by the District Court to be created by the waste discharged from the mills of respondents.[1] This shoaling was found to have reduced the depth of the channel to 17 feet in some places and to 12 feet in others. The District Court made findings which credited respondents with 81.5% of the waste deposited in the channel, and it allocated that in various proportions among the three respondents. See 155 F. Supp. 442.

The Court of Appeals did not review the sufficiency of evidence. It dealt only with questions of law and directed that the complaint be dismissed. 264 F. 2d 289. The case is here on a petition for a writ of certiorari which we granted because of the public importance of the questions tendered. 359 U. S. 1010.

Section 10 of the Rivers and Harbors Act of 1899, 30 Stat. 1121, 1151, as amended, 33 U. S. C. § 403, provides in part: [2]

> "That the creation of *any obstruction* not affirmatively authorized by Congress, *to the navigable capacity* of any of the waters of the United States is hereby prohibited; . . ." (Italics added.)

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[1] A House Report contains similar animadversions. H. R. Rep. No. 1345, 83d Cong., 2d Sess., p. 10.

[2] Section 10 provides in full:

"That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any

The section goes on to outlaw various structures "in" any navigable waters except those initiated by plans recommended by the Chief of Engineers and authorized by the Secretary of the Army. Section 10 then states that "it shall not be lawful to excavate or fill, or in any manner to alter or modify the . . . capacity of . . . the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

A criminal penalty is added by § 12; and § 12 further provides that the United States may sue to have "any structures or parts of structures erected" in violation of the Act removed. Section 17 directs the Department of Justice to "conduct the legal proceedings necessary to enforce" the provisions of the Act, including § 10.

Section 13 forbids the discharge of "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States"; but § 13 grants authority to the Secretary of the Army to permit such deposits under conditions prescribed by him.

Our conclusions are that the industrial deposits placed by respondents in the Calumet have, on the findings of the District Court, created an "obstruction" within the meaning of § 10 of the Act and are discharges not exempt under § 13. We also conclude that the District Court was authorized to grant the relief.

The history of federal control over obstructions to the navigable capacity of our rivers and harbors goes back

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port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

to *Willamette Iron Bridge Co.* v. *Hatch,* 125 U. S. 1, 8, where the Court held "there is no common law of the United States" which prohibits "obstructions" in our navigable rivers. Congress acted promptly, forbidding by § 10 of the Rivers and Harbors Act of 1890, 26 Stat. 426, 454, "the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity" of any waters of the United States. The 1899 Act followed a report [3] to Congress by the Secretary of War, which at the direction of Congress, 29 Stat. 234, contained a compilation and revision of existing laws relating to navigable waters. The 1899 Act was said to contain "no essential changes in the existing law." [4] Certainly so far as outlawry of any "obstructions" in navigable rivers is concerned there was no change relevant to our present problem.

It is argued that "obstruction" means some kind of structure. The design of § 10 should be enough to refute that argument, since the ban of "any obstruction," unless approved by Congress, appears in the first part of § 10, followed by a semicolon and another provision which bans various kinds of structures unless authorized by the Secretary of the Army.

The reach of § 10 seems plain. Certain types of structures, enumerated in the second clause, may not be erected "in" any navigable river without approval by the Secretary of the Army. Nor may excavations or fills, described in the third clause, that alter or modify "the course, location, condition, or capacity of" a navigable river be made unless "the work" has been approved by the Secretary of the Army. There is, apart from these par-

[3] H. R. Doc. No. 293, 54th Cong., 2d Sess.

[4] 32 Cong. Rec., Pt. 3, p. 2923, which reports the statement by the House Conferees. For the discussion in the Senate see 32 Cong. Rec. 2296–2298.

ticularized invasions of navigable rivers, which the Secretary of the Army may approve, the generalized first clause which prohibits "the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity" of such rivers. We can only conclude that Congress planned to ban any type of "obstruction," not merely those specifically made subject to approval by the Secretary of the Army. It seems, moreover, that the first clause being specifically aimed at "navigable capacity" serves an end that may at times be broader than those served by the other clauses. Some structures mentioned in the second clause may only deter movements in commerce, falling short of adversely affecting navigable capacity. And navigable capacity of a waterway may conceivably be affected by means other than the excavations and fills mentioned in the third clause. We would need to strain hard to conclude that the only obstructions banned by § 10 are those enumerated in the second and third clauses. In short, the first clause is aimed at protecting "navigable capacity," though it is adversely affected in ways other than those specified in the other clauses.

There is an argument that § 10 of the 1890 Act, 26 Stat. 454, which was the predecessor of the section with which we are now concerned, used the words "any obstruction" in the narrow sense, embracing only the prior enumeration of obstructions in the preceding sections of the Act. The argument is a labored one which we do not stop to refute step by step. It is unnecessary to do so, for the Court in *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, 708, decided not long after the 1890 Act became effective, gave the concept of "obstruction," as used in § 10, a broad sweep: "It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything, wherever done

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or however done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition." This broad construction given § 10 of the 1890 Act was carried over to § 10 of the 1899 Act in *Sanitary District* v. *United States,* 266 U. S. 405, 429, the Court citing *United States* v. *Rio Grande Irrigation Co., supra,* with approval and saying that § 10 of the 1899 Act was "a broad expression of policy in unmistakable terms, advancing upon" § 10 of the 1890 Act.

The decision in *Sanitary District* v. *United States, supra,* seems to us to be decisive. There the Court affirmed a decree enjoining the diversion of water from Lake Michigan through this same river. Mr. Justice Holmes, writing for the Court, did not read § 10 narrowly but in the spirit in which Congress moved to fill the gap created by *Willamette Iron Bridge Co.* v. *Hatch, supra.* That which affects the water level may, he said, amount to an "obstruction" within the meaning of § 10:

> "Evidence is sufficient, if evidence is necessary, to show that a withdrawal of water on the scale directed by the statute of Illinois threatens and will affect the level of the Lakes, and that is a matter which cannot be done without the consent of the United States, even were there no international covenant in the case." *Sanitary District* v. *United States, supra,* 426.
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> . . . . . .
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> "There is neither reason nor opportunity for a construction that would not cover the present case. As now applied it concerns a change in the condition of the Lakes and the Chicago River, admitted to be navigable, and, if that be necessary, an obstruction to their navigable capacity . . . ." *Id.,* at 429.

It is said that that case is distinguishable because it involved the erections of "structures," prohibited by the second clause of § 10. The "structures" erected, however, were not "in" navigable waters. The Sanitary District had reversed the flow of the Chicago River, "formerly a little stream flowing into Lake Michigan," 266 U. S., at 424, and used it as a sluiceway to draw down the waters of the Great Lakes to a dangerous degree. Moreover, the Court did not rely on the second clause of § 10 but on the first and the third. *Id.*, at 428. The decree in that case did not run against any "structure"; it merely enjoined the diversion of water from Lake Michigan in excess of 250,000 cubic feet per minute.

That broad construction of § 10 was reaffirmed in *Wisconsin* v. *Illinois*, 278 U. S. 367, 414, another case involving the reduction of the water level of the Great Lakes by means of withdrawals through the Chicago River. And the Court, speaking through Chief Justice Taft (*id.*, at 406, 414, 417), made clear that it adhered to what Mr. Justice Holmes had earlier said, "This withdrawal is prohibited by Congress, except so far as it may be authorized by the Secretary of War." *Sanitary District* v. *United States, supra,* at 429.

The teaching of those cases is that the term "obstruction" as used in § 10 is broad enough to include diminution of the navigable capacity of a waterway by means not included in the second or third clauses. In the *Sanitary District* case it was caused by lowering the water level. Here it is caused by clogging the channel with deposits of inorganic solids. Each affected the navigable "capacity" of the river. The concept of "obstruction" which was broad enough to include the former seems to us plainly adequate to include the latter.

As noted, § 13 bans the discharge in any navigable water of "any refuse matter of any kind or description what-

ever other than that flowing from streets and sewers and passing therefrom in a liquid state." The materials carried here are "industrial solids," as the District Court found. The particles creating the present obstruction were in suspension, not in solution. Articles in suspension, such as organic matter in sewage, may undergo chemical change. Others settle out. All matter in suspension is not saved by the exception clause in § 13. Refuse flowing from "sewers" in a "liquid state" means to us "sewage." Any doubts are resolved by a consistent administrative construction which refused to give immunity to industrial wastes resulting in the deposit of solids in the very river in question.[5] The fact that

[5] We have a rather precise history of administrative construction of the 1899 Act as it applies to the deposit of solids in the Calumet River by mills located on it. The Army Engineers, beginning in 1909, warned a steel company of the accumulation of solids from industrial wastes being poured into the Calumet. In 1918, 1920, 1924, 1927, 1928, 1931, and 1937 the District Engineer required these deposits to be removed. An improvement in the Calumet was authorized by the Act of August 30, 1935, 49 Stat. 1028, 1036, on the basis of a report from the Army Engineers. See H. R. Doc. No. 494, 72d Cong., 2d Sess. The costs were computed on the basis that shoals created by the deposit of solids would be removed by the company creating them. The report states, at p. 24, "It is assumed, in this estimate, that the shoal adjacent to the outer bulkhead of the Illinois Steel Co. will be removed by that company to the depth of 21 feet originally provided by the United States."

This long-standing administrative construction, while not conclusive of course, is entitled to "great weight" even though it arose out of cases "settled by consent rather than in litigation." *Federal Trade Comm'n* v. *Mandel Brothers, Inc.*, 359 U. S. 385, 391.

For references in public documents to this administrative construction see H. R. Doc. No. 237, 63d Cong., 1st Sess., pp. 77, 160; S. Rep. No. 66, 68th Cong., 1st Sess., p. 2; H. R. Doc. No. 494, 72d Cong., 2d Sess., pp. 24, 34; S. Rep. No. 2225, 74th Cong., 2d Sess., p. 2; Hearings, Civil Functions, Department of the Army Appropriations for 1955, Subcommittee of House Committee on

discharges from streets and sewers may contain some articles in suspension that settle out and potentially impair navigability [6] is no reason for us to enlarge the group to include these industrial discharges. We follow the line Congress has drawn and cannot accept the invitation to broaden the exception in § 13 because other matters "in a liquid state" might logically have been treated as favorably as sewage is treated. We read the 1899 Act charitably in light of the purpose to be served. The philosophy of the statement of Mr. Justice Holmes in *New Jersey* v. *New York,* 283 U. S. 336, 342, that "A river is more than an amenity, it is a treasure," forbids a narrow, cramped reading either of § 13 or of § 10.

The Court of Appeals concluded that even if violations were shown, no relief by injunction is permitted. Yet § 17 provides, as we have seen, that "the Department of Justice shall conduct the legal proceedings necessary to enforce" the provisions of the Act, including § 10. It is true that § 12 in specifically providing for relief by injunction refers only to the removal of "structures" erected in violation of the Act (see *United States* v. *Bigan,* 274 F. 2d 729), while § 10 of the 1890 Act provided for the enjoining of any "obstruction." Here again *Sanitary*

Appropriations, 83d Cong., 2d Sess., Pt. 1, pp. 695–696; H. R. Rep. No. 1345, 83d Cong., 2d Sess., p. 10.

[6] H. R. Doc. No. 417, 69th Cong., 1st Sess., p. 9, states:

"In some instances the organic solid matter in sewage and wastes causes temporary shoaling in the vicinity of the point of discharge, but in most cases of this kind nature eventually decomposes this organic matter and rectifies the condition. In a few instances, where large quantities of sewage are discharged into sluggish and restricted waters, overpollution results and the oxygen content remains insufficient to enable nature to break up the solids. In such cases permanent shoaling in the vicinity of the point of discharge results and dredging must be resorted to. As a rule such dredging is well attended to by municipal authorities."

District v. *United States, supra,* is answer enough. It was argued in that case that relief by injunction was restricted to removal of "structures." See 266 U. S., at 408. But the Court replied, "The Attorney General by virtue of his office may bring this proceeding and no statute is necessary to authorize the suit." [7] *Id.*, at 426. The authority cited was *United States* v. *San Jacinto Tin Co.,* 125 U. S. 273, where a suit was brought by the Attorney General to set aside a fraudulent patent to public lands. The Court held that the Attorney General could bring suit, even though Congress had not given specific authority. The test was whether the United States had an interest to protect or defend. Section 10 of the present Act defines the interest of the United States which the injunction serves. Protection of the water level of the Great Lakes through injunctive relief, *Sanitary District* v. *United States, supra,* is precedent enough for ordering that the navigable capacity of the Calumet River be restored. The void which was left by *Willamette Iron Bridge Co.* v. *Hatch, supra,* need not be filled by detailed codes which provide for every contingency. Congress has legislated and made its purpose clear; it has provided enough federal law in § 10 from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation. This is for us the meaning of *Sanitary District* v. *United States, supra,* on this procedural point.[8]

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[7] The "main ground" advanced was the interest of the United States in removing obstructions to commerce. 266 U. S., at 426. Another ground was a treaty with Great Britain. *Id.*, at 425–426. But these were alternative grounds, the treaty rights being treated as lesser or subordinate interests. *Id.*, at 426.

[8] See Comment, Substantive and Remedial Problems in Preventing Interferences with Navigation: The Republic Steel Case, 59 Col. L. Rev. 1065, 1079.

Since the Court of Appeals dealt only with these questions of law and not with subsidiary questions raised by the appeal, we remand the case to it for proceedings in conformity with this opinion.

Reversed.

Memorandum of MR. JUSTICE FRANKFURTER, dissenting.

In the absence of comprehensive legislation by Congress dealing with the matter, I would go a long way to sustain the power of the United States, as *parens patriae,* to enjoin a nuisance that seriously obstructs navigation. But that road to judicial relief in this case is, in light of *Willamette Iron Bridge Co.* v. *Hatch,* 125 U. S. 1, barred by the Rivers and Harbors Act of 1899. For the reasons set forth by my Brother HARLAN, the structure and history of that Act, reflected by the very particularities of its provisions, make it unavailable for the situation now before the Court.

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

In my opinion this decision cannot be reconciled with the terms of the Rivers and Harbors Act of 1899, apart from which the Court, as I understand its opinion, does not suggest the United States may prevail in this case. Far from presenting the clear and simple statutory scheme depicted by the Court, the provisions of the governing statute are complex and their legislative history tortuous. My disagreement with the Court rests on four grounds: (1) that the term "any obstruction" in § 10 of the Act was not used at large, so to speak, but refers only to the particular kinds of obstructions specifically enumerated in the Act; (2) that the discharge of this liquid matter from

the respondents' mills does not fall within any of the Act's specific proscriptions; (3) that in any event injunctive relief was not authorized; and (4) that *Sanitary District* v. *United States,* 266 U. S. 405, does not militate against any of these conclusions.

Five sections of the Act are relevant to this case:

(1) Section 9, 33 U. S. C. § 401, makes it unlawful to construct any bridge, dam, dike, or causeway without the consent of Congress and the approval of the Chief of Engineers and the Secretary of War.[1]

(2) Section 10, 33 U. S. C. § 403, contains three clauses: *Clause 1* provides "That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited." *Clause 2* makes it unlawful to build any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structure

[1] Section 9 provides in full as follows:

"That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War."

without complying with certain conditions. *Clause 3* makes it unlawful "to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of . . . the channel of any navigable water" without the authorization of the Secretary of War.[2]

(3) Section 12, 33 U. S. C. § 406, provides that violation of § 9, § 10, or § 11 (the last[3] not being material here) constitutes a misdemeanor, and that removal of any "structures or parts of structures" erected in violation of said sections may be enforced by injunction.[4]

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[2] Section 10 provides in full as follows:

"That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

[3] Section 11 deals with the power of the Secretary of War to establish harbor lines.

[4] Section 12 provides in full as follows:

"That every person and every corporation that shall violate any of the provisions of sections nine, ten, and eleven of this Act, or any rule or regulation made by the Secretary of War in pursuance of the provisions of the said section fourteen, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars nor less than five

(4) Section 13, 33 U. S. C. § 407, makes it unlawful to place in navigable waters any refuse of any kind other than "that flowing from streets and sewers and passing therefrom in a liquid state . . . ." [5]

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hundred dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any circuit court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney-General of the United States."

[5] Section 13 provides in full as follows:

"That it shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided*, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further*, That the Secretary of War, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful."

(5) Section 16, 33 U. S. C. § 411, makes violation of § 13, § 14, or § 15 (the latter two not being involved here) [6] a misdemeanor. No injunctive relief is provided for.[7]

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[6] Section 14 deals with unauthorized use and occupation of federal navigational installations. Section 15 deals with floating obstructions and sunken vessels.

[7] Section 16 provides in full as follows:

"That every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections thirteen, fourteen, and fifteen of this Act shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars nor less than five hundred dollars, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction. And any and every master, pilot, and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel who shall knowingly engage in towing any scow, boat, or vessel loaded with any material specified in section thirteen of this Act to any point or place of deposit or discharge in any harbor or navigable water, elsewhere than within the limits defined and permitted by the Secretary of War, or who shall willfully injure or destroy any work of the United States contemplated in section fourteen of this Act, or who shall willfully obstruct the channel of any waterway in the manner contemplated in section fifteen of this Act, shall be deemed guilty of a violation of this Act, and shall upon conviction be punished as hereinbefore provided in this section, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. And any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections thirteen, fourteen, and fifteen of this Act shall be liable for the pecuniary penalties specified in this section, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft, which latter sum shall be placed to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred, and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof."

The Court holds that respondents have violated §§ 10 and 13, and that injunctive relief is authorized under the present circumstances. A closer examination of the Act and its history than that undertaken in the Court's opinion, in my view, refutes both conclusions.

I.

The Court relies primarily on the first clause of § 10, which provides:

> "That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited . . . ."

If that clause stood in isolation, it might bear the broad meaning which the Court now attributes to it. However, it is but one part of an involved and comprehensive statute which has emerged from a long legislative course. The bare words of the clause cannot be considered apart from that context.

Two circumstances apparent on the face of the statute immediately raise a doubt whether the term "any obstruction" can be taken in its fullest literal sense. *First,* the clause is surrounded in the statute by an exhaustive enumeration of particular types of obstructions and cognate activities, that is, "bridge, dam, dike, or causeway" (§ 9); "wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures" (§ 10, cl. 2); "excavate," "fill," "alter," "modify" (§ 10, cl. 3); and "any refuse matter of any kind" (§ 13). If the "any obstruction" clause were intended to cover a category of obstructions not included within any of the specific enumerations, it is strange that it should be inserted at the beginning of a section which lists several specific obstructions and which is itself both preceded and followed by other sections making similar enumerations. *Second,* the lawful creation of

the structural obstructions mentioned in § 9 requires the approval of Congress, while those listed in clauses 2 and 3 of § 10 and in § 13 can be lawfully accomplished with only the authorization of the Secretary of War. Yet clause 1 of § 10 says that "*any* obstruction" must be affirmatively authorized by Congress. If the clause is taken in its literal sense, the condition of congressional approval therein prescribed is difficult to square with the condition of approval by the Secretary of War prescribed as to many of the obstructions specifically enumerated.[8] Because of the doubts raised by these considerations, it becomes necessary to explore the derivation of the 1899 Act. When this is done, I believe it will be found that "any obstruction" will not bear the broad meaning given it by the Court, but that it must be taken as embracing only the particular obstructions specified in the statute.

The provisions of the 1899 Act dealing with obstructions derive ultimately from a proposal made by the Chief of Engineers and transmitted to Congress by the Secretary of War in 1877.[9] A bill based on this recommendation was three times introduced in Congress,[10] and came to be known as the Dolph bill. It was reported favorably all three times, and was passed by the Senate twice.[11] It enumerated the proscribed obstructions in terms virtually

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[8] It is to be noted that if § 10, cl. 1, is construed to cover obstructions not within any of the Act's specific prohibitions, and if the respondents' practices are held to fall only within § 10, cl. 1, then the relief granted by the District Court would not in any event be proper, since its decree required only the approval of the Chief of Engineers of the Department of the Army. 155 F. Supp. 442, 453.

[9] The letters are reprinted in S. Rep. No. 224, 50th Cong., 1st Sess.

[10] H. R. 2007, 49th Cong., 1st Sess.; S. 27, 50th Cong., 1st Sess.; S. Rep. No. 224, 50th Cong., 1st Sess.; H. R. Rep. No. 2760, 50th Cong., 1st Sess.; S. 88 and H. R. 394, 51st Cong., 1st Sess.; H. R. Rep. No. 1635, 51st Cong., 1st Sess.; H. R. Rep. No. 477, 51st Cong., 1st Sess.

[11] 19 Cong. Rec. 2338, 21 Cong. Rec. 1319.

identical to those contained in the 1899 Act, *but did not contain the "any obstruction" clause found in § 10 of that Act.*

After the Senate had for the second time passed the Dolph bill but before the House had acted on it, the annual rivers and harbors appropriation bill, which was to become the Rivers and Harbors Act of 1890,[12] came up for consideration on the floor of Congress. The bill already contained a set of provisions dealing with the power of the Secretary of War to order the alteration or removal of bridges which obstructed navigation. During the Senate debate on those provisions, Senator Edmunds of Vermont offered as an amendment an additional section which provided as follows:

> "Every obstruction, not affirmatively authorized by law, to the navigable capacity of any waters in respect of which the United States has jurisdiction is hereby prohibited. . . . Every person and every corporation which shall be guilty of creating or continuing any such obstruction in this section mentioned shall be deemed guilty of a misdemeanor . . . . The creating or continuing of any obstruction in this section mentioned may be prevented by the injunction of any circuit court . . . ." [13]

Subsequently, the Dolph bill was offered *in toto* as a further amendment.[14] The Senate accepted the Edmunds amendment and passed the appropriation bill as so amended,[15] but it refused to add the Dolph bill.[16] In conference, however, it was decided to accept both by combining them. The penal section of the Dolph bill, which

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[12] 26 Stat. 426.

[13] 21 Cong. Rec. 8607.

[14] 21 Cong. Rec. 8684.

[15] 21 Cong. Rec. 8608, 8691.

[16] 21 Cong. Rec. 8685.

followed all of the sections enumerating particular obstructions, had provided simply that every offender against any provision of the Act should forfeit a $250 penalty and be liable for actual damages. The conferees deleted that entire section and replaced it with an adaptation of the Edmunds amendment.[17] The latter, which was enacted into law as § 10 of the Rivers and Harbors Act of 1890, read as follows:

> "That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. . . . Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor . . . [T]he creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court . . . ." [18]

Thus, the Edmunds amendment, in which the "any obstruction" clause had first appeared, and which carried both penal and injunctive sanctions, was substituted for a section which theretofore had contained purely penal provisions and had followed an exhaustive enumeration of those particular obstructions to which the penalties applied. It is to be further noted that while the original Edmunds amendment had made its remedial provisions applicable to any person creating "any such obstruction *in this section* mentioned," Congress, in incorporating the Edmunds amendment into the Dolph bill, made such provisions applicable to any person creating "any such unlaw-

[17] 21 Cong. Rec. 9558.

[18] 26 Stat. 454.

ful obstruction *in this act* mentioned, or who shall violate the provisions of the last four preceding sections of this act . . . ." (Emphasis added.) In both instances, the word "such" clearly referred back to the initial sentence of the section prohibiting "any obstruction," the only place in either bill where that term appears. Whatever the meaning of "any obstruction" may have been in the original Edmunds amendment, Congress made it clear in § 10 of the 1890 Act that "such" obstruction meant those obstructions "in this act mentioned." To consider "any obstruction" in that section as embracing something more than the kinds of obstructions specifically enumerated in the Act would lead to the conclusion that the remedial provisions of § 10 did not cover all the obstructions proscribed by the first sentence of the section.[19] Definition

[19] The scanty legislative history in connection with the Edmunds amendment does not militate against this view. It was reported from the Senate Judiciary Committee with no explanation three days before the floor consideration of the appropriation bill. See 21 Cong. Rec. 8603. It was first discussed in the context of its effect on the problem of bridges and its relation to the provisions already in the appropriation bill dealing with the Secretary of War's power over bridges. *Id.*, 8603–8605. Subsequent discussion centered on the meaning of the term "not affirmatively authorized by law." *Id.*, 8607.

Two isolated statements which might be read to attribute a catch-all meaning to "any obstruction" are inconclusive. Senator Edmunds referred to an example which had been brought to the Judiciary Committee's attention, involving a railroad company which had been tumbling rocks into a navigable river. *Ibid.* However, it seems that even the specific "refuse" provisions of the Dolph bill would have covered such a practice, and in any event, discussion of the Edmunds amendment out of the context of the Dolph bill can hardly be significant as to the scope of the "any obstruction" clause with relation to the Dolph bill. Senator Carlisle referred to the Edmunds amendment as covering not only bridges, but "all obstructions of every kind whatsoever." *Id.*, 8689. Apart from the fact that this statement was made prior to the adaptation of the

of an additional set of offenders—those "who shall violate the provisions of the last four preceding sections of this act"—was made necessary by the fact that the Dolph bill contained prohibitions of several practices which might not amount to obstructions.

From this background, I think the reasonable conclusion to be drawn is that "any obstruction" in § 10 of the 1890 Act referred only to those obstructions enumerated in the preceding sections of the Act, and not to obstruction in the catchall sense.[20]

Edmunds amendment for purposes of incorporation into the Dolph bill, Senator Carlisle's own subsequent proposal to eliminate the Edmunds amendment but to incorporate its provisions for judicial proceedings into the section of the bill dealing with bridges, thereby "harmonizing" the two provisions, *ibid.*, casts grave doubt on whether the Senator himself believed that the Edmunds amendment covered any obstructions other than those created by bridges.

[20] The Court asserts that a contrary construction of § 10 of the 1890 Act was established by *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690. The defendant there attempted to build a dam across the Rio Grande River in New Mexico. The building of dams was specifically prohibited by § 7 of the 1890 Act. The defendant, however, contended that the Act did not apply because the Rio Grande was nonnavigable at the point where the dam was to be built. The very passage of which the Court quotes only a part deals simply with that contention:

"It is urged that the true construction of this act limits its applicability to obstructions in the navigable portion of a navigable stream, and that as it appears that although the Rio Grande may be navigable for a certain distance above its mouth, it is not navigable in the Territory of New Mexico, this statute has no applicability. The language is general, and must be given full scope. It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything, wherever done or however done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition. . . . [I]t would be to improperly ignore the scope of this language to limit it

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The Rivers and Harbors Act of 1899, with which the present case is directly concerned, came about as a result of Congress' direction to the Secretary of War in 1896 to prepare a compilation and revision of existing general laws relating to navigable waters.[21] The Secretary's report purported only to codify existing law with no substantive changes,[22] and Senator Frye, the Chairman of the Commerce Committee, and the conferees on the bill as ultimately passed, confirmed that the legislation was to have no new substantive effect.[23] This indeed is recognized by the Court. As part of the codification, Congress took the first sentence of § 10 of the 1890 Act and inserted it as the first sentence of one of the provisions enumerating several specific obstructions which then became § 10 of the 1899 Act.[24] There is nothing to indicate that in so doing, Congress departed from its announced intention to leave the substance of the Act unchanged. Thus the "any obstruction" language of the first sentence of new § 10 was, as it had been in the old § 10, simply declaratory of all the obstructions specifically proscribed throughout the Act, whether of a structural or nonstructural nature.[25]

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to the acts done within the very limits of navigation of a navigable stream." *Id.*, at 708.

The Court was obviously not remotely concerned with the issue in the present case, *i. e.*, whether the first clause of § 10 covers obstructions not enumerated in the remainder of the Act, since the dam there involved was specifically covered by § 7.

[21] 29 Stat. 234.

[22] H. R. Doc. No. 293, 54th Cong., 2d Sess.

[23] 32 Cong. Rec. 2296–2297, 2923.

[24] The identity of the numbers of the respective sections in the new and old Acts is purely coincidental.

[25] This construction of the first clause of § 10 seems to have been assumed, though not expressly passed on, by this Court in *Wisconsin* v. *Illinois*, 278 U. S. 367, 412–413. The phrase "not affirmatively authorized by law" was changed to "not affirmatively authorized by Congress" simply to overcome the holding of a lower court

II.

I cannot agree that respondents' practices are prohibited by any of the specific provisions of the Act of which § 10, cl. 1, is declaratory. The Court seems to rely in part on § 10, cl. 3, on the theory that the discharge from respondents' plants "alter or modify the . . . capacity" of the Calumet River. But again, this provision must be read in context. It is evident that in §§ 9 and 10 Congress was dealing with obstructions which are *constructed,* in a conventional sense, reserving for § 13 the treatment of discharges of refuse which may eventually create obstructions. The structure of § 10, cl. 3, itself confirms this. The basic prohibition of the clause relates to excavations and fills, both of which represent construction in the ordinary sense of that term. The immediately following phrase, "or in any manner to alter or modify the . . . capacity . . . of the channel of any navigable water," must be read as referring to the same general class of things as the basic prohibition of the clause. If there could be any doubt about the clause's frame of reference, it is dispelled by the concluding words: "unless the *work* has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same." (Emphasis added.)

Finally, I do not believe that § 13 can be construed to proscribe respondents' practices. The term "any refuse

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that authorization by state law was sufficient. *United States* v. *Bellingham Bay Boom Co.,* 72 F. 585 (C. C. D. Wash. 1896), aff'd, 81 F. 658 (C. C. A. 9th Cir. 1897), rev'd on other grounds, 176 U. S. 211 (1900). See *Sanitary District* v. *United States,* 266 U. S. 405, 429; *Wisconsin* v. *Illinois, supra,* at 412. Since the prohibition of the clause covers both those obstructions which require congressional approval and those which require only approval of the Secretary of War, the phrase "authorized by Congress" must be read to mean authorized by Congress or the agency designated by it. *Wisconsin* v. *Illinois, supra,* at 412–413.

matter of any kind or description whatever" undoubtedly embraces the matter discharged from respondents' mills. However, § 13 expressly exempts refuse "flowing from streets and sewers and passing therefrom in a liquid state." [26] The Court says that materials in "a liquid state" must mean materials which do not settle out. But it is difficult to believe that a nineteenth century Congress, in carving out an exception for liquid sewage, meant to establish an absolute standard of purity which not only bore no relation to the prevailing practice of sewage disposal at the time,[27] but also is impossible to achieve even under present-day technology. It is conceded that despite respondents' best efforts to separate out industrial solids, a few minute particles remain. These comprise a small fraction of 1% of the total solution and the most damaging of them are too small to be seen under a microscope. One need not be an expert to say that the refuse discharged by an ordinary sewer pipe today, and *a fortiori* 60 years ago, undoubtedly contains far more solid matter in suspension than respondents' discharges. And the statute affords no basis for differentiating, as the Court suggests, between industrial and domestic refuse.

III.

Even if a violation of § 10 or § 13 could be established, injunctive relief would not be authorized. The Court seems to avoid saying that the statute provides for injunc-

[26] While a refuse provision was contained in the Dolph bill which became the 1890 Act, the liquid-sewage exception was first added in 1894, 28 Stat. 363, and carried forward into the 1899 Act. There was no discussion in the reports or debates of the meaning of the exception.

[27] In 1900, only 4% of the urban population having sewage facilities provided any treatment at all for domestic and trade wastes. Modern Sewage Disposal (1938), p. 13 (Federation of Sewage Works Assns., Langdon Pearse, editor, Anniversary Book, Lancaster Press, Inc.).

tive relief under the present circumstances, but holds that the propriety of such relief can somehow be "inferred" from the statute. However, where, as in this statute, Congress has provided a detailed and limited scheme of remedies, it seems to me the Court is precluded from drawing on any source outside the Act. One need go no farther than the plain words of § 16, which prescribes the penalties for violation of § 13, to see that an injunction against violation of the latter section is not authorized. As to violations of § 10, section 12 provides only that "the removal of any *structures or parts of structures erected* in violation of" § 9, § 10, or § 11 may be enforced by injunction. (Emphasis added.)

The Government relies heavily on the fact that the comparable provision in § 10 of the 1890 Act authorized injunctive relief against "any unlawful obstruction." A closer examination of that section, however, undermines the Government's conclusion. It authorized criminal penalties in two instances: *First,* for the creation of any unlawful obstruction mentioned in the Act, and *second,* for violation of the preceding four sections. By contrast, the section authorized injunctive relief only in the first instance—the creation of any unlawful obstruction "in this act mentioned." To me this indicates that a deliberate distinction was drawn between those prohibitions relating to obstructions created by construction in the ordinary sense and those relating to other types of interferences with navigation, including the discharge of refuse. In the 1899 Act, the provisions relating to the erection of particular types of obstructions were gathered together in §§ 9, 10, and 11 and subjected to the penalties of § 12. The criminal penalties of § 12 are applicable to *any* violation of the preceding three sections (and any rule promulgated by the Secretary of the Army under § 14), while injunctive relief is limited to "structures or parts of structures," thus reflecting the same distinction

made in the 1890 Act. The provisions relating to violations not involving the erection of any structures, such as discharge of refuse, unauthorized use of government navigational installations, and careless sinking of vessels, were gathered together in §§ 13, 14, and 15 and subjected to the penalties of § 16. The last-mentioned section is conspicuously lacking in any reference to injunctive relief, thus again reflecting the distinction established by the 1890 Act. Since the deposits attributable to respondents' mills are not "structures" within the meaning of § 12, their removal, as I read the Act, cannot be enforced by injunction.

The Court seems to say that § 17, which directs the Department of Justice to conduct the legal proceedings necessary to enforce the Act, itself authorizes injunctive relief. But it would have been futile for Congress to prescribe and carefully limit the relief available for violation of the Act if § 17 were meant to authorize a disregard of those limitations. Section 17, in my view, does no more than allocate within the Government the responsibility for the invocation of those remedies already authorized by Congress.

IV.

The case of *Sanitary District* v. *United States, supra,* is not, in my opinion, the "decisive" authority which the Court finds it to be, either as to the question whether a violation has taken place or as to whether injunctive relief would be authorized under the present circumstances, given a violation of the Act. The United States in that case had originally sought an injunction against the construction of the Calumet-Sag channel and later against the diversion thereby of water from Lake Michigan in excess of the amount authorized by the Secretary of War. There is no doubt that a substantive violation of the Act was made out under §§ 9 and 10, since the com-

plained-of diversion and consequent alteration in the navigable capacity of the Great Lakes had been brought about by the excavation of a channel and the construction of pumping stations, intercepting sewers, movable dams, and navigational locks.[28] By contrast, respondents in the present case have erected no structures which could give rise to either a violation of the Act or a right to injunctive relief.

To the extent that *Sanitary District* relied on the inherent power of the United States, apart from the statute, it is wide of the mark in this situation. The Court here seems to concede that the *Sanitary* case is no authority for inferring a substantive cause of action arising from the constitutional power of the United States over navigable waters. Indeed, no other conclusion could well be reached in view of the holding in *Willamette Iron Bridge Co.* v. *Hatch,* 125 U. S. 1, 8, that "there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers," and of the opinion in *Wisconsin* v. *Illinois,* 278 U. S. 367, 414, which said of the *Sanitary* case that "[t]he decision there reached and the decree entered can not be sustained, except on the theory that the Court decided . . . that Congress had exercised the power to prevent injury to the navigability of Lake Michigan . . . ."

The Court nevertheless seems to find in the *Sanitary* case an authorization to infer that the United States has a right to injunctive relief, despite the statute's failure to provide for it. Whatever the validity of that proposition may have been in the context of *Sanitary,* it can have no

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[28] Brief for Appellant, pp. 5–14. It is to be noted that the Sanitary District did not challenge the propriety of injunctive relief in the District Court, and indeed invited it to avoid criminal penalties in testing its right to maintain the channel and divert the complained-of amount of water. 266 U. S., at 431–432; Record on Appeal, Vol. VIII, pp. 129, 151–152; Brief for Appellee, pp. 66–67, 284–285.

applicability here. For in the former case, the effect of the complained-of practices was to lower the level of the entire Great Lakes system. The Government there argued that a right to injunctive relief could be inferred because of the repercussions of the State's action beyond its own borders,[29] and the Court expressly relied upon the "sovereign interest" of the United States in all the Great Lakes and upon a treaty with Great Britain touching the use of Canadian boundary waters. In the present case, the waters affected consist of a few miles of the Calumet River lying wholly within the State of Illinois, and no treaty or international obligation is involved.

What has happened here is clear. In order to reach what it considers a just result the Court, in the name of "charitably" construing the Act, has felt justified in reading into the statute things that actually are not there. However appealing the attempt to make this old piece of legislation fit modern-day conditions may be, such a course is not a permissible one for a court of law, whose function it is to take a statute as it finds it. The filling of deficiencies in the statute, so that the burdens of maintaining the integrity of our great navigable rivers and harbors may be fairly allocated between those using them and the Government, is a matter for Congress, not for this Court.

I would affirm.

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[29] Brief for Appellee, pp. 123–158.

SCHAFFER ET AL. *v.* UNITED STATES.

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

No. 111. Argued March 24, 1960.—Decided May 16, 1960.*

Under 18 U. S. C. § 2314, three persons named Stracuzza, who admittedly were the common center of a scheme to transport stolen goods, were indicted in a single indictment with the four petitioners for transporting in interstate commerce goods known to have been stolen and having a value in excess of $5,000. Count 1 charged two of the petitioners and the Stracuzzas with transporting stolen goods from New York to Pennsylvania; Count 2 charged another petitioner and the Stracuzzas with transporting stolen goods from New York to West Virginia; Count 3 charged another petitioner and the Stracuzzas with transporting stolen goods from New York to Massachusetts; and Count 4 charged all the defendants with a conspiracy to commit the substantive offenses. On motion of petitioners for acquittal at the close of the Government's case, the court dismissed the conspiracy count for failure of proof; but it found that no prejudice would result from a joint trial and submitted the substantive counts to the jury under careful detailed instructions. Petitioners were convicted and the Court of Appeals affirmed, finding that no prejudice resulted from the joint trial. *Held:* The judgments are affirmed. Pp. 512–518.

(a) The joinder of all the defendants in the original indictment was proper under Rule 8 (b) of the Federal Rules of Criminal Procedure; even after dismissal of the conspiracy count, severance was not required under Rule 14 unless the joinder prejudiced the defendants; and, on the record, this Court cannot say that both the trial court and the Court of Appeals erred in finding that petitioners were not prejudiced by a joint trial. Pp. 514–517.

(b) Though each individual shipment amounted to less than $5,000, the trial court did not err in permitting the series of related shipments to each petitioner to be aggregated in order to meet the statutory minimum of $5,000, since 18 U. S. C. § 2311 provides

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*Together with No. 122, *Karp et al.* v. *United States*, also on certiorari to the same Court.

that "the aggregate value of all goods . . . referred to in a single indictment shall constitute the value thereof." Pp. 517–518.

(c) The prosecutor's remarks in his summation to the jury were not prejudicial. P. 518.

266 F. 2d 435, affirmed.

Jacob Kossman argued the cause for petitioners in No. 111. With him on the brief was *Irving W. Coleman.*

Harris B. Steinberg argued the cause and filed a brief for petitioners in No. 122.

John F. Davis argued the causes for the United States. With him on the briefs were *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Julia P. Cooper.*

MR. JUSTICE CLARK delivered the opinion of the Court.

Involved here are questions concerning joinder of defendants under Rule 8 (b) of the Federal Rules of Criminal Procedure,[1] and whether shipments of stolen goods in interstate commerce may be aggregated as to value in order to meet the statutory minimum of $5,000, under 18 U. S. C. § 2314.[2]

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[1] Rule 8 (b) provides:

"Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

[2] 18 U. S. C. § 2314 provides in relevant part:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . .

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

18 U. S. C. § 2311 provides so far as material here:

" 'Value' means the face, par, or market value, whichever is the

The indictment charged transportation in interstate commerce of goods known to have been stolen and having a value in excess of $5,000. It contained three substantive counts. Count 1 charged the two Schaffers (petitioners in No. 111) and the three Stracuzzas (defendants below, who either pleaded guilty or had the charges against them *nolle prossed* at trial) with transporting stolen ladies' and children's wearing apparel from New York to Pennsylvania. Count 2 charged petitioner Marco and the Stracuzzas with a similar movement of stolen goods from New York to West Virginia. Count 3 charged petitioner Karp and the Stracuzzas with like shipments from New York to Massachusetts. The fourth and final count of the indictment charged all of these parties with a conspiracy to commit the substantive offenses charged in the first three counts. The petitioners here were tried on the indictment simultaneously in a single trial. On motion of petitioners for acquittal at the close of the Government's case, the court dismissed the conspiracy count for failure of proof. This motion was denied, however, as to the substantive counts, the court finding that no prejudice would result from the joint trial. Upon submission of the substantive counts to the jury on a detailed charge, each petitioner was found guilty and thereafter fined and sentenced to prison. The Court of Appeals affirmed the convictions, likewise finding that no prejudice existed by reason of the joint trial. 266 F. 2d 435. We granted certiorari. 361 U. S. 809.

The allegations of the indictment having met the explicit provisions of Rule 8 (b) as to joinder of defendants, we cannot find clearly erroneous the findings of the trial court and the Court of Appeals that no prejudice resulted from the joint trial. As to the requirements of

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greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof."

value, we hold that the shipments to a single defendant may be aggregated. The judgments are therefore affirmed.

We first consider the question of joinder of defendants under Rule 8 (b) of the Federal Rules of Criminal Procedure. It is clear that the initial joinder of the petitioners was permissible under that Rule, which allows the joinder of defendants "in the same indictment . . . if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." It cannot be denied that the petitioners were so charged in the indictment. The problem remaining is whether, after dismissal of the conspiracy count before submission of the cases to the jury, a severance should have been ordered under Rule 14 [3] of the Federal Rules of Criminal Procedure. This Rule requires a separate trial if "it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together . . . ." Under the circumstances here, we think there was no such prejudice.

It is admitted that the three Stracuzzas were the common center of the scheme to transport the stolen goods. The four petitioners here participated in some steps of the transactions in the stolen goods, although each was involved with separate interstate shipments. The separate substantive charges of the indictment employed almost identical language and alleged violations of the same criminal statute during the same period and in the same manner. This made proof of the over-all opera-

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[3] Rule 14 provides:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

tion of the scheme competent as to all counts. The variations in the proof related to the specific shipments proven against each petitioner. This proof was related to each petitioner separately and proven as to each by different witnesses. It included entirely separate invoices and other exhibits, all of which were first clearly identified as applying only to a specific petitioner and were so received and shown to the jury under painstaking instructions to that effect. In short, the proof was carefully compartmentalized as to each petitioner. The propriety of the joinder prior to the failure of proof of conspiracy was not assailed.[4] When the Government rested, however, the petitioners filed their motion for dismissal and it was sustained as to the conspiracy count. The petitioners then pressed for acquittal on the remaining counts, and the court decided that the evidence was sufficient on the substantive counts. The case was submitted to the jury on each of these counts, and under a charge which was characterized by petitioners' counsel as being "extremely fair." This charge meticulously set out separately the evidence as to each of the petitioners and admonished the jury that they were "not to take into consideration any proof against one defendant and apply it by inference or otherwise to any other defendant."

Petitioners contend that prejudice would nevertheless be implicit in a continuation of the joint trial after dismissal of the conspiracy count. They say that the resulting prejudice could not be cured by any cautionary instructions, and that therefore the trial judge was left with no discretion. Petitioners overlook, however, that the joinder was authorized under Rule 8 (b) and that subsequent severance was controlled by Rule 14, which provides for separate trials where "it appears that a

[4] A motion of petitioner Karp for a severance on grounds other than those tendered here was denied. 158 F. Supp. 522.

defendant . . . is prejudiced . . . by such joinder for trial . . . ." It appears that not only was no prejudice shown, but both the trial court and the Court of Appeals affirmatively found that none was present. We cannot say to the contrary on this record. Nor can we fashion a hard-and-fast formula that, when a conspiracy count fails, joinder is error as a matter of law. We do emphasize, however, that, in such a situation, the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear. And where, as here, the charge which originally justified joinder turns out to lack the support of sufficient evidence, a trial judge should be particularly sensitive to the possibility of such prejudice. However, the petitioners here not only failed to show any prejudice that would call Rule 14 into operation but even failed to request a new trial. Instead they relied entirely on their motions for acquittal. Moreover, the judge was acutely aware of the possibility of prejudice and was strict in his charge—not only as to the testimony the jury was not to consider, but also as to that evidence which was available in the consideration of the guilt of each petitioner separately under the respective substantive counts. The terms of Rule 8 (b) having been met and no prejudice under Rule 14 having been shown, there was no misjoinder.

This case is not like *United States* v. *Dietrich*,[5] where a single-count indictment against two defendants charged only a single conspiracy offense, or *McElroy* v. *United States*,[6] where no count linked all the defendants and all the offenses. Neither is *Kotteakos* v. *United States*,[7] on which the petitioners place their chief reliance, apposite. That case turned on the harmless-error rule, and its appli-

[5] 126 F. 664.

[6] 164 U. S. 76 (1896).

[7] 328 U. S. 750 (1946).

cation to a serious variance between the indictment and the proof. There the Court found "it highly probable that the error had substantial and injurious effect." 328 U. S., at 776. The dissent agreed that the test of injury resulting from joinder "depends on the special circumstances of each case," *id.*, at 777; but it reasoned that the possibility was "non-existent" that evidence relating to one defendant would be used to convict another, and declared that the "dangers which petitioners conjure up are abstract ones." *Id.*, at 778. The harmless-error rule, which was the central issue in *Kotteakos,* is not even reached in the instant case, since here the joinder was proper under Rule 8 (b) and no error was shown.

Petitioners also contend that, since the individual shipments with which they were connected amounted to less than $5,000 each, the requirements of the statute as to value were not present. However, it appeared at the trial that the total merchandise shipped to each petitioner during the period charged in the several counts was over $5,000, even though each individual shipment was less. The trial court permitted the aggregation of the value of these shipments to meet the statutory limit,[8] and it is this that is claimed to be error. A sensible reading of the statute properly attributes to Congress the view that where the shipments have enough relationship so that they may properly be charged as a single offense, their value may be aggregated. The Act defines "value" in terms of that aggregate.[9] The legislative history makes clear that the value may be computed on a "series of transactions." [10] It seems plain that the Stracuzzas and each of the petitioners were engaged in a series of trans-

[8] See note 2, *supra.*

[9] See note 2, *supra.*

[10] H. R. Rep. No. 1462, 73d Cong., 2d Sess., p. 2; H. R. Conf. Rep. No. 1599, 73d Cong., 2d Sess., p. 3.

actions, and therefore there is no error on that phase of the case.[11]

Petitioners in No. 122 further contend that certain of the prosecutor's remarks in his summation to the jury were improper and prejudicial. We agree with the treatment of this issue by the Court of Appeals, and see no need for further elaboration.

The judgments are therefore

Affirmed.

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

The indictment in these cases charged violations of 18 U. S. C. § 2314 for transporting in interstate commerce goods known to have been stolen [1] and having a value in excess of $5,000.[2]

Counts 1, 2, and 3 were substantive counts. Count 1 charged the two Schaffers, petitioners in No. 111, together with the three Stracuzzas, with transporting stolen ladies'

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[11] This is not a case like *Andrews* v. *United States*, 108 F. 2d 511, where aggregation of shipments to a number of individuals was justified on the theory of a common design among the recipients. The instant case, unlike *Andrews*, involves aggregation of a number of shipments to a single defendant, and therefore it was quite unnecessary to justify aggregation on the theory of common design.

[1] 18 U. S. C. § 2314 provides in relevant part:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . .

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

[2] 18 U. S. C. § 2311 provides so far as material here:

" 'Value' means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof."

and children's wearing apparel from New York to Pennsylvania between May 15, 1953, and July 27, 1953.

Count 2 charged Marco, one of the petitioners in No. 122, and the Stracuzzas with a similar movement from New York to West Virginia from June 11, 1953, to July 27, 1953.

Count 3 charged Karp, the other petitioner in No. 122, with like shipments from New York to Massachusetts from May 21, 1953, to July 27, 1953.

Count 4 charged all the parties with a conspiracy to commit the substantive offenses.

Two of the Stracuzzas (who seemed to be the brains behind the various illegal transactions) pleaded guilty and received suspended sentences. The indictment against the third Stracuzza was disposed of *nol. pros.* The four present petitioners pleaded not guilty and were tried simultaneously in a single trial,[3] one of the Stracuzzas being the principal witness for the Government.

At the close of the Government's case the court dismissed the conspiracy count [4] for failure of proof. Indeed, it does not appear even arguable that there was evidence linking all petitioners with each other in one conspiracy. Over objection the court continued the joint trial on the remaining substantive counts, instructing the jury that the evidence against each defendant was to be considered separately, the proof against one not to be used against another.

It is clear that but for the conspiracy count the joinder of these petitioners for similar but unrelated crimes would have been in error. Rule 8 (b) of the Federal Rules of Criminal Procedure allows joinder of defendants in the

[3] A motion of petitioner Karp for a severance was denied. 158 F. Supp. 522.

[4] A separate indictment charging a conspiracy between petitioners and others to violate 18 U. S. C. § 659 by receiving and concealing goods stolen in interstate commerce was also dismissed.

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same indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." [5]

The Court of Appeals, while conceding that it would have been clearly erroneous to try petitioners together were it not for the conspiracy count, concluded that no showing of prejudice had been established and that the District Court did not abuse its discretion in denying separate trials.

I take a different view. I believe that once the conspiracy count was dismissed, the court had before it the same problem as would be presented if the prosecution had sought to try before a single jury separate indictments against defendants who had been charged with like crimes but which were wholly unrelated to each other.

Rule 8 (b) [6] contemplates joinder of defendants in two types of situations—first, where they participate jointly in one "act or transaction"; or second, where they participate "in the same series of acts or transactions constituting an offense or offenses." These four petitioners did not participate in one act or transaction as evidenced by the fact that the proof of conspiracy utterly failed. The other acts or transactions charged were not in the same "series," within the meaning of Rule 8 (b).

Mr. Justice Van Devanter, when circuit judge, in *United States* v. *Dietrich*, 126 F. 664, 670, said:

> "Much can be said in support of a practice which, subject to a discretion invested in the court to enable

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[5] Rule 8 (b) provides:

"Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

[6] See note 5, *supra*.

> it to do justice between the government and the accused, permits two or more defendants to be in separate counts of the same indictment severally charged with distinct and several offenses of the same class and grade, and subject to the same punishment, where the offenses appear to have been committed at the same time and place and to form parts of the same transaction. Under such circumstances the proof in respect to one offense would almost necessarily throw light upon the other or others, and the connection between them would frequently be so close that it would be difficult or impossible to separate the proof of one from the proof of the other or others."

McElroy v. *United States,* 164 U. S. 76, decided long before the present Rules, held it error to consolidate four indictments charging unrelated offenses (arson and assault with intent to kill) where six people were named in three of the indictments and only three of the six in the remaining one. The Court said the question of joinder or severance did not rest "in mere discretion"; that under those circumstances joinder was error as a matter of law:

> "[S]uch joinder cannot be sustained where the parties are not the same and where the offences are in nowise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them. It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defence, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions." *Id.,* at 81.

I think this is the sound rule and consistent with what Mr. Justice Van Devanter said in the *Dietrich* case. There must somehow be a nexus between the several

transactions charged against the several defendants, lest proof of distinct transactions blend to the prejudice of some defendants. The evidence concerning these petitioners was not in any proper sense of the words evidence concerning "the same series of acts or transactions" constituting an offense. The Schaffers had nothing to do with Karp's shipments to Massachusetts nor Marco's shipments to West Virginia; nor did the latter two have anything to do with the Schaffers' shipments to Pennsylvania. The only possible connection between these disparate transactions was the fact that each petitioner dealt with the Stracuzzas, who were the brains of these deals. But that was a happenstance which did not make petitioners any the less strangers to each other. The Pennsylvania, Massachusetts, and West Virginia shipments had nothing in common except that they were all from the house of Stracuzza. Yet customers of one shop, engaged in an illegal enterprise, do not become participants "in the same series of acts or transactions," unless somehow or other what each does is connected up with the others or has some relation to them.

It is said that the joinder was proper if participation "in the same series" of transactions was "alleged" in the indictment. Such an allegation, to be sure, saves the indictment from attack at the preliminary stages. Yet once it becomes apparent during the trial that the defendants have not participated "in the same series" of transactions, it would make a mockery of Rule 8 (b) to hold that the allegation alone, now known to be false, is enough to continue the joint trial.

The Court in *Kotteakos* v. *United States,* 328 U. S. 750, 773, disapproved the joinder for trial of eight or more conspiracies related in kind "when the only nexus among them lies in the fact that one man participated in all." Guilt with us remains personal. "The dangers of transference of guilt from one to another across the line

separating conspiracies, subconsciously or otherwise, are so great," said the Court in the *Kotteakos* case, "that no one really can say prejudice to substantial right has not taken place." *Id.*, at 774. A like danger of such transference existed in the present case. It is not enough to say that evidence of the guilt of each of the present petitioners may have been clear. Reasons for severance are founded on the principle that evidence against one person may not be used against a codefendant whose crime is unrelated to the others. Instructions can be given the jury and admonitions can be made explicit that the line between the various defendants must be kept separate. The district judge conscientiously made that effort here. But where, as here, there is no nexus between the several crimes, the mounting proof of the guilt of one is likely to affect another. There is no sure way to protect against it except by separate trials, especially where, as here, the several defendants, though unconnected, commit the crimes charged by dealing with one person, one house, one establishment. By a joint trial of such separate offenses, a subtle bond is likely to be created between the several defendants though they have never met nor acted in unison; prejudice within the meaning of Rule 14 [7] is implicit.

This is unlike the case where the conspiracy count and the substantive counts are submitted to the jury, the verdict being not guilty of conspiracy but guilty on the other counts. There is then no escape from the quandary in which defendants find themselves. Once the conspiracy is supported by evidence, it presents issues for the jury to

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[7] Rule 14 provides:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

decide. What may motivate a particular jury in returning a verdict of not guilty on the conspiracy count may never be known.

Conspiracy presents perplexing problems that have long concerned courts. See *Krulewitch* v. *United States,* 336 U. S. 440; *Delli Paoli* v. *United States,* 352 U. S. 232. While it is proper at times to join a conspiracy count with substantive counts even where the latter are the same as the overt acts charged in the conspiracy count, *Pinkerton* v. *United States,* 328 U. S. 640, there is danger in any multiplication. The loose practice of trying to bring together into one conspiracy those whose ties are at best extremely tenuous has often been criticized.[8] We allow conspiracy to be put to new dangerous uses when we sanction the practice approved here.

I would reverse these judgments and remand the causes for new trials.

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[8] See Annual Report of the Attorney General for 1925, pp. 5–6; O'Dougherty, Prosecution and Defense Under Conspiracy Indictments, 9 Brooklyn L. Rev. 263; Developments in the Law: Criminal Conspiracy, 72 Harv. L. Rev. 920, 980–983; Note, Guilt by Association—Three Words in Search of a Meaning, 17 U. of Chi. L. Rev. 148; Note, The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants, 62 Harv. L. Rev. 276; *United States* v. *Falcone,* 109 F. 2d 579, 581 (C. A. 2d Cir.); *United States* v. *Liss,* 137 F. 2d 995, 1003 (C. A. 2d Cir.) (dissenting opinion).

WYATT *v.* UNITED STATES.

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

No. 119. Argued January 13, 1960.—Decided May 16, 1960.

Petitioner was tried and convicted in a Federal District Court of knowingly transporting a woman in interstate commerce for the purpose of prostitution, in violation of 18 U. S. C. § 2421. At the trial, the woman, who had married petitioner since the date of the offense, was ordered over her objection and that of petitioner to testify for the prosecution. *Held:* The ruling was correct and the judgment is affirmed. Pp. 525–531.

(a) Though the common-law rule of evidence ordinarily permitting a defendant to exclude the adverse testimony of his or her spouse still applies in the federal courts, there is an exception which permits the defendant's wife to testify against him when she was the victim of a violation of § 2421. Pp. 526–527.

(b) The privilege accorded by the general rule resides in the witness as well as in the defendant. Pp. 527–529.

(c) In view of the purpose of § 2421, a prostituted witness-wife may not protect her husband by declining to testify against him. Pp. 529–530.

(d) A different conclusion is not required by the fact that the marriage took place after the commission of the offense. Pp. 530–531.

263 F. 2d 304, affirmed.

Robert R. Rissman and *Fred Okrand* argued the cause for petitioner. With *Mr. Rissman* on the brief was *A. L. Wirin.*

Roger G. Connor argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Kirby W. Patterson.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioner was tried and convicted of knowingly transporting a woman in interstate commerce for the purpose

of prostitution, in violation of the White Slave Traffic Act, 18 U. S. C. § 2421. At the trial, the woman, who had since the date of the offense married the petitioner, was ordered, over her objection and that of the petitioner, to testify on behalf of the prosecution.[1] The Court of Appeals, on appeal from a judgment of conviction, affirmed the ruling of the District Court. 263 F. 2d 304. As the case presented significant issues concerning the scope and nature of the privilege against adverse spousal testimony, treated last Term in *Hawkins* v. *United States*, 358 U. S. 74, we granted certiorari. 360 U. S. 908. We affirm the judgment.

First. Our decision in *Hawkins* established, for the federal courts, the continued validity of the common-law rule of evidence ordinarily permitting a party to exclude the adverse testimony of his or her spouse. However, as that case expressly acknowledged, the common law has long recognized an exception in the case of certain kinds of offenses committed by the party against his spouse. *Id.*, at 75, citing *Stein* v. *Bowman*, 13 Pet. 209, 221. Exploration of the precise breadth of this exception, a matter of some uncertainty, see 8 Wigmore, Evidence (3d ed.), § 2239, can await a case where it is necessary. For present purposes it is enough to note that every Court of Appeals which has considered the specific question now holds that the exception, and not the rule, applies to a Mann Act prosecution, where the defendant's wife was the victim of the offense.[2] Such unanimity with respect

[1] Although the record is ambiguous as to the fact and time of petitioner's marriage, we shall consider established, as the Court of Appeals did, the sequence of events stated in the text. Further, the Court of Appeals noted that, while the record did not clearly establish that the petitioner, as well as his wife, claimed a privilege with respect to her testimony, it would assume that he had. 263 F. 2d 304, 308. We accept that assumption.

[2] *United States* v. *Mitchell*, 137 F. 2d 1006 (C. A. 2d Cir.); *Levine* v. *United States*, 163 F. 2d 992 (C. A. 5th Cir.); *Shores* v. *United*

to a rule of evidence lends weighty credentials to that view.

While this Court has never before decided the question, we now unhesitatingly approve the rule followed in five different Circuits. We need not embark upon an extended consideration of the asserted bases for the spousal privilege (see *Hawkins, supra,* at 77–78; Wigmore, *op. cit., supra,* § 2228 (3)) and an appraisal of the applicability of each here, *id.,* § 2239, for it cannot be seriously argued that one who has committed this "shameless offense against wifehood," *id.,* at p. 257, should be permitted to prevent his wife from testifying to the crime by invoking an interest founded on the marital relation or the desire of the law to protect it. Petitioner's attempt to prevent his wife from testifying, by invoking an asserted privilege of his own, was properly rejected.

Second. The witness-wife, however, did not testify willingly, but objected to being questioned by the prosecution, and gave evidence only upon the ruling of the District Court denying her claimed privilege not to testify. We therefore consider the correctness of that ruling.[3]

States, 174 F. 2d 838 (C. A. 8th Cir.), overruling *Johnson* v. *United States,* 221 F. 250; *Pappas* v. *United States,* 241 F. 665 (C. A. 9th Cir.); *Hayes* v. *United States,* 168 F. 2d 996 (C. A. 10th Cir.).

[3] The United States does not question the standing of petitioner to seek reversal because of the allegedly erroneous refusal to respect the privilege of his wife. Since such testimony, even if wrongly compelled, is *per se* admissible, *Funk* v. *United States,* 290 U. S. 371, and relevant, it has been argued that the party has suffered no injury of which he may complain. Wigmore, *op. cit., supra,* § 2196 (2) (*a*); McCormick, Evidence, § 73; Uniform Rules of Evidence, Rule 40; Am. L. Inst. Model Code of Evidence, Rule 234; Note, 30 Col. L. Rev. 686, 693–694. See, *e. g., Turner* v. *State,* 60 Miss. 351, 353. However, as the point has not been briefed or argued, we have thought it appropriate, in view of our disposition of the case on the merits, not to consider the issue of standing, and of course intimate no view on it.

The United States argues that, once having held, as we do, that in such a case as this the petitioner's wife could not be prevented from testifying voluntarily, *Hawkins* establishes that she may be compelled to testify. For, it is said, that case specifically rejected any distinction between voluntary and compelled testimony. 358 U. S., at 77. This argument fails to take account of the setting of our decision in *Hawkins*. To say that a witness-spouse may be prevented from testifying voluntarily simply means that the *party* has a privilege to exclude the testimony; [4] when, on the other hand, the spouse may not be compelled to testify against her will, it is the *witness* who is accorded a privilege. In *Hawkins,* the Government took the position that the spousal privilege should be that of the witness, and not that of the party, so that while the wife could decline to testify, she could not be prevented from giving evidence if she elected not to claim a privilege which, it was said, belonged to her alone. Brief for the United States, No. 20, O. T. 1958, pp. 22–43. In declining to hold that the party had no privilege, we manifestly did not thereby repudiate the privilege of the witness.

While the question has not often arisen, it has apparently been generally assumed that the privilege resided in the witness as well as in the party. *Hawkins* referred to "a rule which bars the testimony of one spouse against the other unless *both* consent," *supra,* at 78. (Emphasis supplied.) See *Stein* v. *Bowman, supra,* at 223 (wife cannot "by force of authority be compelled to state facts in evidence"); *United States* v. *Mitchell, supra,* at 1008 ("the better view is that the privilege is that of either spouse who chooses to claim it"); Wigmore, *op. cit., supra,* § 2241; McCormick, Evidence, § 66, n. 3. In its

[4] *Funk* v. *United States, supra,* abolished, for the federal courts, the disqualification or incompetence of the spouse as a witness, thus establishing the admissibility of his or her testimony, and leaving the question one of privilege only.

Hawkins brief, the Government, while calling for the abolition of the party's privilege, urged that the common-law development could be explained, and its policies fully vindicated, by recognition of the privilege of the witness. Brief, pp. 22–25, 33, 42–43; see *Hawkins, supra,* at 77, and concurring opinion, at 82. At least some of the bases of the party's privilege are in reason applicable to that of the witness. As Wigmore puts it, *op. cit., supra,* at p. 264: "[W]hile the defendant-husband is entitled to be protected against condemnation through the wife's testimony, the witness-wife is also entitled to be protected against becoming the instrument of that condemnation,—the sentiment in each case being equal in degree and yet different in quality." In light of these considerations, we decline to accept the view that the privilege is that of the party alone.

Third. Neither can we hold that, whenever the privilege is unavailable to the party, it is *ipso facto* lost to the witness as well. It is a question in each case, or in each category of cases, whether, in light of the reason which has led to a refusal to recognize the party's privilege, the witness should be held compellable. Certainly, we would not be justified in laying down a general rule that both privileges stand or fall together. We turn instead to the particular situation at bar.

Where a man has prostituted his own wife, he has committed an offense against both her and the marital relation, and we have today affirmed the exception disabling him from excluding her testimony against him. It is suggested, however, that this exception has no application to the witness-wife when she chooses to remain silent. The exception to the party's privilege, it is said, rests on the necessity of preventing the defendant from sealing his wife's lips by his own unlawful act, see *United States* v. *Mitchell, supra,* at 1008–1009; Wigmore, *op. cit., supra,* § 2239, and it is argued that where the wife has chosen

not to "become the instrument" of her husband's downfall, it is her own privilege which is in question, and the reasons for according it to her in the first place are fully applicable.

We must view this position in light of the congressional judgment and policy embodied in the Mann Act. "A primary purpose of the Mann Act was to protect women who were weak from men who were bad." *Denning* v. *United States,* 247 F. 463, 465. It was in response to shocking revelations of subjugation of women too weak to resist that Congress acted. See H. R. Rep. No. 47, 61st Cong., 2d Sess., pp. 10–11. As the legislative history discloses, the Act reflects the supposition that the women with whom it sought to deal often had no independent will of their own, and embodies, in effect, the view that they must be protected against themselves. Compare 18 U. S. C. § 2422 (consent of woman immaterial in prosecution under that section). It is not for us to re-examine the basis of that supposition.

Applying the legislative judgment underlying the Act, we are led to hold it not an allowable choice for a prostituted witness-wife "voluntarily" to decide to protect her husband by declining to testify against him. For if a defendant can induce a woman, against her "will," to enter a life of prostitution for his benefit—and the Act rests on the view that he can—by the same token it should be considered that he can, at least as easily, persuade one who has already fallen victim to his influence that she must also protect him. To make matters turn upon *ad hoc* inquiries into the actual state of mind of particular women, thereby encumbering Mann Act trials with a collateral issue of the greatest subtlety, is hardly an acceptable solution.

Fourth. What we have already said likewise governs the disposition of the petitioner's reliance on the fact that his marriage took place after the commission of the

offense. Again, we deal here only with a Mann Act prosecution, and intimate no view on the applicability of the privilege of either a party or a witness similarly circumstanced in other situations. The legislative assumption of lack of independent will applies as fully here. As the petitioner by his power over the witness could, as we have considered should be assumed, have secured her promise not to testify, so, it should be assumed, could he have induced her to go through a marriage ceremony with him, perhaps "in contemplation of evading justice by reason of the very rule which is now sought to be invoked." *United States* v. *Williams,* 55 F. Supp. 375, 380.

The ruling of the District Court was correctly upheld by the Court of Appeals.[5]

Affirmed.

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

Last Term this Court held that a wife could not voluntarily testify against her husband in a criminal prosecution over his objection. *Hawkins* v. *United States,* 358 U. S. 74. The Court finds the case at bar so different from *Hawkins* that it approves overriding not only the husband's objection, but also the wife's. In both cases the husband was prosecuted for violation of the Mann Act, 18 U. S. C. § 2421. The only relevant difference is that here the wife herself was the person allegedly transported by the husband for purposes of prostitution. Morally speaking, this profanation of the marriage relationship adds an element of the utmost depravity to the ugly business of promoting prostitution. Legally speaking, however, this does not warrant the

[5] The petitioner's further assertion, that apart from the testimony of the wife there was insufficient corroboration of his admission of transportation, thus fails by its own assumption.

radical departure from the *Hawkins* rule which the Court now sanctions.

The Court's analysis of the problem here presented is sound in so many ways that the unsoundness of its conclusion is especially disappointing—and somewhat curious. Briefly, that analysis appears to be as follows: The Court accepts the principle that the spousal privilege belongs both to the person charged with the offense, as we held in *Hawkins,* and also to the witness. Moreover, the Court rejects the notion that the latter may be barred from asserting the privilege simply because, in a given case, it may be improper for the former to invoke it. The defendant may not claim the privilege where he is charged with "certain kinds of offenses committed . . . against his spouse," and the Court believes that the instant case involves this type of crime. It apparently recognizes, moreover, that the policy behind this exception may be effectuated in the ordinary situation by giving the injured party the *option* to testify, without *compelling* her to testify.[1] In this case, however, it con-

[1] Perhaps the Court is merely assuming this to be true *arguendo.* Since the basic purpose of the exception is to prevent the husband from abusing the wife with impunity, the assumption is amply warranted. See, *e. g., Lord Audley's Trial,* 3 How. St. Tr. 401, 402, 414 (1631); *Bentley* v. *Cooke,* 3 Doug. 422, 424 (1784) ("[T]hat necessity is not a general necessity, as where no other witness can be had, but a particular necessity, as where, for instance, the wife would otherwise be exposed without remedy to personal injury." Mansfield, L. C. J.); 8 Wigmore, Evidence (3d ed.), § 2239; Comment, 4 Ark. L. Rev. & Bar Assn. J. 426, 427; Note, 38 Va. L. Rev. 359, 361. All that is necessary to fulfill this purpose is to provide the injured spouse with the means for redress. If she chooses not to utilize that means, there is no greater justification for compelling her testimony in such a case than there is in the normal situation. Although there is concededly authority to the contrary, in my view it is not well reasoned. Since the Court does not disagree, it is unnecessary at this time to discuss the matter in detail.

cludes that the wife "should be assumed" to be under the sway of the husband to such an extent that she cannot be entrusted with that choice. Consequently, the trial court—and the prosecutor—must be given the power to protect her against herself by forcing her to testify.

The fatal defect in this conclusion lies in the Court's evaluation of the mental state of the wife, an evaluation which finds no support in the record and which cannot properly be justified by any legislative enactment.

The Court does not and could not rely upon the record to prove that petitioner's wife was somehow mesmerized by him when she was on the witness stand. The evidence, in point of fact, strongly suggests that the wife played a managerial role in the sordid enterprise which formed the basis for the prosecution.[2] Apparently this was the jury's view, since the jurors asked the judge whether it would "make any difference or—if the woman had anything to do with the instigation or planning . . . ." The judge, of course, instructed them that this would be immaterial, but the jury nevertheless unanimously recommended leniency. Thus this case is a strange vehicle for the Court to use in announcing its "lack of independent will" theory. Presumably it is to be regarded as the exception which proves the rule.

The sole ground assigned by the Court for its decision is that it is a necessary application of the "legislative judgment underlying the [Mann] Act," which "reflects the supposition that the women with whom [Congress] sought to deal often had no independent will of their own, and embodies, in effect, the view that they must be pro-

[2] The most important testimony regarding the petitioner's purpose in providing for his wife's transportation was given by a hotel bellboy, who related various conversations which he had with petitioner. The clerk also testified as to his conversations with the wife, and there is little if anything to distinguish the evidence relating to the wife from that relating to the husband.

tected against themselves." In support of this hypothesis, the Court cites legislative history and the fact that, under 18 U. S. C. § 2422, a companion provision to § 2421, the consent of the woman does not relieve the defendant of criminal responsibility.[3] This equation of the legislative judgment involved in fashioning a criminal statute with the judgment involved in the Court's restriction of the husband-wife privilege is, I submit, entirely too facile, for it overlooks the critically different nature of these problems. In assessing the pertinence of the woman's consent to the culprit's criminal responsibility, Congress chose between the interest of society in eradicating the importation and interstate transportation of prostitutes and the interest of women to be protected from clever and unscrupulous profiteers, on the one hand, and the voluntary engagement of women in prostitution on the other. In view of the manifest imbalance of these competing considerations and the difficulty of definition and proof of the type of consent which might conceivably be relevant, it is hardly surprising that Congress passed the Mann Act and made consent entirely immaterial under § 2422. The testimonial privilege, however, presents questions of quite a different order, since there is a significant interest traditionally regarded as supporting the privilege, as we recognized in *Hawkins*—the preservation of the conjugal relationship. And where the wife refuses to testify, there is strong evidence that there is still a marital relationship to be protected.

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[3] Section 2421, generally speaking, makes it a crime (a) to transport in interstate or foreign commerce any woman for the purpose of prostitution or other immoral purpose, or with the intent of inducing her to engage in prostitution or other immoral practice, and (b) to secure interstate or foreign transportation for any woman for the above purposes or with the above intent. Section 2422, generally speaking, makes it a crime to induce a woman to travel on common carriers in interstate or foreign commerce for the above purposes or with the above intent.

Not only does prior congressional action provide no support for the Court's decision, but without such support that decision represents an incursion into what is essentially a legislative area. It is true, of course, that federal courts have the authority to interpret the common-law principles of evidence "in the light of reason and experience." Fed. Rules Crim. Proc., 26. This authority, however, must be exercised with a discriminating awareness of the distinction between matters which fall within the special competence of the judiciary and those which are primarily the concern of the legislature. It is more properly Congress' business, not ours, to place comparative values upon the quest for facts in the judicial process as against the safeguarding of the marriage relationship, and to give—or deny—expression to what has been termed "a *natural repugnance* in every fair-minded person to compelling a wife or husband to be the means of the other's condemnation, and to compelling the culprit to the humiliation of being condemned by the words of his intimate life-partner." 8 Wigmore, Evidence, 227. That this decision is uniquely legislative and not judicial is demonstrated by the fact that, both in England and in this country, changes in the common-law privilege have been wrought primarily by legislatures.[4] And perhaps

[4] Every State has a statute governing the matter. For discussion of these statutes, see 3 Vernier, American Family Laws, 585–586; 2 Wigmore, Evidence, § 488, 8 *id.*, § 2245; 43 Marq. L. Rev. 131, 132; 33 Tulane L. Rev. 884; Note, 38 Va. L. Rev. 359. The many differences among these statutes is further evidence of the divergent views which may be held with respect to the relative importance of the factors involved. It is interesting to note in this connection that apparently only a small minority of States have passed statutes which make the wife competent to testify in a prosecution against her husband for pandering or white slavery when she is the female involved, and only some of these make her compellable as well as competent. See, *e. g.*, Me. Rev. Stat., 1954, c. 134, § 22; Ore. Comp. Laws Ann., 1940, § 23–921; Utah Code Ann., 1943, § 103–51–14; Va. Code, 1950,

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it is worth noting that the essentials of the privilege have survived with remarkable sturdiness through the course of continued consideration by legislative bodies.[5]

Of particular interest is the past action and attitude of Congress with respect to the privilege. As the Court

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§ 18–97; W. Va. Code Ann., 1955, §§ 6062, 6063. See also Note, 38 Va. L. Rev. 359, 366. Nor does the comprehensive British legislation give comfort to the Court. For a description of these statutes, see Evidence of Spouses in Criminal Cases, 99 Sol. J. 551. See also Nokes, Evidence, A Century Of Family Law (Graveson and Crane ed.), 146–149; Scots L. T. (1956), 145. Compare *Leach* v. *Rex*, [1912] A. C. 305, with *Rex* v. *Lapworth*, [1931] 1 K. B. 117. The experience of the Alabama Supreme Court is instructive. That court, in an "exception of necessity" case, held that the wife was not only competent to testify, but also compellable. *Johnson* v. *State*, 94 Ala. 53, 10 So. 427. The Alabama Legislature, however, abolished this decision by statute. Ala. Code, 1940, Tit. 15, § 311.

[5] See the sources cited in note 4, *supra*. To be sure, the privilege has been strongly attacked by commentators, most of whom rely upon Wigmore's treatise. Wigmore's lengthy criticism of the privilege is best summarized in his own words:

"This privilege has no longer any good reason for retention. In an age which has so far rationalized, depolarized, and de-chivalrized the marital relation and the spirit of Femininity as to be willing to enact complete legal and political equality and independence of man and woman, this marital privilege is the merest anachronism, in legal theory, and an indefensible obstruction to truth, in practice." 8 Wigmore, Evidence, 232.

It is arguable that this is as much an *ipse dixit* as the statements in favor of the rule which Wigmore criticizes upon that very ground. *Id.*, at 226–228. In any event, it is evident that his conclusion involves value judgments which the legislature is far better adapted to accept or reject than the judiciary.

For a view contrasting with Wigmore's, see *Bassett* v. *United States*, 137 U. S. 496, 505–506, where this Court narrowly construed a legislative provision regarding the privilege:

"We do not doubt the power of the legislature to change this ancient and well-supported rule; but an intention to make such a change should not lightly be imputed. It cannot be assumed that it is indifferent to sacred things, or that it means to lower the holy relations

pointed out in *Hawkins*, in 1887 Congress passed a statute which permitted either spouse to testify in prosecutions of the other for the crimes of bigamy, polygamy, or unlawful cohabitation, *but stipulated that neither should be compelled to testify.* 24 Stat. 635. Apparently Congress believed that this provision gave sufficient protection to the spouse-witness, and that the interest of the State in securing convictions was outweighed by the considerations supporting the right of the spouse-witness not to testify against her will. Even more in point is the 1917 legislation by which Congress made spouses competent to testify against each other in prosecutions for the importation of aliens for immoral purposes. 39 Stat. 878–879, re-enacted as 66 Stat. 230, 8 U. S. C. § 1328. Thus Congress has acted with respect to the scope of the privilege in prosecutions under a statute kindred to § 2421, but has remained silent so far as § 2421 itself is concerned. The negative implication does not require elaboration.[6]

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of husband and wife to the material plane of simple contract. So, before any departure from the rule affirmed through the ages of the common law . . . can be adjudged, the language declaring the legislative will should be so clear as to prevent doubt as to its intent and limit."

[6] The nature of relevant action by Congress and by the state legislatures, see note 4, *supra*, distinguishes this case from *Funk* v. *United States*, 290 U. S. 371, which held that one spouse was competent to testify on behalf of the other in a criminal trial. As the Court there pointed out, the disqualification was based upon interest, and "[t]he rules of the common law which disqualified as witnesses persons having an interest, long since, in the main, have been abolished both in England and in this country . . . ." *Id.*, at 380. The contrast between this case and *Funk*, where the Court was able to rely upon "the general current of legislation and of judicial opinion," *id.*, at 381, is striking. In this connection, perhaps it should be emphasized that the federal decisions cited in note 2 of the Court's opinion stand, as the Court indicates, only for the proposition that a Mann Act prosecution falls within the common-law exception so that the wife may testify, and not for the rule that a wife in such a case may be

Moreover, it should be noted that even under § 1328 the testimony of the spouse is made only "admissible and competent," not compellable.[7]

In my judgment, the Court in this case strays from the course of appropriate judicial reserve marked by *Hawkins*. I am unwilling to join in a decision based upon an assumption of fact which is without support in the record and which involves a delicate, and essentially legislative, determination. I therefore dissent.

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compelled to testify. But see *Shores* v. *United States*, 174 F. 2d 838, 841, where the Court of Appeals for the Eighth Circuit stated in dicta that the wife may be *compelled* to testify in *any* exception case—a view much broader than that here adopted by this Court.

[7] This seems to be the plain meaning of the statutory language, though similar language in state statutes has received both broad and narrow constructions. Compare *McCormick* v. *State*, 135 Tenn. 218, 186 S. W. 95, with *Richardson* v. *State*, 103 Md. 112, 117, 63 A. 317, 319–320. For the view of an English court, see *Leach* v. *Rex*, [1912] A. C. 305, 311 (not compellable) ("The principle that a wife is not to be compelled to give evidence against her husband is deep seated in the common law of this country, and I think if it is to be overturned it must be overturned by a clear, definite, and positive enactment, not by an ambiguous one . . . ." Lord Atkinson). See also 8 Wigmore, Evidence, § 2245 (*a*); Note, 38 Va. L. Rev. 359, 362–363.

MITCHELL *v.* TRAWLER RACER, INC.

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

No. 176. Argued January 21, 1960.—Decided May 16, 1960.

In an action by a seaman who was a member of the crew of a fishing trawler to recover damages for personal injuries sustained as a result of unseaworthiness due to the temporary presence on the ship's rail of slime and fish gurry remaining there from recent unloading operations, the shipowner's actual or constructive knowledge of the temporary unseaworthy condition is not an essential element of the seaman's case. Pp. 539–550.

(a) A shipowner's duty to furnish a seaworthy ship is absolute and it is not limited by concepts of common-law negligence. Pp. 542–549.

(b) Liability of the shipowner for a temporary unseaworthy condition is not different from the liability which attaches when the unseaworthy condition is permanent. Pp. 549–550.

265 F. 2d 426, reversed.

Morris D. Katz argued the cause and filed a brief for petitioner.

James A. Whipple argued the cause for respondent. With him on the brief was *Paul J. Kirby.*

Briefs of *amici curiae* urging reversal were filed by *Samuel A. Neuburger,* by *Arthur J. Mandell,* and by *Philip F. DiCostanzo.*

Walter E. Maloney, Thomas E. Byrne, Jr., M. L. Cook, J. Ward O'Neill, Louis J. Gusmano and *James M. Estabrook* filed a brief for the American Merchant Marine Institute, Inc., as *amicus curiae,* urging affirmance.

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was a member of the crew of the Boston fishing trawler *Racer,* owned and operated by the

respondent. On April 1, 1957, the vessel returned to her home port from a 10-day voyage to the North Atlantic fishing grounds, loaded with a catch of fish and fish spawn. After working that morning with his fellow crew members in unloading the spawn,[1] the petitioner changed his clothes and came on deck to go ashore. He made his way to the side of the vessel which abutted the dock, and in accord with recognized custom stepped onto the ship's rail in order to reach a ladder attached to the pier. He was injured when his foot slipped off the rail as he grasped the ladder.

To recover for his injuries he filed this action for damages in a complaint containing three counts: the first under the Jones Act, alleging negligence; the second alleging unseaworthiness; and the third for maintenance and cure. At the trial there was evidence to show that the ship's rail where the petitioner had lost his footing was covered for a distance of 10 or 12 feet with slime and fish gurry, apparently remaining there from the earlier unloading operations.

The district judge instructed the jury that in order to allow recovery upon either the negligence or unseaworthiness count, they must find that the slime and gurry had been on the ship's rail for a period of time long enough for the respondent to have learned about it and to have removed it.[2] Counsel for the petitioner requested that

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[1] In accordance with tradition, the employment agreement provided that the proceeds from the sale of the fish spawn should be divided among the members of the crew, no part thereof going to the officers or to the owner of the vessel.

[2] The instructions on this aspect of the case were as follows: "In a case like this we have the argument presented here, which you do not have to believe, that the ship was unseaworthy because at the time of the injury there was on the rail of the ship some kind of slime. Well, if that really was there and had been there any period of time, and it caused the accident, then you would find as

the trial judge distinguish between negligence and unseaworthiness in this respect, and specifically requested him to instruct the jury that notice was not a necessary element in proving liability based upon unseaworthiness of the vessel. This request was denied.[3] The jury awarded the petitioner maintenance and cure, but found for the respondent shipowner on both the negligence and unseaworthiness counts.

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a matter of your conclusion of fact, that unseaworthiness caused the accident.

"I haven't told you what unseaworthiness is. You will recognize it is somewhat overlapping and alternative to, indeed quite similar to, negligence because it is one of the obligations of the owner of a ship to see to it through appropriate captains, mates, members of the crew, or someone, that there isn't left upon the rail of a ship, especially a rail which is going to be utilized for leaving the ship, to climb the ladder, any sort of substance such as slime.

"It doesn't make any difference who puts it there. As far as the owner-operator of the vessel goes, it is his job to see it does not stay there too long, if he knows it is the kind of place, as he could have known here, which is used by members of the crew in getting off the ship.

"So I think it would be fair to tell you the real nub of this case which I hope has not been clouded for you, the real nub of this case is, Was there on the rail some slime; was it there for an unreasonably long period of time; was there a failure on the part of the owner-operator through appropriate agents to remove it; and was that slime the cause of the injury which the plaintiff suffered.

. . . . .

"Was there something there and was it there for a reasonably long period of time so that a shipowner ought to have seen that it was removed? That is the question."

[3] "Mr. Katz: May I make a further request? In your charge you specifically said 'and was it there for a reasonably long period of time so that the shipowner could have had it removed.'

"I submit that would apply to the negligence count only but with respect to unseaworthiness, if there is an unseaworthy condition, there is an absolute situation, there is no time required. It is the only—

"The Court: Denied. Refer to the case in the Second Circuit."

An appeal was taken upon the sole ground that the district judge had been in error in instructing the jury that constructive notice was necessary to support liability for unseaworthiness. The Court of Appeals affirmed, holding that at least with respect to "an unseaworthy condition which arises only during the progress of the voyage," the shipowner's obligation "is merely to see that reasonable care is used under the circumstances . . . incident to the correction of the newly arisen defect." 265 F. 2d 426, 432. Certiorari was granted, 361 U. S. 808, to consider a question of maritime law upon which the Courts of Appeals have expressed differing views. Compare *Cookingham* v. *United States,* 184 F. 2d 213 (C. A. 3d Cir.), with *Johnson Line* v. *Maloney,* 243 F. 2d 293 (C. A. 9th Cir.), and *Poignant* v. *United States,* 225 F. 2d 595 (C. A. 2d Cir.).

In its present posture this case thus presents the single issue whether with respect to so-called "transitory" unseaworthiness the shipowner's liability is limited by concepts of common-law negligence. There are here no problems, such as have recently engaged the Court's attention, with respect to the petitioner's status as a "seaman." Cf. *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85; *Pope & Talbot, Inc.,* v. *Hawn,* 346 U. S. 406; *United Pilots Assn.* v. *Halecki,* 358 U. S. 613, or as to the status of the vessel itself. Cf. *West* v. *United States,* 361 U. S. 118. The *Racer* was in active maritime operation, and the petitioner was a member of her crew.[4]

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[4] The trial judge instructed the jury as follows: "In this case, on the basis of rulings I made earlier, I have instructed you on the undisputed fact, Mr. Mitchell is to be regarded as being an employee of the defendant and therefore entitled to those rights if any which flow from the maritime law and flows [*sic*] from the act of Congress."

In a memorandum filed almost a month after the trial, the district judge, apparently relying upon the fact that the shipowner had no direct financial interest in the spawn which had been unloaded

The origin of a seaman's right to recover for injuries caused by an unseaworthy ship is far from clear. The earliest codifications of the law of the sea provided only the equivalent of maintenance and cure—medical treatment and wages to a mariner wounded or falling ill in the service of the ship. Markedly similar provisions granting relief of this nature are to be found in the Laws of Oleron, promulgated about 1150 A. D. by Eleanor, Duchess of Guienne; in the Laws of Wisbuy, published in the following century; in the Laws of the Hanse Towns, which appeared in 1597; and in the Marine Ordinances of Louis XIV, published in 1681.[5]

For many years American courts regarded these ancient codes as establishing the limits of a shipowner's liability to a seaman injured in the service of his vessel. *Harden* v. *Gordon,* 2 Mason 541; *The Brig George,* 1 Sumner 151;

(see note 1, *supra*), stated that, "[T]here should have been a directed verdict for the defendant on the unseaworthiness count. If there were slime on the rail, it was put there by an associate and joint-venturer of the plaintiff and not by a stranger or by anyone acting for the defendant. If Sailor A and his wife go on board, and each of them has a right to be there, but they are engaging in a frolic of their own, not intended for the profit or advantage of the shipowner, say, for example, that they are munching taffy, and the wife drops the taffy on the deck, and the sailor slips on it, the sailor, if he is injured, is not entitled to collect damages from the shipowner. In short, absolute as is the liability for unseaworthiness, it does not subject the shipowner to liability from articles deposited on the ship by a co-adventurer of the plaintiff." But this theory played no part in the issues developed at the trial, where the district judge denied the respondent's motion for a directed verdict and instructed the jury as indicated above.

[5] All of these early maritime codes are reprinted in 30 Fed. Cas. 1171–1216. The relevant provisions are Articles VI and VII, of the Laws of Oleron, 30 Fed. Cas. 1174–1175; Articles XVIII, XIX, and XXXIII, of the Laws of Wisbuy, 30 Fed. Cas. 1191, 1192; Articles XXXIX and XLV of the Laws of the Hanse Towns, 30 Fed. Cas. 1200; and Title Fourth, Articles XI and XII, of the Marine Ordinances of Louis XIV, 30 Fed. Cas. 1209.

Reed v. *Canfield,* 1 Sumner 195.[6] During this early period the maritime law was concerned with the concept of unseaworthiness only with reference to two situations quite unrelated to the right of a crew member to recover for personal injuries. The earliest mention of unseaworthiness in American judicial opinions appears in cases in which mariners were suing for their wages. They were required to prove the unseaworthiness of the vessel to excuse their desertion or misconduct which otherwise would result in a forfeiture of their right to wages. See *Dixon* v. *The Cyrus,* 7 Fed. Cas. 755, No. 3,930; *Rice* v. *The Polly & Kitty,* 20 Fed. Cas. 666, No. 11,754; *The Moslem,* 17 Fed. Cas. 894, No. 9,875. The other route through which the concept of unseaworthiness found its way into the maritime law was via the rules covering marine insurance and the carriage of goods by sea. *The Caledonia,* 157 U. S. 124; *The Silvia,* 171 U. S. 462; *The Southwark,* 191 U. S. 1; I Parsons on Marine Insurance (1868) 367–400.

Not until the late nineteenth century did there develop in American admiralty courts the doctrine that seamen had a right to recover for personal injuries beyond maintenance and cure. During that period it became generally accepted that a shipowner was liable to a mariner injured in the service of a ship as a consequence of the owner's failure to exercise due diligence. The decisions of that era for the most part treated maritime injury cases on the same footing as cases involving the duty of a shoreside employer to exercise ordinary care to provide his employees with a reasonably safe place to work. *Brown* v. *The D. S. Cage,* 4 Fed. Cas. 367, No. 2002;

[6] And, of course, the vitality of a seaman's right to maintenance and cure has not diminished through the years. *Calmar S. S. Corp.* v. *Taylor,* 303 U. S. 525; *Waterman S. S. Corp.* v. *Jones,* 318 U. S. 724; *Farrell* v. *United States,* 336 U. S. 511; *Warren* v. *United States,* 340 U. S. 523.

Halverson v. *Nisen,* 11 Fed. Cas. 310, No. 5970; *The Noddleburn,* 28 Fed. 855; *The Neptuno,* 30 Fed. 925; *The Lizzie Frank,* 31 Fed. 477; *The Flowergate,* 31 Fed. 762; *The A. Heaton,* 43 Fed. 592; *The Julia Fowler,* 49 Fed. 277; *The Concord,* 58 Fed. 913; *The France,* 59 Fed. 479; *The Robert C. McQuillen,* 91 Fed. 685.

Although some courts held shipowners liable for injuries caused by "active" negligence, *The Edith Godden,* 23 Fed. 43; *The Frank & Willie,* 45 Fed. 494, it was held in *The City of Alexandria,* 17 Fed. 390, in a thorough opinion by Judge Addison Brown, that the owner was not liable for negligence which did not render the ship or her appliances unseaworthy. A closely related limitation upon the owner's liability was that imposed by the fellow-servant doctrine. *The Sachem,* 42 Fed. 66.[7]

This was the historical background behind Mr. Justice Brown's much quoted second proposition in *The Osceola,* 189 U. S. 158, 175: "That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." In support of this proposition the Court's opinion noted that "[i]t will be observed in these cases that a departure has been made from the Continental codes in allowing an indemnity beyond the expense of maintenance and cure in cases arising from unseaworthiness. This departure originated in England in the Merchants' Shipping Act of 1876 . . . and in this country, in a general consensus of opinion among the Circuit and

[7] For a more thorough discussion of the history here sketched see Tetreault, Seamen, Seaworthiness, and the Rights of Harbor Workers, 39 Cornell L. Q. 381, 382–403; Gilmore and Black, The Law of Admiralty (1957), pp. 315–332. See also the illuminating discussion in the opinion of then Circuit Judge Harlan in *Dixon* v. *United States,* 219 F. 2d 10, 12–15.

District Courts, that an exception should be made from the general principle before obtaining, in favor of seamen suffering injury through the unseaworthiness of the vessel. We are not disposed to disturb so wholesome a doctrine by any contrary decision of our own." 189 U. S., at 175.

It is arguable that the import of the above-quoted second proposition in *The Osceola* was not to broaden the shipowner's liability, but, rather, to limit liability for negligence to those situations where his negligence resulted in the vessel's unseaworthiness. Support for such a view is to be found not only in the historic context in which *The Osceola* was decided, but in the discussion in the balance of the opinion, in the decision itself (in favor of the shipowner), and in the equation which the Court drew with the law of England, where the Merchant Shipping Act of 1876 imposed upon the owner only the duty to use "all reasonable means" to "insure the seaworthiness of the ship." This limited view of *The Osceola*'s pronouncement as to liability for unseaworthiness may be the basis for subsequent decisions of federal courts exonerating shipowners from responsibility for the negligence of their agents because that negligence had not rendered the vessel unseaworthy. *The Henry B. Fiske,* 141 Fed. 188; *Tropical Fruit S. S. Co.* v. *Towle,* 222 Fed. 867; *John A. Roebling's Sons Co.* v. *Erickson,* 261 Fed. 986. Such a reading of the *Osceola* opinion also finds arguable support in several subsequent decisions of this Court. *Baltimore S. S. Co.* v. *Phillips,* 274 U. S. 316; *Plamals* v. *The Pinar Del Rio,* 277 U. S. 151; *Pacific Co.* v. *Peterson,* 278 U. S. 130.[8] In any event, with the passage of the Jones Act in 1920, 41 Stat. 1007, 46 U. S. C. § 688, Congress effectively obliterated all distinctions between

[8] Where it was said "[u]nseaworthiness, as is well understood, embraces certain species of negligence; while the [Jones Act] includes several additional species not embraced in that term." 278 U. S., at 138.

the kinds of negligence for which the shipowner is liable, as well as limitations imposed by the fellow-servant doctrine, by extending to seamen the remedies made available to railroad workers under the Federal Employers' Liability Act.[9]

The first reference in this Court to the shipowner's obligation to furnish a seaworthy ship as explicitly unrelated to the standard of ordinary care in a personal injury case appears in *Carlisle Packing Co.* v. *Sandanger,* 259 U. S. 255. There it was said "we think the trial court might have told the jury that without regard to negligence the vessel was unseaworthy when she left the dock . . . and that if thus unseaworthy and one of the crew received damage as the direct result thereof, he was entitled to recover compensatory damages." 259 U. S., at 259. This characterization of unseaworthiness as unrelated to negligence was probably not necessary to the decision in that case, where the respondent's injuries had clearly in fact been caused by failure to exercise ordinary care (putting gasoline in a can labeled "coal oil" and neglecting to provide the vessel with life preservers). Yet there is no reason to suppose that the Court's language was inadvertent.[10]

During the two decades that followed the *Carlisle* decision there came to be a general acceptance of the view that *The Osceola* had enunciated a concept of absolute liability for unseaworthiness unrelated to principles of negligence law. Personal injury litigation based upon unseaworthiness was substantial. See, Gilmore and Black, The Law of Admiralty (1957), p. 316. And the standard texts accepted that theory of liability without question.

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[9] An earlier legislative effort to broaden recovery for injured seamen (the La Follette Act of 1915, 38 Stat. 1164, 1185) had been emasculated in *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372.

[10] As one commentator has chosen to regard it. See Tetreault, *op. cit., supra,* note 7, at 394.

See Benedict, The Law of American Admiralty (6th ed., 1940), Vol. I, § 83; Robinson, Admiralty Law (1939), p. 303 *et seq.* Perhaps the clearest expression appeared in Judge Augustus Hand's opinion in *The H. A. Scandrett,* 87 F. 2d 708:

> "In our opinion the libelant had a right of indemnity for injuries arising from an unseaworthy ship even though there was no means of anticipating trouble.
>
> "The ship is not freed from liability by mere due diligence to render her seaworthy as may be the case under the Harter Act (46 U. S. C. A. §§ 190–195) where loss results from faults in navigation, but under the maritime law there is an absolute obligation to provide a seaworthy vessel and, in default thereof, liability follows for any injuries caused by breach of the obligation." 87 F. 2d, at 711.

In 1944 this Court decided *Mahnich* v. *Southern S. S. Co.,* 321 U. S. 96. While it is possible to take a narrow view of the precise holding in that case,[11] the fact is that *Mahnich* stands as a landmark in the development of admiralty law. Chief Justice Stone's opinion in that case gave an unqualified stamp of solid authority to the view that *The Osceola* was correctly to be understood as holding that the duty to provide a seaworthy ship depends not at all upon the negligence of the shipowner or his agents. Moreover, the dissent in *Mahnich* accepted this reading of *The Osceola* and claimed no more than that the injury in *Mahnich* was not properly attributable to unseaworthiness. See 321 U. S., at 105–113.

In *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, the Court effectively scotched any doubts that might have lingered

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[11] *I. e.,* as simply overruling the decision in *Plamals* v. *The Pinar Del Rio,* 277 U. S. 151, that unseaworthiness cannot include "operating negligence." See Gilmore and Black, *op. cit., supra,* at 317.

after *Mahnich* as to the nature of the shipowner's duty to provide a seaworthy vessel. The character of the duty, said the Court, is "absolute." "It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. . . . It is a form of absolute duty owing to all within the range of its humanitarian policy." 328 U. S., at 94–95. The dissenting opinion agreed as to the nature of the shipowner's duty. "[D]ue diligence of the owner," it said, "does not relieve him from this obligation." 328 U. S., at 104.

From that day to this, the decisions of this Court have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care. *Pope & Talbot, Inc.*, v. *Hawn*, 346 U. S. 406; *Alaska Steamship Co.* v. *Petterson*, 347 U. S. 396; *Rogers* v. *United States Lines*, 347 U. S. 984; *Boudoin* v. *Lykes Bros. S. S. Co.*, 348 U. S. 336; *Crumady* v. *The J. H. Fisser*, 358 U. S. 423; *United Pilots Assn.* v. *Halecki*, 358 U. S. 613.

There is no suggestion in any of the decisions that the duty is less onerous with respect to an unseaworthy condition arising after the vessel leaves her home port, or that the duty is any less with respect to an unseaworthy condition which may be only temporary. Of particular relevance here is *Alaska Steamship Co.* v. *Petterson, supra.* In that case the Court affirmed a judgment holding the shipowner liable for injuries caused by defective equipment temporarily brought on board by an independent contractor over which the owner had no control. That decision is thus specific authority for the proposition that the shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability.

That decision also effectively disposes of the suggestion that liability for a temporary unseaworthy condition is different from the liability that attaches when the condition is permanent.[12]

There is ample room for argument, in the light of history, as to how the law of unseaworthiness should have or could have developed. Such theories might be made to fill a volume of logic. But, in view of the decisions in this Court over the last 15 years, we can find no room for argument as to what the law is. What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence. To hold otherwise now would be to erase more than just a page of history.

What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. *Boudoin* v. *Lykes Bros. S. S. Co.*, 348 U. S. 336.

The judgment must be reversed, and the case remanded to the District Court for a new trial on the issue of unseaworthiness.

Reversed and remanded.

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

No area of federal law is judge-made at its source to such an extent as is the law of admiralty. The evolution of judge-made law is a process of accretion and erosion. We are told by a great master that law is civilized to the

[12] The persuasive authority of *Petterson* in a case very similar to this one has been recognized by the Court of Appeals for the Second Circuit. *Poignant* v. *United States*, 225 F. 2d 595.

extent that it is purposefully conscious. Conversely, if law just "grow'd" like Topsy, unreflectively and without conscious design, it is irrational. When it appears that a challenged doctrine has been uncritically accepted as a matter of course by the inertia of repetition—has just "grow'd" like Topsy—the Court owes it to the demands of reason, on which judicial law-making power ultimately rests for its authority, to examine its foundations and validity in order appropriately to assess claims for its extension.

Our law of the sea has an ancient history. While it has not been static, the needs and interests of the interrelated world-wide seaborne trade which it reflects are very deeply rooted in the past. For the most part it has not undergone the great changes attributable to the emergence and growth of industrialized society on land. In the law of the sea, the continuity and persistence of a doctrine, particularly one with international title-deeds, has special significance.

The birth of the current doctrine of unseaworthiness, now impressively challenged by Chief Judge Magruder's opinion under review, can be stated precisely: it occurred on May 29, 1922, in *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255. The action was brought in the Washington state courts by Sandanger, an employee of Carlisle, who was injured while working on its motorboat on a six- or eight-hour trip. The injury occurred when he lighted fuel from a can on board marked "coal oil" in order to start a cookstove, and it exploded. It appeared thereafter that the can had mistakenly been filled with gasoline. In a suit based on a claim of negligence, Sandanger won a verdict on a finding of negligence, which was challenged in the Supreme Court of Washington on the ground that the exclusively applicable maritime law did not afford relief by way of compensation for negligent injury of an employee. The Washington court held that an

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injury caused by a negligently created unseaworthy condition was compensable, even when, under the rule laid down in *The Osceola,* 189 U. S. 158, negligent injury without unseaworthiness would not be. 112 Wash. 480, 192 P. 1005.

The matter was dealt with in this Court in the few lines innovating the rule of absolute liability: "we think the trial court might have told the jury that without regard to negligence the vessel was unseaworthy when she left the dock . . . and that if . . . one of the crew received damage as the direct result thereof, he was entitled to recover compensatory damages." 259 U. S., at 259. (The full text is quoted in the margin.[1]) No explication accompanied this dogmatic pronouncement on an issue not presented by an issue of the affirmed judgment. It was strangely deemed sufficient to rely on the unelaborated citation of two cases in this Court (*The Silvia,* 171 U. S. 462, 464, and *The Southwark,* 191 U. S. 1, 8) which were concerned not with the rights of seamen but with the shipowner's liability for cargo damage. The abrupt, unreasoned conclusion was reached without benefit of argument: the parties had presented the case solely on the basis on which the action was instituted and in the terms in which it had been decided by the Supreme Court of Washington—liability founded on negligence. Neither our own investigation nor that of the parties here has disclosed a single case in an English or an American court prior to *Sandanger* in which the absolute duty to

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[1] "Considering the custom prevailing in those waters and other clearly established facts, in the present cause, we think the trial court might have told the jury that without regard to negligence the vessel was unseaworthy when she left the dock if the can marked 'coal oil' contained gasoline; also that she was unseaworthy if no life preservers were then on board; and that if thus unseaworthy and one of the crew received damage as the direct result thereof, he was entitled to recover compensatory damages."

provide a seaworthy vessel for cargo carriage and marine insurance contracts was applied to a seaman's suit for personal injury. *Sandanger* was an unillumined departure in the law of the sea. Reasoned decision of the case before us, in which extension is sought of a rule so dubiously initiated,[2] requires that its rational, historical and social basis be scrutinized and not merely accepted as unquestionable dogma.

We must take it as established that the petitioner, a seaman employed on the *Racer,* fell from her rail while using it as a customary stepping place in leaving the vessel; that the resulting injury was caused by the presence of fish spawn on the rail rendering it slippery; that it was not negligent for respondent to allow the spawn to get on and remain on the rail.[3] It further appears that the spawn was deposited on the rail shortly before the injury, when bags of it were handed across the rail in the course of the unloading of the vessel.

The claim now before the Court rested on the alleged unseaworthiness of the vessel. Petitioner asserts that if the presence of spawn on the rail rendered it not reasonably fit for its function, then, without more—and particularly without regard to the length of time the spawn had remained on the rail—respondent was liable to compensate him for his consequent injuries. He asserts that these conclusions flow from the rule of *Sandanger, supra,* that the owner's liability to compensate

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[2] Chief Judge Magruder has appropriately noted that no previous decision in this Court has considered whether liability for unseaworthiness existing at the start of the voyage extends to subsequently arising conditions. 265 F. 2d, at 432; see also *Dixon* v. *United States,* 219 F. 2d 10 (C. A. 2d Cir.).

[3] It was not contended that the failure to provide the vessel with a different mode of access, or other means for unloading, rendered it unseaworthy from the start of the voyage. Cf. *Poignant* v. *United States,* 225 F. 2d 595 (C. A. 2d Cir.).

seamen for injuries caused by the unseaworthiness of his vessel is "absolute."

Respondent contends, and the lower courts held, that the fact that spawn on the rail caused petitioner's injury is not, of itself, sufficient to establish respondent's liability. It urges two related propositions in the alternative in support of its judgment. The first of these—the express ground of Judge Magruder's decision and the primary ground urged here in its support—is that since this unseaworthy condition concededly did not arise until after the commencement of the voyage it did not create liability unless it persisted so long before the injury as to have afforded the owner notice of its existence. This view makes liability for an unseaworthy condition created without negligence after the start of the voyage turn on the existence of negligence in permitting the condition to persist. Respondent also urges that, even if negligently caused or allowed to persist, this transitory hazard arising after the start of the voyage in equipment otherwise sound was not an unseaworthy condition.

We are thus confronted with two questions of the nature and scope of the duty of a shipowner to seamen to provide a seaworthy ship. The decision in *Sandanger, supra,* in light of the facts from which its generalization was drawn, certainly did not foreshadow the result urged by petitioner, a result characterized by Judge Magruder as "startlingly opposed to principle." 265 F. 2d, at 432. There was in that case no such analysis of the reasons upon which the rule announced was rested as to govern or even suggest the present decision. The Court does not deny force to the distinctions urged by respondent, but regards the questions now presented as foreclosed by *Alaska S. S. Co.* v. *Petterson,* 347 U. S. 396. In fact, today's decision rests on an unrevealing *per curiam* opinion, itself founded on prior decisions affording no justification for the result here.

As the opinion of the Court of Appeals shows, 205 F. 2d 478, that case held a shipowner liable for injuries to a longshoreman caused by defective equipment brought on board his vessel by a contract stevedore for use in loading operations. The owner gave the stevedore permission at his option to substitute his own equipment for that of the vessel, and the equipment which caused the injury was a snatch-block, standard ships' equipment, supplied pursuant to that permission. Following *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, and *Pope & Talbot* v. *Hawn,* 346 U. S. 406, which had held that the owner's duty to provide a seaworthy ship runs to non-seamen engaged in seamen's work, *Petterson* at best added to this doctrine the rule that that duty could not be delegated by giving the stevedore control over loading operations and an option to substitute its own equipment for that of the vessel. The parties did not raise or argue either (1) that the vessel was seaworthy at the start of her voyage and no absolute liability attached to subsequently arising conditions, or (2) that because the condition was temporary, in the sense pertinent here, there was no unseaworthiness. There is therefore no foundation, either in what the *per curiam* revealed or in the history of the case, to warrant the inference that the Court was conscious of the distinctions now squarely pressed upon us, much less that it rejected them. Such a conclusion is the more fanciful because, even had the Court considered and accepted the contentions now urged, it might well have found them insufficient to avoid liability and have held that, by giving permission to have substitution made for warranted ships' equipment, the owner adopted the substitute as his own.

In view of the insubstantial foundation in authority of what is today decided, I deem it incumbent upon me to examine the history of the evolution of the doctrine of

absolute liability in injury cases upon which petitioner rests his claim.

Although it was reasonably well established by the middle of the nineteenth century that the maritime carrier of goods, in the absence of express provisions to the contrary, warranted their safe delivery against all hazards save acts of God or the public enemy, see, *e. g., The Propeller Niagara* v. *Cordes,* 21 How. 7, 23, the origins of such strict liability are not entirely clear. The English admiralty courts apparently confined the shipowner's liability to losses resulting from his fault or that of his servants. See Fletcher, The Carrier's Liability, 51–79. The imposition of stricter liability appears to have begun not in the admiralty at all, but in the common-law courts as the jurisdiction of the admiral gradually declined. See Mears, The History of the Admiralty Jurisdiction, in 2 Select Essays in Anglo-American Legal History, p. 312 *et seq.* (originally published in Roscoe, Admiralty Jurisdiction and Practice, pp. 1–61). They increasingly regarded the carrier by sea as a common carrier, whether or not he fitted the traditional concept, see Paton, Bailment in the Common Law, 233–236, and it does not appear that they predicated his strict liability to redeliver cargo on any peculiarly maritime aspects of the carriage.

In any event, with the sanction of the English—and, to a lesser extent, the American—courts it early became possible for the maritime carrier to use the contract of carriage by way of limiting this extraordinary liability, and the significance of a carrier's liability as such shrank. See *Pope* v. *Nickerson,* 3 Story 465. Disclaimers of any duty beyond the exercise of diligence were valid and common, and, in England, disclaimers of liability even for negligent damage were sustained. See I Parsons, Maritime Law, 177–179, n. 1; compare, *In re Missouri S. S. Co.,* 42 Ch. D. 321 (1889), with *Liverpool Steam Co.* v. *Phenix Ins. Co.,* 129 U. S. 397, 438–439 (1889).

It was against the background of such limitations of the carrier's strict duty to redeliver cargo, and in derogation of them, that the more limited, though absolute, duty to furnish a seaworthy vessel emerged. Unlike the strict duty imposed on carriers in general to redeliver cargo, it was a concept rooted in the peculiarly maritime hazards of carriage by sea. It expressed, and became the focus of, American judicial resistance to broad disclaimers, and was implied despite relatively specific limitations in the contract of carriage. See, *e. g., The Caledonia,* 157 U. S. 124, 137. The reasons for the development are evident. The hazards of the sea were great even in vessels properly maintained and outfitted; in imperfect ships they became intolerable. Since at the start of a voyage the familiar facilities of the home port were ordinarily available to the owner to permit him to reduce the risk, it was not unreasonable to require him at the peril of extensive liability to make the vessel seaworthy—reasonably fit for the intended voyage, see *The Silvia,* 171 U. S. 462, 464; *The Southwark,* 191 U. S. 1, 9—and thereby remove a profitable temptation to add to the hazards of the sea. Though the fact that the duty was absolute is in some measure indicative of an unstated determination that the carrier's ability to distribute the risk justified regarding him as an insurer, cf. *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 94, the dominant reason appears to have been that under the conditions existing before the start of a voyage it was fair to demand the increment of additional safety which could be obtained by barring the defense of due care. The instances of defects in fact undiscoverable under the comparatively ideal pre-voyage circumstances would be predictably low, and the extraordinary character of the risk, coupled with the exclusive knowledge and control of the owner and his ability to contract away the risk in his

dealings with suppliers and service companies, justified imposing the burden on him.

This judicial evolution was doubtless influenced as well by the similarly absolute implied warranty in contracts of marine insurance by which the assured, whether shipowner, charterer, or shipper, warranted the seaworthiness of the vessel at the start of its voyage as a condition upon the attaching of the policy. The origin of this rule has been attributed to the customary understanding of the risks actually undertaken by the insurer. See, *e. g.,* Tetreault, Seamen, Seaworthiness, and the Rights of Harbor Workers, 39 Cornell L. Q. 381, 395. But whatever role custom may have played, the implied warranty appears to have sprung, at least in part, from considerations of policy unrelated to the insurer's understanding. "I have endeavoured, both with a view to the benefit of commerce and the preservation of human life, to enforce that doctrine [of the implied warranty of initial seaworthiness] as far as, in the exercise of a sound discretion, I have been enabled to do so. . . ." Lord Eldon, in *Douglas* v. *Scougall,* 4 Dow 269, 276 [1816]; cf. *The Caledonia,* 157 U. S. 124.

Toward the end of the nineteenth century these different considerations, which had given rise to a single duty, became imperceptibly fused. This Court held that the warranty of assured to insurer was identical to that of carrier to shipper, even explaining the carrier's implied promise in terms of the undertaking of the shipper. *The Caledonia,* 157 U. S. 124.

The divergence of attitude between American and English courts which appeared in the scope of the contractual disclaimers of liability each would recognize, was more sharply exemplified by the scope they respectively attributed to the warranty of seaworthiness in cargo and insurance cases. By 1853 English courts had clearly limited the warranty to the condition of the vessel at the

start of the voyage, while recognizing that American courts had just as clearly held the owner liable and the insurer exonerated for losses occasioned by unseaworthy conditions subsequently arising and allowed to persist through the negligence of responsible servants. See, *e. g.*, Baron Parke in *Gibson* v. *Small,* 4 H. L. Cas. 353, 398–399; I Parsons, Marine Insurance, 381–383; *Union Ins. Co.* v. *Smith,* 124 U. S. 405, 427. The English courts were strongly influenced by the inherent limitations of the owner's actual control of a vessel (see, *e. g., Gibson* v. *Small, supra,* at 404); while the American so highly esteemed the protection of life and property, presumably to be so gained, as to have held the owner in effect absolutely liable to select master and crew who would in fact diligently see to the continuing seaworthiness of the vessel. In America, the result of the conflicts created by this divergence in the law of two maritime nations was the Harter Act of 1893, 27 Stat. 445. The carrier was thereby permitted to disclaim any duty other than to exercise due diligence in the preparation of the vessel. If he in fact exercised such diligence, he was freed of liability for losses "resulting from faults or errors in navigation or in the management" of the vessel. The purpose and effect of the Act was to strike a compromise between the English and American standards so as to reduce conflicts between them.[4] See Gilmore and Black, The Law of Admiralty, 122. One collateral effect of the Act was largely to remove from concern of the

[4] The considerations urging harmony of law for international carriage, especially as between the United States and the United Kingdom, led, in 1936, to the enactment of the Carriage of Goods by Sea Act, 49 Stat. 1207, substantially adopting the recommendations of an international convention on the problem. See Gilmore and Black, The Law of Admiralty, 122–124. Where applicable, the 1936 Act imposes only the duty to use due diligence to provide a seaworthy ship at the start of the voyage.

courts questions of liability for cargo damage caused by unseaworthy conditions arising after the start of the voyage. Cf. *The Silvia,* 171 U. S. 462; *May* v. *Hamburg-Amerikanische,* 290 U. S. 333. After, and probably because of, the Harter Act, the statement frequently appears in cargo-damage cases that the warranty of seaworthiness applies only at the start of the voyage; subsequently arising deficiencies are treated as aspects of "navigation or management." See, *e. g., May* v. *Hamburg-Amerikanische, supra,* at 345; *The Steel Navigator,* 23 F. 2d 590, 591 (C. A. 2d Cir. 1928). However, even that Act did not diminish the tendency of the admiralty courts to find that a contractual disclaimer did not apply to the warranty of seaworthiness at the start of the voyage, and the absolute warranty of initial seaworthiness therefore remained. See, *e. g., The Carib Prince,* 170 U. S. 655.

The most striking differences between English and American courts as to the scope of the warranty of seaworthiness occurred in the area of compensation for seamen's injuries.[5] The law of both nations early recognized unseaworthiness as a condition upon the contract of employment, which, upon the employer's default, operated to exonerate the seaman from forfeiture of wages if he quit the ship. 1 Parsons, Maritime Law, 455; *The Arizona* v. *Anelich,* 298 U. S. 110, 121–122, n. 2. But

[5] From the time of the earliest maritime codes seamen injured in the service of the vessel have, to varying extents, been entitled to maintenance and cure at the expense of the ship. See *The Osceola,* 189 U. S. 158, 169–170. But the seaman's right to compensation for injuries is a relatively modern development, probably originating in cases concerning the negligent failure of the vessel to discharge the duty to provide maintenance and cure. See *Brown* v. *Overton,* 4 Fed. Cas. 418 (D. C. Mass. 1859); Tetreault, Seamen, Seaworthiness, and the Rights of Harbor Workers, 39 Cornell L. Q. 381, 385. However, there appears to have been no connection between the elaboration of the duty to provide maintenance and cure and the emergence of the doctrine of absolute liability for unseaworthiness.

though the duty to provide a seaworthy vessel was thus held to run to seamen, the seaman's remedy was for a considerable time restricted to this limited form of self-help.

In England the question of a seaman's right to compensatory damages for injuries resulting from the unseaworthiness of the vessel was first presented for decision in *Couch* v. *Steele,* [1854] 3 El. & Bl. 402. The plaintiff claimed compensation for damage from illness brought about by the leaky condition of the vessel. The court, apparently assuming that the vessel was unseaworthy, declared that the warranty did not run to seamen, for the reason that it was unknown whether the deficiencies of the vessel were taken into account in the contract for wages. Coleridge, J. (at 408), distinguished the insurance warranty as turning on doctrines which "have no place in any other branch of the law," and confined the duty of owner to seamen to the scope of master-servant law on land. A similar disposition to analogize maritime to non-maritime activity on the part of the English common-law courts was manifested in *Readhead* v. *Midland R. Co.,* [1869] L. R., 4 Q. B. 379, where the claim was advanced that a railway passenger injured when a wheel broke was, by analogy to the warranty of seaworthiness as to cargo, entitled to compensation for his injuries. The court disposed of the contention by describing the warranty of seaworthiness as solely responsive to the need, early noted in *Coggs* v. *Bernard,* [1703] 2 Ld. Raym. 909, to prevent common carriers generally from colluding with thieves.

Couch v. *Steele, supra,* was modified by the Merchant Shipping Act of 1876, 39 & 40 Vict., c. 80, sec. 5, by which a duty was imposed on the owner to exercise due care to provide and maintain a seaworthy vessel. For injuries resulting from breach of the duty, a seaman could recover compensatory damages. But even that Act was narrowly

construed as to conditions arising after the start of the voyage in the course of operation of the vessel. See *Hedley* v. *Pinkney & Sons S. S. Co.*, [1894] A. C. 222. In the United States, *Couch* v. *Steele, supra,* was early disapproved. See, *e. g., The Noddleburn,* 28 F. 855 (D. C. Ore. 1886); 2 Parsons, Shipping and Admiralty, 78. The liability which lower courts generally found to exist, however, was not founded upon the absolute warranty rejected in *Couch,* but upon fault. See, *e. g., The Noddleburn, supra; The Flowergate,* 31 F. 762 (D. C. E. D. N. Y. 1887); *The Lizzie Frank,* 31 F. 477, 479 (D. C. S. D. Ala. 1887) (which followed *Readhead* v. *Midland R. Co., supra,* in explaining the cargo warranty as stemming only from common-carrier status).

In 1903 this Court decided *The Osceola,* 189 U. S. 158, and laid down its oft-cited four propositions (at 175) governing the liability of vessel and owner to injured seamen. As has frequently been noted, the second proposition, a dictum declaring a right to indemnity for injuries "received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship" (at 175) does not appear to have announced a doctrine of liability without fault. No cargo or insurance cases were relied upon, and none of the cases cited had found such liability. The only reliance on English law was on the Act of 1876, *supra,* which defined the duty as requiring the exercise of due diligence to render the vessel seaworthy. It appears instead that it was the intention of *The Osceola* to adopt the analysis of Judge Addison Brown in *The City of Alexandria,* 17 F. 390 (D. C. S. D. N. Y. 1883), which it cited, under which a seaman could recover only for injuries resulting from that limited species of negligence which resulted in an unseaworthy condition. Such is the tenor of the third and fourth propositions of *The Osceola.*

After *The Osceola* a number of decisions denied recovery for negligently caused injury on the ground that unseaworthiness was absent. See, *e. g., Tropical Fruit S. S. Co.* v. *Towle,* 222 F. 867 (C. A. 5th Cir. 1915); *John A. Roebling's Sons Co.* v. *Erickson,* 261 F. 986 (C. A. 2d Cir. 1919). After an abortive attempt by Congress, see 38 Stat. 1164, 1185; *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372, there followed in 1920 the remedial legislation now familiarly known as the Jones Act, extending relief against the owner for all forms of negligent injury to seamen, free of the so-called fellow-servant rule of admiralty.

It was against this background that *Carlisle Packing Co.* v. *Sandanger,* 259 U. S. 255, quite out of the blue, citing cargo cases, declared that the owner's duty to a seaman to provide a seaworthy vessel was as absolute as that established by the implied warranty as to cargo.[6] In so ruling, the Court gave expression to a policy, long discernible in American admiralty decisions, of implying the warranty not merely because of the customary expectations of the parties to an agreement—the English court's basis for rejection of the warranty in *Couch* v. *Steele, supra*—but as well in order to increase protection to life and property against the hazards of the sea. They had previously manifested this conception of the source of the warranty in the degree to which they departed from the English common-law courts in confining attempted disclaimers of the warranty, and in their willingness to find a duty to maintain the condition of seaworthiness throughout the voyage.

The reasons which justified the implication on grounds of policy as to cargo, justified it as to employed seamen;

[6] It is not irrelevant to note that the spokesman for the Court was the Justice under whose lead the most unhappy admiralty doctrines were promulgated: *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, and *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149.

and there was no countervailing extensive increase in the nature of the duty to give the Court serious pause in extending to the protection of life a policy designed in significant part for the protection of property. Despite the Harter Act, the absolute warranty of initial seaworthiness as to cargo survived; and under the strict rules of shipboard organization and conduct, the safety of the seaman was, in a very real sense, subject to the same hazards.

It was predictable that there would be few, if any, matters with which the owner would have to be concerned under the warranty so extended, that he could reasonably have ignored as creating no threat to the safety of cargo. At the start of the voyage, his opportunity would be ample, as in the case of cargo, to undertake that effective diligence which would in fact avoid all but a very few injuries resulting from unseaworthiness; and he would be able to protect himself from the consequences of most deficiencies undetectable by him by agreement with suppliers, or service companies, and from the rest by the purchase of insurance. The additional burden created by extension of the warranty to seamen was thus not unduly heavy; and the interest to be vindicated had for long been a traditional concern of American admiralty.

If *Sandanger* now stood alone, it would be plain that the absolute warranty it announced was no greater in scope than the warranty as to cargo which pre-existed the Harter Act of 1893, and the question now presented—whether the warranty is also absolute as to subsequently arising conditions—would clearly present a novel issue for decision. Subsequent decisions in this Court have not deliberately closed the gap.

It was twenty-two years before the question of the existence and scope of absolute liability came before

this Court again, and in the interim the lower courts manifested sharp disagreement whether it existed at all. Compare *The Rolph,* 299 F. 52 (C. A. 9th Cir. 1924), and *The Tawmie,* 80 F. 2d 792 (C. A. 5th Cir. 1936), with *The H. A. Scandrett,* 87 F. 2d 708 (C. A. 2d Cir. 1937). (In this case Judge Augustus N. Hand followed *Sandanger* in relying upon cargo cases.)

In 1944 this Court decided *Mahnich* v. *Southern S. S. Co.,* 321 U. S. 96. The suit was brought by a seaman under the general maritime law (the statute of limitations having run on Jones Act claims) for injuries which he incurred at sea when a rope, with which the staging on which he was working fifteen feet over the deck was rigged, parted and he fell. The mate in charge had taken the rope, which was unused, but at least two years old, from the Lyle Gun (a life-saving device) box. After the accident it appeared that the rope was decayed.

The District Court, 45 F. Supp. 839, found that the mate's selection of the rope was negligent but dismissed the libel on the ground that, apart from the Jones Act, negligent injury alone was not compensable and that the vessel, since it had other good rope on board sufficient for the job, was not unseaworthy. The Court of Appeals affirmed. 135 F. 2d 602. It assumed, without deciding, that the rope was negligently selected (a dissenting judge found no negligence, 135 F. 2d, at 605), and agreed with the District Court's conclusion that the vessel was not unseaworthy. Though it reversed, this Court, too, found it unnecessary to decide the contested question of negligence. It gave as its primary reason that "the exercise of due diligence does not relieve the owner of his obligation to the seaman to furnish adequate appliances." (321 U. S., at 100.) Although this statement was the critical major premise of an opinion which went on to decide that such absolute liability would not be barred by

the mate's intervening negligence, it was rested primarily on *Carlisle Packing Co.* v. *Sandanger, supra,* without further explanation.

There is no more disclosure in the opinion or history of this case than there was in *Sandanger* to warrant attributing to this statement a deliberate or authoritative ruling that liability is absolute for all injuries resulting from unseaworthy conditions. Confined to the facts of the case, the decision that intervening negligence would not constitute a defense to an action for injuries resulting from an unseaworthy condition is consistent with the rule of the cargo and insurance cases, confining the absolute warranty to damage resulting from initial unseaworthiness. The rope, which was new, had decayed from overlong or improper storage, not from use, and was, it is right to assume, defective from the start of the voyage. Cf. *The Edwin I. Morrison,* 153 U. S. 199, 211.

Moreover, a claim for extending the scope of the absolute warranty was not raised or argued by the parties. They simply assumed that liability would follow unseaworthiness unless intervening negligence was a defense. Their major concern, and the primary focus of the Court's attention, was the earlier case of *Plamals* v. *The Pinar Del Rio,* 277 U. S. 151, where it was held, on substantially identical facts, that the mate's negligence did not create liability for unseaworthiness where there was an adequate supply of sound rope on board. In *Mahnich, Plamals* was held to have rested on one of two mistaken premises: either (1) that the question of seaworthiness turned solely on the supply of rope and not on the condition of the appliance rigged in the course of the voyage, or (2) that liability for provision of an unseaworthy appliance in the course of a voyage would be barred where the unseaworthiness resulted from the mate's negligence. The Court in *Mahnich* was not remotely called upon, in rejecting those premises as it did, to consider whether the absolute war-

ranty of seaworthiness extends to conditions arising after the commencement of the voyage. Finally, there is evidence that if the Court made any assumption about the scope of the warranty it assumed that, as in the case of cargo until the Harter Act, it was absolute, but only as to conditions existing at the commencement of the voyage. It said:

> "It required the Harter Act to relax the exacting obligation to cargo of the owner's warranty of seaworthiness of ship and tackle. That relaxation has not been extended, either by statute or by decision, to the like obligation of the owner to the seaman" (at 101).

Seas Shipping Co. v. *Sieracki,* 328 U. S. 85, is no better authority for petitioner's contentions here. The action was instituted by a longshoreman who was injured while loading respondent's vessel, when a forged shackle supporting the vessel's ten-ton boom gave way because of a latent defect in the forging. The defect had existed from the time of the construction of the ship. Both parties conceded that the vessel was unseaworthy, and that if a seaman had been injured in the same way he could have recovered compensatory damages. The District Court gave judgment for the owner on the ground that it was not negligent for it to have failed to discover the defect. 57 F. Supp. 724. The Court of Appeals reversed, on the ground that Sieracki was entitled to recover under the warranty of seaworthiness. 149 F. 2d 98. The turning-point of the case in this Court was whether the warranty of seaworthiness, concededly absolute on the facts, covered longshoremen doing seamen's work.

The Court's extended discussion of the sources and rationale of the warranty is entirely consistent with the history noted above. 328 U. S., at 90–96. Nothing that

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was said or implied casts any light whatever on the question whether the initial absolute warranty carried over by *Sandanger* from the cargo cases extends to subsequently arising conditions, unless, as in *Mahnich,* the Court's equation of the warranty running to seamen with the pre-Harter Act warranty as to cargo bespeaks its assumption that the warranty was absolute only as to the start of the voyage.

No other case in this Court is further enlightening on the question of the scope of the absolute warranty. *Alaska S. S. Co.* v. *Petterson,* 347 U. S. 396, has already been discussed. See also *Rogers* v. *United States Lines,* 347 U. S. 984. *Pope & Talbot, Inc.,* v. *Hawn,* 346 U. S. 406, is irrelevant here. The injury occurred in port in the course of loading the vessel; the question of unseaworthiness was not an issue in this Court; and the jury had found the defendant guilty of negligence. *Boudoin* v. *Lykes Bros. S. S. Co.,* 348 U. S. 336, concerned unseaworthiness predicated upon the incompetency of a crew member, which, as the Court found, was a traditional aspect of the initial warranty of seaworthiness. *Crumady* v. *The J. H. Fisser,* 358 U. S. 423, found unseaworthiness as a result of the vessel's failure to use "safe practice," 358 U. S., at 426, n., in the preparation of a winch for unloading operations, on its face a negligent act, although its negligent character was not the overt basis of the decision. None of the several parties to the case raised the objections now urged upon us, and no more than in *Mahnich* were they considered or adjudicated.

Against this background of prior adjudications it assumes what is required to be established to assert that "[t]here is no suggestion in any of the decisions that the duty is less onerous with respect to an unseaworthy condition arising after the vessel leaves her home port. . . ." In fact, there is no overt suggestion in any of our decisions that the duty is not less onerous, and the origin

of the duty in cargo and marine insurance cases strongly suggests that it is. Even the admiralty courts of the nineteenth century, during the growth of American shipping, found no justification in peculiarly maritime concerns for imposing an absolute duty at all times after the start of the voyage to maintain the vessel in seaworthy condition. Once the vessel was made safe, it was thought sufficient to entrust its safe conduct to an appropriate standard of diligence. This view undoubtedly involved the weighing of a number of factors, all of which remain pertinent today: the unavailability of the familiar facilities of the home port, or of any port, to make inspections or repairs; the unfairness of holding the vessel accountable for losses resulting from damage, detectable or otherwise, caused, without fault of the vessel, by perils of the sea; the likelihood that those whose safety depends on the vessel will in any event use every reasonable precaution to preserve it, and that in the circumstances of operation of the vessel no additional care could be exacted by the imposition of absolute liability; and the determination that to impose absolute liability for injuries caused by defects arising without fault in the complex operation of a vessel would be, in all the circumstances, unduly burdensome.

This latter consideration is especially pertinent in cases of so-called "transitory" unseaworthiness such as is before us. For disposition of this case it may be assumed, though with considerable misgiving, that the condition here created wholly without fault after the journey had begun, rendered the vessel unseaworthy. But the unreasonableness of imposing liability on the vessel for injuries occasioned by the unavoidable consequences of its proper operation need not therefore be ignored. No compensating increase in the caution actually to be exercised can be anticipated as a result of the creation of such a duty. Nor can the owner pass along the risk to suppliers or

service companies. The only rational justification for its imposition is that the owner is now to be regarded as an insurer who must bear the cost of the insurance. But the Court offers no reason of history or policy why vessel owners, unlike all other employers, should, in circumstances where the only benefit to be gained is the insurance itself, be regarded by law as the insurers of their employees. If there were a sufficient reason for the judicial imposition of such a duty, it would be arbitrary in the extreme to limit it to cases where by chance the injury occurs through the momentary inadequacy of a prudently run vessel. All accidental injury should fall within such a humanitarian policy provided only that it occurs in the service of the ship. It was such a policy which from the earliest times has justified the imposition of the duty to provide maintenance and cure; but nothing in the nature of modern maritime undertakings justifies extending to compensation a form of relief which for more than five centuries has been found sufficient.

I would affirm the judgment below.

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

In joining my Brother FRANKFURTER'S dissent, I wish to add a few words. I believe the Court's decision not only finds no support in the past cases, but also is unjustified in principle, and is directed at ends not appropriately within our domain. The Second Circuit's decision in *Poignant* v. *United States,* 225 F. 2d 595, provides a useful point of departure for what I have to say.

In *Poignant* the libellant, a crew member, slipped on a small piece of garbage lying in a passageway of the ship. The vessel lacked garbage chutes, and the garbage was pulled, in cans, through the passageway to a railing, where it was jettisoned. The Court of Appeals first expressed the view that any unseaworthy condition which existed

had in all probability arisen after the voyage had commenced. It said, much as the Court now holds, that *Alaska Steamship Co.* v. *Petterson,* 347 U. S. 396, required it to apply a rule of absolute liability nonetheless. It then put, as the critical issue, the question whether the presence of some garbage in a public passageway constituted an unseaworthy condition, and, finding the matter to turn on an issue of fact, remanded the case for trial. However, it is important to note the manner in which the court dealt with the problem. Although at the outset of the opinion the allegedly unseaworthy condition was assumed to be the presence of garbage in a passageway, 225 F. 2d, at 597, the remand was *in fact* directed to the question whether the absence of garbage chutes rendered the vessel not reasonably fit for the voyage, and therefore unseaworthy. *Id.,* at 598. This, of course, would be a condition going to the proper outfitting of the vessel for sea travel, and a clear case of initial unseaworthiness. In such event, the injury would have been the proximate result of that unseaworthiness, for it was by reason of the lack of chutes that garbage was carried through the passageways at all.

For me this approach indicates the rule which should govern the case before us. Had the petitioner contended and proved that a properly outfitted trawler of this type should have had a particular device for unloading fish, or an alternative means of facilitating petitioner's egress from the vessel, so that either the railing would not have been slippery or the petitioner would not have been required to use the railing in debarking, the case would have been governed by the absolute liability rule of *Sandanger* and its successors, and respondent's opportunity to remove the spawn from the rail would properly be held immaterial. As the case is decided, however, we are told that even though there is no claim that the vessel should have made different provisions for the unloading of its

catch or the debarking of its crew, the shipowner is liable for an injury caused by a temporary unsafe condition arising from the normal operation of the vessel, not the result of fault or mismanagement of anyone on board, and which no one had a reasonable opportunity to remedy. Had there been negligence, either in permitting the spawn to accumulate or in failing to remove it, the admiralty principles developed in the cargo cases, and taken over into personal injury cases, would warrant an imposition of liability, although as to cargo damage the Harter Act and the Carriage of Goods by Sea Act would, of course, bar recovery. *The Silvia,* 171 U. S. 462. But where, as here, there is neither a claim that the vessel was initially unseaworthy, nor any showing of negligence, the imposition of liability seems to me, borrowing from Judge Magruder, a "hard doctrine," "startlingly opposed to principle." 265 F. 2d, at 432.

The Court is not fashioning a rule designed to protect life, cf. *Bullard* v. *Roger Williams Ins. Co.,* 4 Fed. Cas. 643, No. 2,122, at 646, for there appears no real basis for expectation that today's decision will promote the taking of greater precautions at sea. See, dissenting opinion of FRANKFURTER, J., *ante,* p. 557. The respondent is held liable, without being told that there was something left undone which should have been done, for petitioner is not asked to show, as was the libellant in *Poignant,* that the vessel ought to have been outfitted differently, that is, in a fashion which would have prevented the dangerous condition from arising at all. Nor is the respondent permitted to show that such condition was not due to its fault.

The *sole* interest served by the Court's decision is compensation. Such an interest is, of course, equally present in the case of an undoubted accident, where under the Court's ruling no right of recovery is bestowed, as it is in the present case. But, because of the Court's inherent

incapacity to deal with the problem in the comprehensive and integrated manner which would doubtless characterize its legislative treatment, cf. *Dixon* v. *United States*, 219 F. 2d 10, 15, this arbitrary limitation is preserved. This internal contradiction in the rule which the Court has established only serves to highlight a more central point: it is not for a court, even a court of admiralty, to fashion a tort rule solely in response to considerations which underlie workmen's compensation legislation, weighty as such considerations doubtless are as a legislative matter. Citation is not needed to remind one of the readiness of Congress to deal with felt deficiencies in judicial protection of the interests of those who go to sea. We should heed the limitations on our own capacity and authority. See *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282, 285–287.

I would affirm.

PARKER *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM.

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

No. 38. Argued January 20, 1960.—Decided May 16, 1960.

This Court granted certiorari to review dismissal of petitioner's application for habeas corpus, in which he claimed that his conviction in a state court violated the Due Process Clause of the Fourteenth Amendment. Before the case could be heard here, petitioner was released from imprisonment after having served his sentence less time off for good behavior. *Held:* The case has become moot; this Court is without jurisdiction to deal with the merits of petitioner's claim; and the writ of certiorari is dismissed for want of jurisdiction. Pp. 574–576.

Reported below: 258 F. 2d 937.

Frank M. Wozencraft argued the cause for petitioner. With him on the brief was *William F. Walsh.*

Leon F. Pesek, Assistant Attorney General of Texas, argued the cause for respondent. With him on the brief were *Will Wilson,* Attorney General, and *Linward Shivers,* Assistant Attorney General.

PER CURIAM.

This is an application for a writ of habeas corpus brought in the United States District Court for the Southern District of Texas alleging unlawful detention under a sentence of imprisonment following a trial in the state court in which petitioner was, according to his claim, denied due process of law as guaranteed by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. After hearing, the District Court dismissed the petition. The Court of Appeals for the Fifth Circuit, with one judge dissenting, affirmed the order of dismissal, 258 F. 2d 937, to which opinion reference is made for the facts. A petition for certiorari to

review this judgment presented so impressive a showing for the exercise of this Court's discretionary jurisdiction that the case was brought here with leave to the petitioner to proceed *in forma pauperis,* 359 U. S. 924, and his motion for the assignment of counsel was duly granted. 359 U. S. 951.

Before the case could come to be heard here, the petitioner was released from the state prison after having served his sentence with time off for good behavior. The case has thus become moot, and the Court is without jurisdiction to deal with the merits of petitioner's claim. "The purpose of the proceeding defined by the statute [authorizing the writ of habeas corpus to be issued] was to inquire into the legality of the detention, and the only judicial relief authorized was the discharge of the prisoner or his admission to bail." *McNally* v. *Hill,* 293 U. S. 131, 136. "Without restraint of liberty, the writ will not issue." *Id.,* 138. See also *Johnson* v. *Hoy,* 227 U. S. 245.* "It is well settled that this court will not proceed to adjudication where there is no subject-matter on which the judgment of the court can operate." *Ex parte Baez,* 177 U. S. 378, 390. We have applied these principles to deny the writ of certiorari for mootness on the express ground that petitioner was no longer in respondent's custody in at least three cases not relevantly different from the present one. *Weber* v. *Squier,* 315 U. S. 810; *Tornello* v. *Hudspeth,* 318 U. S. 792; *Zimmerman* v. *Walker,*

*It is likewise true that "a motion for relief under 28 U. S. C. § 2255 [relevant only to federal sentences] is available only to attack a sentence under which a prisoner is in custody." 358 U. S., at 420. Contrary to the unconsidered assumption in *Pollard* v. *United States,* 352 U. S. 354, this was decided after full deliberation only a year ago. See the opinion of MR. JUSTICE DOUGLAS, 358 U. S., at 418, and the opinion of MR. JUSTICE STEWART for the Court on this point, 358 U. S., at 420, in *Heflin* v. *United States,* 358 U. S. 415. Of course Rule 35 of the Federal Rules of Criminal Procedure is not available for state sentences.

319 U. S. 744. In all these cases there was custody as the basis for habeas corpus jurisdiction until the cases reached here. In *Weber*, the respondent's custody ceased because the petitioner had received the benefits of the United States Parole Act. In *Tornello* the petitioner had been pardoned, and was no longer in the custody of anyone. In *Zimmerman* petitioner had been unconditionally released and was also no longer in the custody of anyone. These cases demonstrate that it is a condition upon this Court's jurisdiction to adjudicate an application for habeas corpus that the petitioner be in custody when that jurisdiction can become effective. It is precisely because a denial of a petition for certiorari without more has no significance as a ruling that an explicit statement of the reason for a denial means what it says. Accordingly, the writ of certiorari is dismissed for want of jurisdiction.

Since the case has become moot before the error complained of in the judgment below could be adjudicated, the case is remanded to the Court of Appeals to vacate its judgment and to direct the District Court to vacate its order and dismiss the application.

MR. JUSTICE HARLAN, joined by MR. JUSTICE CLARK, also considers this case moot on a further ground. It appears that petitioner has outstanding against him felony convictions in a number of other States. Under Texas law any one of those convictions would carry the same consequences with respect to petitioner's exercise of civil rights in Texas (Election Code Art. 5.01) as his conviction in this case. See *Harwell* v. *Morris,* 143 S. W. 2d 809, 812–813. This Court is as much bound by constitutional restrictions on its jurisdiction as it is by other constitutional requirements. The "moral stigma of a judgment which no longer affects legal rights does not present a case or controversy for appellate review." *St. Pierre* v. *United States,* 319 U. S. 41, 43.

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

If the Court is right in holding that George Parker's five-year quest for justice must end ignominiously in the limbo of mootness, surely something is badly askew in our system of criminal justice. I am convinced the Court is wrong. Even assuming *arguendo* that we could not enter a *nunc pro tunc* order, I believe that we still would be able to grant relief.

We have here the case of a man who was convicted of a felony in flagrant disregard of his constitutional right to assistance of counsel. Since the Court terms his claim an "impressive" one, lengthy discussion of its merits is unnecessary. Still, it is not amiss briefly to describe what it is the Court here declines to decide.

In 1954, petitioner was tried in the District Court of Moore County, Texas, on a charge of forging a check. He was then 67 years of age and, respondent concedes, in "failing health." The judge refused to appoint counsel to represent him.[1] He was convicted and received a sen-

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[1] "The COURT. Do you want a trial by jury or without a jury?

"Mr. PARKER. Well, it is immaterial to me, Judge. I don't have any attorney.

"The COURT. Well, you are going to have to make up your mind. It is certainly immaterial to the court.

"Mr. PARKER. I guess a jury then.

. . . . . .

"The COURT. Do you have a lawyer hired?

"Mr. PARKER. No, sir, I don't.

"The COURT. The law does not require the court to appoint an attorney to represent a defendant where he has a trial by jury and it is not the practice of this court to appoint any attorney to represent the defendant. It is up to him to arrange for his own counsel. Now, if you are eligible for a suspended sentence, why, then, the court would get some lawyer to advise you about the procedure in filing

tence of seven years. To any lawyer's eye—and it is not at all clear that the restriction to lawyers is warranted—his trial was a sham. Although the testimony directly bearing on the issue of forgery was not strong,[2] petitioner's conviction is hardly surprising, for the prosecution's case consisted in large part of a potent mélange of assorted types of inadmissible evidence—introduced without objection by petitioner.[3] But petitioner suffered as much from errors of omission as he did from errors of commission. Petitioner now alleges—and respondent does not deny—that the victim of the alleged forgery was

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your application for a suspended sentence but only for that part and only if you are eligible for a suspended sentence.

. . . . .

"Mr. PARKER. I will not apply for any suspended sentence."

[2] For example, the woman on whose account the check was drawn was never called as a witness. The only evidence regarding petitioner's lack of authority from her to sign the check is contained in this bit of testimony—of highly questionable admissibility—by the woman's son:

"Q. Did your mother tell you that she authorized him to write checks on her?

"A. No, sir.

. . . . .

"Q. And, your mother didn't authorize anyone to use that signature?

"A. No, sir."

[3] In his brief, respondent stated that it was "not necessary to discuss" petitioner's argument that his trial was gravely infected by error, because these matters of state law "are not properly before this Court." Obviously they are very much before the Court in a deprivation of counsel case, for they are among the factors which indicate to what degree the defendant has been prejudiced. On oral argument, respondent's counsel, the Assistant Attorney General of Texas, freely answered the Court's questions regarding these issues, and, with admirable candor, expressed his view that as a matter of fact—though not as a matter of law—no layman could competently defend himself against a criminal charge.

petitioner's mother-in-law and that the principal prosecution witness was his brother-in-law, a "bitter enemy"; [4] but petitioner introduced no evidence to this effect at the trial.[5] Nor is this strange, for petitioner's halting attempts to defend himself disclose his utter ineptness in the courtroom. After the prosecution had examined its witnesses—unhampered by searching cross-examination—petitioner conducted what respondent terms "a premeditated type of defense which might have been successful on another jury."

Item:

> "Direct examination by Mr. PARKER:
>
> "Q. Ted, you go ahead and tell the court about my condition and how you have known me—tell the jury?
>
> "A. Well, do I understand it right?
>
> "Q. Huh?
>
> "A. You mean your physical condition, so forth and so on?
>
> "Q. Yes. Just go ahead and tell the jury about what you know?
>
> "A. Well, his physical condition, according to everything, is bad or, at least, the doctors say so, you know. I couldn't—as far as the checks, I don't

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[4] The allegation is supported by an affidavit of petitioner's wife.

[5] In fact, the testimony of the brother-in-law conveyed the opposite impression:

"Q. You know G. L. Parker, don't you?

"A. I know of him.

"Q. Well, he is the defendant sitting here, isn't he?

"A. I think so.

"Q. Well, as a matter of fact, you know he is, don't you, Mr. Quattlebaum?

"A. Yes.

"Q. How long have you known him?

"A. Well, a long time."

know; but, I do know that he needs medical care. Is that what you meant, George?

"Q. Yes, I guess so; just go ahead and tell them what you know about me. That is all—only—that is all I want to ask—I am just leaving mine up to them, you know?

"The COURT. Do you know what he is driving at—what he wants?

"A. Well, if I understood it, the condition, you know—

"The COURT. That is up to you too.

"[The PROSECUTOR]. You got anything else?

"Mr. PARKER. No. Go ahead and ask him."

Item:

"The COURT. Are you through?

"Mr. PARKER. Judge, here are some letters I would like for the jury to see.

"The COURT. We can't give the letters to the jury.

"Mr. PARKER. For—from the doctors?

"The COURT. No, sir.

"Mr. PARKER. That is all."

This is enough to give the flavor of the "trial." It is difficult to recall a case which more clearly illustrates the helplessness of the layman when called upon to defend himself against a criminal charge. Judge, now Chief Judge, Rives, who dissented from the judgment of the Court of Appeals, was clearly correct in stating:

"Upon such a record, it would appear that Parker's efforts to defend himself were little short of farcical. In view of the small amounts of the checks, his family connection with the Quattlebaums, and the open way in which the checks were payable to and endorsed by Parker, it is quite possible that he may have had a defense to the charge of forgery, or at least that miti-

> gating circumstances might have been shown. The record . . . shows that he suffered badly from the lack of assistance of counsel, and tends to corroborate his claim of extreme illness." 258 F. 2d 937, 944.

But George Parker's unhappy experience with the law was not destined to end with the trial. Instead, time after time the courts have turned aside his applications for redress. There has hardly been a minute in the past five years that Parker's case has not been before a court. He was convicted in November, 1954, and on March 23, 1955, the Court of Criminal Appeals of Texas affirmed his conviction in a brief opinion. 276 S. W. 2d 533. Parker then applied to the Court of Criminal Appeals for habeas corpus, but his petition was denied on September 21, 1955, without a hearing. On February 27, 1956, this Court denied certiorari.[6] 350 U. S. 971. Next, on May 31, 1956, Parker turned to the Federal District Court and sought relief by way of habeas corpus. The district judge denied his petition on June 24, 1957, after his thrice-repeated request for a lawyer had been thrice-ignored. The Court of Appeals affirmed on August 29, 1958. 258 F. 2d 937. Parker petitioned for certiorari on October 24, 1958; and this Court granted the petition on March 2, 1959. 359 U. S. 924. At last an attorney was appointed to represent Parker's interests. 359 U. S. 951. Then, on June 6, 1959, Parker was released from the penitentiary—almost five years after his conviction, three years after he had applied to the Federal District Court for relief, more

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[6] Petitioner suffered throughout from the poverty which prevented him from hiring an attorney and from obtaining a transcript of the record of his trial. Left to his own devices, his petitions—at least his first petition to this Court—did not sufficiently reveal the prejudice which he suffered at the trial because of the failure of the trial court to appoint an attorney.

than seven months after he had petitioned this Court for certiorari, and more than three months after certiorari had been granted. Now that petitioner has dutifully fulfilled the requirement that he exhaust—an apt word—all other remedies,[7] he is told that it is too late for the Court to act.

I.

The Court does not suggest that this strange result is a happy one. But it appears to believe it is bound by precedent to the view that, because of the nature of the habeas corpus remedy, "it is a condition upon this Court's jurisdiction . . . that the petitioner be in custody when that jurisdiction can become effective." Consequently, the Court does not express any view on the mootness question considered *de novo*. Since, as will appear, I do not regard the decisions upon which the Court relies as at all decisive, I am obliged to consider whether the habeas corpus statute, 28 U. S. C. §§ 2241–2254, entitles us to pass upon the merits of this controversy. I conclude that it does.

It is quite true that the statute provides that the writ of habeas corpus will not issue unless the applicant is "in custody." 28 U. S. C. § 2241 (c). But the statute does not impose this same restriction upon the grant of relief. Rather, the federal courts are given a broad grant of authority to "dispose of the matter as law and justice require." 28 U. S. C. § 2243. In the case at bar, the "in custody" prerequisite to issuance of the writ is no longer relevant, because the function of the writ—to provide and to facilitate inquiry into the validity of the applicant's claim—has already been fully served.[8] The district judge

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[7] See 28 U. S. C. §§ 2242, 2254; *Darr* v. *Burford*, 339 U. S. 200.

[8] See *Ex parte Baez*, 177 U. S. 378, 389; Ingersoll, History And Law of Habeas Corpus, 2. In *Baez*, the Court pointed out that, as a practical matter, the writ could not be issued and the applicant pro-

ordered that petitioner's application be heard upon affidavits, depositions, and the record of the trial,[9] and the latter alone conclusively substantiates petitioner's allegations. Thus all that remains is to determine what form of relief should be given. Under the circumstances of this case, "law and justice require" that the patent invalidity of Parker's conviction be proclaimed.

Granting Parker relief would not only comport with the statutory mandate, but would also be in keeping with the spirit of the writ. Habeas corpus, with an ancestry reaching back to Roman Law,[10] has been over the centuries a means of obtaining justice and maintaining the rule of law when other procedures have been unavailable or ineffective. The early years of its development in England were distinguished by the role it played in securing enforcement of the guarantees of Magna Charta.[11] But even the Great Writ was not secure from the pressures of the English Crown, and perhaps the most effective method

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duced for a hearing before the date scheduled for his release, so that mootness could be anticipated. 177 U. S., at 389–390. This was a proper application of the "in custody" requirement.

[9] 28 U. S. C. §§ 2246, 2247. Petitioner secured the transcript through the financial assistance of a fellow prisoner to the extent of $25.

[10] See Church, Habeas Corpus (2d ed. 1893), 2–3.

[11] See 2 Hallam, Europe During the Middle Ages, 552; 9 Holdsworth's History of English Law 111–125; Hurd, Habeas Corpus (2d ed. 1876), 66–74.

It is instructive to recall the following passages of the Magna Charta:

"39. No free-man shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land.

"40. To none will we sell, to none will we deny, to none will we delay right or justice." Magna Charta, reprinted in S. Doc. No. 232, 66th Cong., 2d Sess. 17.

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of eviscerating the remedy proved to be procrastination.[12] Abuses such as the delay of over four months in the famous *Jenkes* case finally caused Parliament to enact the Habeas Corpus Act of 1679, 31 Car. II, c. 2, which required returns on the writ to be made within specified periods of time and which proscribed the judiciary's tactic of refusing to issue the writ during "Vacation-Time." [13] The summary nature of the remedy thus became es-

[12] "Prerogative then reigned. The obnoxious members of the late Parliament were seized and imprisoned for words spoken in debate. The writ of habeas corpus was rendered powerless even to liberate them on bail by the servile *procrastination* of the court who dared not expressly to *deny* the right. And finally JOHN ELLIOTT, the most distinguished leader of the popular party, doomed to imprisonment and loaded with fines by a court usurping jurisdiction, died in the Tower—a martyr to parliamentary freedom of speech." Hurd, Habeas Corpus (2d ed. 1876), 78. See also 3 Blackstone Commentaries (15th ed. 1809), 133–135; authorities cited in note 13, *infra*.

[13] ". . . Jenkes, a citizen of London on the popular or factious side, having been committed by the king in council for a mutinous speech in Guildhall, the justices at quarter sessions refused to admit him to bail, on pretence that he had been committed by a superior court; or to try him, because he was not entered in the calendar of prisoners. The chancellor, on application for a habeas corpus, declined to issue it during the vacation; and the chief-justice of the king's bench, to whom, in the next place, the friends of Jenkes had recourse, made so many difficulties that he lay in prison for several weeks." Hallam, History of England (8th ed. 1855), 10–11. See also 3 Blackstone Commentaries (15th ed. 1809), 134–135; Church, Habeas Corpus (2d ed. 1893), 24–25; 6 Howell's State Trials 1190–1207; Hurd, Habeas Corpus (2d ed. 1876), 82. It is plain from these other sources that the "several weeks" mentioned in Hallam's account refers only to one period of Jenkes' incarceration. There is also some dispute among these authors with respect to the historical significance of the *Jenkes* case. The nature of the abuses which led to passage of the Act is clear, however; and, for present purposes, it is immaterial which particular case aroused the greatest public sentiment.

tablished, and our own statutory writ has this same stamp.[14]

The general problem we confront in the case at bar, then, is hardly novel in the history of the writ—an intolerable delay in affording justice and the absence of any other remedy.[15] The causes, to be sure, have changed with the times. Instead of the arbitrariness of judges, Parker has had to contend with the time-consuming nature of our system of appellate review and collateral attack. We cannot expect history to tell us exactly how to cope with this problem, because it simply did not exist in the early days of the common-law writ, when there was little if any appellate review of the then relatively simple habeas corpus proceedings.[16] But history does provide general guidance. This guidance is incompatible with the idea that the writ designed as an effective agent of justice has become fossilized so that old problems, once thought to have been solved, are now insurmountable because they have taken slightly new forms. The Court has not hesitated to expand the scope of habeas corpus far beyond its traditional inquiry into matters of technical "jurisdiction." The statute permitted this adaptation in the interests of "law and justice," and the Court has responded to the demands of that compelling standard. We have the same

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[14] Under our habeas corpus statute, the court is required to issue the writ or a show-cause order "forthwith" unless the petition does not state a cause for relief. The return must normally be made within three days, and the hearing held within five days thereafter. 28 U. S. C. § 2243.

[15] Respondent's attorney, the Assistant Attorney General of Texas, conceded during oral argument that there is no other judicial avenue open to petitioner.

[16] See 2 Spelling, Injunctions (2d ed. 1901), 1159–1165. Cf. Ingersoll, History And Law of Habeas Corpus, 32–33; 9 Holdsworth's History of English Law 123–124.

latitude in this case, and the character of the writ does not require us to impose upon applicants what will amount to a "time-is-of-the-essence" strait jacket.

II.

The Court apparently believes that these considerations are foreclosed by prior decisions. The fact is, however, that while the writ-remedy argument seems never to have been squarely presented to this Court, the weight of authority favors petitioner.

In *Pollard* v. *United States,* 352 U. S. 354, the Court was confronted with a mootness question identical to that presented here. *Pollard* involved a collateral attack upon a conviction by way of motion under 28 U. S. C. § 2255. After certiorari had been granted, the petitioner was released from prison. Nevertheless, this Court held that the case was not moot. But, just as the habeas corpus statute provides that the writ "shall not extend to a prisoner unless . . . [h]e is in custody," [17] so too is § 2255 available only to a "prisoner in custody under sentence of a court." Moreover, as this Court has noted, § 2255 affords the same relief as habeas corpus, with the difference, which is not material here, that a § 2255 motion is filed in the sentencing court instead of in the court of the district of incarceration.[18] Consequently, if Pollard's

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[17] 28 U. S. C. § 2241 (c).

[18] Section 2255, of course, is available only with respect to federal judgments, whereas habeas corpus is available to attack either state or federal judgments.

The legislative history of § 2255 and its relationship to habeas corpus are exhaustively discussed in *United States* v. *Hayman,* 342 U. S. 205, 210–219. See also *Heflin* v. *United States,* 358 U. S. 415, 420–421 (concurring opinion). While I share the views expressed by MR. JUSTICE DOUGLAS in *Heflin, supra,* at 417–418, I believe that if § 2255 and habeas corpus are to be treated as synonymous when

claim was not moot, it is difficult to perceive why Parker's claim is.

The Court recognizes the difficulty posed by *Pollard,* and solves it by stating that this aspect of *Pollard* was predicated upon an "unconsidered assumption" which was overruled by *Heflin* v. *United States,* 358 U. S. 415, "after full deliberation." But *Heflin* did not purport to discard *Pollard,* and there is no inherent inconsistency between these two decisions. In *Heflin,* the Court decided that a prisoner could not secure § 2255 relief from a sentence which he had not yet begun to serve because he was not yet "in custody" pursuant to that sentence. But the mootness problem dealt with in *Pollard* was not involved in *Heflin.* A construction of § 2255 similar to the construction of the habeas corpus statute proposed above would harmonize *Heflin* and *Pollard*; it is only the Court's opinion in this case which tends to make them irreconcilable. Thus the Court's argument comes full circle.

Moreover, it is curious that the Court, in dealing with the cases upon which it relies, does not exhibit the same attitude that is reflected by its treatment of *Pollard.* The three cases which constitute the principal basis for the Court's judgment are *Weber* v. *Squier,* 315 U. S. 810; *Tornello* v. *Hudspeth,* 318 U. S. 792; and *Zimmerman* v. *Walker,* 319 U. S. 744.[19] While in *Pollard* the Court ren-

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the result is to deny their availability, they should be treated in the same manner when this would afford an applicant relief.

[19] The Court mentions three other decisions, but apparently does not rest upon them. In *McNally* v. *Hill,* 293 U. S. 131, the Court held that a person who was serving the first of two consecutive sentences could not attack the second at that time. His habeas corpus remedy, held the Court, lay before him. Petitioner's problem is quite different. His remedy, under the Court's decision, is gone forever. It is also relevant to note that in *McNally* the Court suggested that there was another type of relief available to the

dered judgment after plenary consideration, in these three cases the Court simply denied certiorari, and it did so in terse orders without benefit of briefs or oral arguments. The opinion of the Court in the case at bar hardly seems consistent with this Court's oft-repeated warnings concerning the lack of significance of denials of certiorari. Furthermore, when the records in *Weber, Tornello,* and *Zimmerman* are examined, it becomes unmistakably clear that the orders in those cases were not based upon the theory now espoused by the Court.

Weber was the first of the trio. There the petitioner was paroled while his petition for certiorari was pending, and the Court thereupon denied the petition on grounds of mootness. Since a lower court had issued a writ of habeas corpus prior to the parole, *Weber* would be directly in point if the Court's order had rested upon the premise that petitioner, as a parolee, was no longer in custody within the meaning of the habeas corpus statute. But the respondent did not suggest that the petition be denied on this ground. Rather, his sole argument was that the case was moot because the petitioner was no longer in *his* custody. The only case respondent cited, *Van Meter* v. *Sanford,* 99 F. 2d 511, held that a habeas corpus action becomes moot when the respondent loses custody and is thereby disabled from complying with the order which might be necessary upon remand—in Weber's case, an order of discharge. It was this theory the Court adopted in denying certiorari because petitioner was "no longer in the respondent's custody." [20] It is instructive to note

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petitioner even before he commenced serving his second sentence. *Id.,* at 140. *Johnson* v. *Hoy,* 227 U. S. 245, involved a habeas corpus action brought prior to trial, which obviously presents questions entirely different from those posed by the case at bar. For a discussion of *Ex parte Baez,* 177 U. S. 378, see note 8, *supra.*

[20] Had the case been argued, conceivably the petitioner would have urged upon the Court the writ-remedy distinction, and con-

that the language of the *Weber* order [21] is identical to the language the Court used shortly thereafter to dispose of a case on grounds of mootness where the petitioner had been transferred from one custodian to another, but where he was still in the penitentiary. See *United States ex rel. Innes* v. *Crystal,* 319 U. S. 755. Whatever may be said of the *Weber* theory of mootness,[22] it is irrelevant to the instant case, where it would be unnecessary to issue an order of discharge.

The second case discussed by the Court is *Tornello* v. *Hudspeth, supra,* where a petition for certiorari was

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tended that no order of discharge would be necessary in his case because parole was *not* custody. It is hardly surprising that the Court did not explore this intricate problem *sua sponte;* nor is it surprising that the petitioner did not suggest this approach, inasmuch as the Court's opinion left open the possibility that he could maintain a habeas corpus action against a new respondent.

It may be noted that the Courts of Appeals, in considering the difficult question whether parole is sufficient restraint to serve as a basis for a habeas corpus action, seem to have taken divergent views of the significance of *Weber.* The *Weber* order, unillumined by the record, is hardly a model of clarity, and it is natural enough that some—though not all—courts have been misled. Compare *Siercovich* v. *McDonald,* 193 F. 2d 118 (C. A. 5th Cir.), and *Adams* v. *Hiatt,* 173 F. 2d 896 (C. A. 3d Cir.), with *Factor* v. *Fox,* 175 F. 2d 626, 628–629 (C. A. 6th Cir.), and *Shelton* v. *United States,* 242 F. 2d 101, 109–110 (C. A. 5th Cir.). See also *Anderson* v. *Corall,* 263 U. S. 193, 196. ("While [parole] is an amelioration of punishment, it is in legal effect imprisonment.") But cf. *Wales* v. *Whitney,* 114 U. S. 564.

[21] The order reads as follows:

"Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied on the ground that the cause is moot, it appearing that petitioner has been released upon order of the United States Board of Parole and that he is no longer in the respondent's custody. The motion for leave to proceed further *in forma pauperis* is therefore also denied."

[22] The Court finally came to grips with this problem in *Ex parte Endo,* 323 U. S. 283, 304–307.

denied because "petitioner has been pardoned by the President and . . . is no longer in respondent's custody." Since the Court used the verbal formula of *Weber* and *Innes,* and since the only case cited was *Weber,* it is evident that the Court relied entirely upon the *Weber* theory so far as the custody question was concerned. It is unfortunate that the Court did not consider the significance of the fact that there was no custody at all in *Tornello* and that hence no order of discharge would have been necessary. But the Court's failure to examine this aspect of the mootness problem robs the case of controlling authority. No doubt the Court's uncritical application of the *Weber* rule is attributable not only to the fact that the parties did not discuss the mootness issue at all, but also to the Court's reliance upon the full and unconditional pardon as an alternative ground of mootness.[23]

Not surprisingly, perhaps, the order in the third case, *Zimmerman* v. *Walker, supra,* relied solely upon *Weber* and *Tornello,* and repeated the "released from the respondent's custody" phrase. In that case, respondent filed a suggestion of mootness in which he mentioned the total lack of custody, but in which he relied primarily upon the ground which had proved successful in the past—the absence of custody *by him.* But it is unnecessary to explore this case further, inasmuch as no writ or rule to show cause had ever issued. Since custody is a prerequisite for issuance of the writ, the case was clearly moot; but it is just as clearly irrelevant.

Orders of this character do not provide a solid basis for disposition of Parker's case. The "law and justice" standard of the statute does.

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[23] This aspect of the mootness question as it relates to the instant case is discussed *infra,* pp. 591–594. It may be noted that *Tornello's* conclusion as to the effect of a pardon is not unchallengeable. See 3 The Attorney General's Survey of Release Procedures 267–294.

III.

The concurring opinion raises another objection to granting Parker relief. While the Court's opinion simply construes the statute, the concurring opinion construes the Constitution. The Court's opinion would not foreclose Congress from authorizing relief in a case like Parker's; the concurring opinion would. While the Court's decision is based on the theory that nothing can be done for Parker because of the nature of the relief authorized by the habeas corpus statute, the concurrence is grounded upon the view that Parker has such an insubstantial interest in securing an adjudication that his claim could not present a "case or controversy" under Art. III, § 2 of the Constitution, regardless of what relief a statute were to authorize.[24]

One could take exception to the factual premise of this conclusion. The evidence of record which is relied upon to establish the existence and number of Parker's convictions leaves much to be desired,[25] and there is nothing to

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[24] See *Muskrat* v. *United States*, 219 U. S. 346.

[25] At the trial, the sheriff testified from an F. B. I. record with respect to Parker's prior convictions. The record was not introduced into evidence, its nature was not disclosed, and it was not authenticated in any manner. Moreover, the sheriff's description of the information in the record was confused, and, in response to a question by Parker, he conceded that "some" of the cases were never "disposed of," so far as the record indicated. During the habeas corpus proceedings, respondent submitted a record from the Texas Department of Public Safety which purported to summarize Parker's criminal history. It is, so far as appears, merely a compilation of information from various sources for Department use, and it was submitted only as evidence that Parker was being held pursuant to the judgment in this case. Its usefulness with regard to the mootness issue is further diminished by the fact that the Parker, or Parkers, whose convictions appear on the record are listed under seven different first and middle names.

indicate whether Parker has been relieved of the civil consequences of any of these convictions under statutes designed to mitigate the effect of civil disability laws.[26] Moreover, *Harwell* v. *Morris,* 143 S. W. 2d 809 (Tex. Civ. App.), the decision which the concurring opinion cites as establishing that Parker's convictions outside of Texas—if still effective—would deprive him of his voting rights in Texas, is not persuasive authority. Not only was the decision not reviewed by the Texas Supreme Court, but it was rendered in the context of an election dispute, where the real issue was not the impact upon the voter but the impact upon the candidates. Cf. *Logan* v. *United States,* 144 U. S. 263, 303. In any event, even conceding the accuracy of the assumption with respect to Parker's prior convictions and the *Harwell* issue, it is entirely possible that the conviction in this case would operate to augment the punishment should Parker ever again be adjudged guilty of a crime in Texas or in any other State.

Aside from these considerations, however, there is something fundamentally wrong with the theory that mootness should turn upon whether or not a convicted person can run for office or cast a ballot. The principal policy basis for the doctrine of mootness, when that term is employed in the "case or controversy" context, is to insure that the judiciary will have the benefit of deciding legal questions in a truly adversary proceeding in which there is the "impact of actuality," [27] and in which the contentiousness of the parties may be relied upon to bring to light all relevant considerations.[28] Here the

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[26] See 19 St. John's L. Rev. 185; 59 Yale L. J. 786, 787, n. 3.

[27] Frankfurter, A Note on Advisory Opinions, 37 Harv. L. Rev. 1002, 1006.

[28] See *United States* v. *Johnson,* 319 U. S. 302, 304–305; Bischoff, Status to Challenge Constitutionality, in Supreme Court and Supreme Law (Cahn ed.), 26 *et seq.;* Freund, On Understanding the Supreme Court, 84–86; Note, 103 U. of Pa. L. Rev. 772–773.

issue is surely not abstract. The case comes to us after the actions complained of have occurred, and we have the entire trial record before us. Moreover, George Parker's interest in this litigation is quite substantial enough to insure that his case has been fully presented.[29] Conviction of a felony imposes a *status* upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously

[29] Of opinions expressing a view consistent with the concurring opinion, the Supreme Court of Washington has said, "Those decisions, it seems to us, lose sight of . . . that damaging effect of such a judgment which everybody knows reaches far beyond its satisfaction by payment of a fine or serving a term of imprisonment." *State* v. *Winthrop,* 148 Wash. 526, 534, 269 P. 793, 797. See also *In re Byrnes,* 26 Cal. 2d 824, 161 P. 2d 376; *People* v. *Marks,* 64 Misc. 679, 120 N. Y. Supp. 1106; *Village of Avon* v. *Popa,* 96 Ohio App. 147, 121 N. E. 2d 254; *Roby* v. *State,* 96 Wis. 667, 71 N. W. 1046; Note, 103 U. of Pa. L. Rev. 772, 779–782, 795. But cf. *St. Pierre* v. *United States,* 319 U. S. 41, where the Court held moot on direct appeal the case of a person who had served his sentence for contempt before certiorari was granted. That case is readily distinguishable in view of the factors the Court stressed as relevant. For example, the Court stated that it did not appear "that petitioner could not have brought his case to this Court for review before the expiration of his sentence." Moreover, the Government admitted that petitioner would again be required to testify before a grand jury and that his commitment would again be sought if he refused, so that, as the Court noted, there might very well be "ample opportunity to review such a judgment . . . ." *Id.,* at 43. It seems reasonably clear also that the "collateral consequences" cases have considerably undermined the philosophy of *St. Pierre.* See *Pollard* v. *United States, supra,* at 358; *United States* v. *Morgan,* 346 U. S. 502, 512–513; *Fiswick* v. *United States,* 329 U. S. 211, 220–223. See also *Lafferty* v. *District of Columbia,* 107 U. S. App. D. C. 318, 277 F. 2d 348, where the Court of Appeals for the District of Columbia Circuit set aside a decree of unsoundness of mind after the individual concerned was no longer in a mental institution and was not mentally ill.

Possibly it should be noted, for the sake of completeness, that no one has suggested that the State's interest in upholding the validity of this conviction is insubstantial.

affects his reputation and economic opportunities.[30] And the fact that a man has been convicted before does not make the new conviction inconsequential. There is, after all, such a thing as rehabilitation and reintegration into the life of a community. In this case, for example, none of Parker's previous convictions were in Texas, and he had been out of jail for over five years at the time of the 1954 forgery trial. Five years of law-abiding life in a new community give Parker a significant enough stake in the outcome of this adjudication to preclude a finding of mootness. Furthermore, there is an important public interest involved in declaring the invalidity of a conviction obtained in violation of the Constitution, and, under the Court's decisions, this is a consideration relevant to the mootness question.[31]

In sum, I cannot agree with the Court that George Parker's case comes to us too late. It is too late, much too late, to undo entirely the wrong that has been inflicted upon him; but it is not too late to keep the constitutional balance true. I dissent from the notion that, because we cannot do more, we should do nothing at all.

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[30] For example, under § 504 of the Labor-Management Reporting and Disclosure Act of 1959, persons who have been convicted of specified crimes are ineligible to serve for a five-year period in various positions for labor unions or employer associations. 73 Stat. 536–537.

For a discussion of the "status degradation ceremony" represented by criminal conviction, see Goldstein, Police Discretion Not to Invoke The Criminal Process: Low-Visibility Decisions in the Administration of Justice, 69 Yale L. J. 543, 590–592. See also Waite, The Prevention of Repeated Crime, 30–31; Frym, The Treatment of Recidivists, 47 J. Crim. L., Criminology & Police Science 1; *United States* v. *Hines*, 256 F. 2d 561, 563.

[31] See *Walling* v. *Reuter Co.*, 321 U. S. 671, 674–675; *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm'n*, 219 U. S. 498, 516; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 309.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE concurs, dissenting.

I do not take the dim view of fictions that the opinion of the Court reflects. Fictions are commonplace to lawyers. In Delaware, prior to its adoption of a modern code of civil procedure, the action of ejectment was based on a series of fictions. The declaration averred a lease to a fictitious lessee, the entry by a fictitious lessee, and the ouster by a fictitious ejector "which when proven or admitted by the consent rule" left "the question of title as the only matter to be determined in the case." 2 Woolley, Practice in Civil Actions (1906), § 1591.

We know from English history how the King's Bench and Exchequer contrived to usurp the Court of Common Pleas—by alleging that the defendant was in custody of the king's marshal or that the plaintiff was the king's debtor and could not pay his debt by reason of the defendant's default. See 3 Reeves' History of the English Law (Finlason ed. 1869), 753.

We are told by Maine, Ancient Law (New ed. 1930), 32, that in old Roman law "fictio" was a term of pleading and signified a false averment which could not be traversed, "such, for example, as an averment that the plaintiff was a Roman citizen, when in truth he was a foreigner."

The list is long, and the case for or against a particular fiction is often hotly contested. See Fuller, Legal Fictions, 25 Ill. L. Rev. 363, 513, 877.

Some fictions worked grievous injustices such as the presupposition that a defendant, though far away, was within the jurisdiction and should be proceeded against by outlawry.[1] Bentham inveighed against "the pesti-

[1] 9 Holdsworth, A History of English Law (3d ed. 1944), 254 *et seq.* As to corporations, churches, and boroughs see 1 Pollock and Maitland, History of English Law (2d ed. 1899), 486, 669–670.

lential breath of Fiction."[2] Yet fictions were often expedients to further the end of justice.[3] "[T]he purpose of any fiction is to reconcile a specific legal result with some premise." Fuller, *op. cit., supra,* at 514. As Justice Holmes once said, "To say that a ship has committed a tort is merely a shorthand way of saying that

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[2] 1 Bentham's Works (Bowring ed. 1843), 235.

[3] 9 Holdsworth, *op. cit., supra,* note 1, at 250–251:

"Of all these methods of beginning an action the most common was a *capias ad respondendum,* i. e. a writ directing the sheriff to arrest the defendant. This process was possible in all the most usual personal actions; and, where it was possible, it became the practice, in the course of the eighteenth century, to 'resort to it in the first instance, and to suspend the issuing of the original writ, or even to neglect it altogether, unless its omission should afterwards be objected by the defendant. Thus the usual *practical* mode of commencing a personal action by original writ is to begin by issuing, not an original, but a capias.' As the author of the Pleader's Guide said:—

> 'Still lest the Suit should be delayed,
> And Justice at her Fountain stayed,
> A *Capias* is conceived and born
> Ere yet th' ORIGINAL is drawn,
> To justify the Courts proceedings,
> Its Forms, its Processes, and Pleadings,
> And thus by ways and means unknown
> To all but Heroes of the Gown,
> A Victory full oft is won
> Ere Battle fairly is begun;
> 'Tis true, the wisdom of our Laws
> Has made Effect precede the Cause,
> But let this Solecism pass—
> *In fictione aequitas.*'

"But the original was always supposed; and the defendant could always object to its absence, and compel the plaintiff to procure it from the office of the cursitor. It should be noted also that in the procedure by bill against persons actually privileged, or supposed to be privileged, there was necessarily no original. The bill took the place of the original, and also operated as the plaintiff's declaration." And see 2 Bouvier's Law Dictionary (8th ed. 1914), 1213–1214.

you have decided to deal with it as if it had committed one, because some man has committed one in fact." *Tyler* v. *Court of Registration,* 175 Mass. 71, 77, 55 N. E. 812, 814.

We have here an injustice to undo. Parker was convicted in a Texas court of a crime without benefit of counsel; and the nature of the charge, the kind of defense available, and the capabilities of Parker to defend himself, make it plain to all of us, I assume, that due process of law was denied him under the standards laid down in our cases,[4] the most recent one being *Cash* v. *Culver,* 358 U. S. 633. No remedy against this invasion of his constitutional rights was available to him except by *habeas corpus.* While in prison, he followed the federal route. The writ was applied for, the District Court ordered respondent to answer, see *Walker* v. *Johnston,* 312 U. S. 275, 284, and a hearing on affidavits, other documents, and the trial record was held. The petition was dismissed and the Court of Appeals affirmed. 258 F. 2d 937. Then a petition for a writ of certiorari was filed here. More than seven months after his petition for certiorari was filed with us and over three months after we granted certiorari he was released from prison. That was June 6, 1959. So the Court now rules that he has no relief by way of *habeas corpus* because the illegal detention he challenged has been terminated. And so it has. But his controversy with the State of Texas has not ended. The unconstitutional judgment rendered against him has a continuing effect because under Texas law "[a]ll persons convicted of any felony except those restored to full citizenship and right of suffrage or pardoned" are disqualified from voting. Texas Election Code, Art. 5.01. The loss of these civil rights prevents a case from becoming

[4] And see the dissenting opinion of Judge Rives below, 258 F. 2d 937, 941–944.

moot, even though the sentence has been satisfied.[5] *Fiswick* v. *United States,* 329 U. S. 211, 222; *Pollard* v. *United States,* 352 U. S. 354, 358. The controversy that Parker has with Texas is a continuing one.

If this were a federal conviction, Parker would have a remedy under 28 U. S. C. § 2255. See *Pollard* v. *United States, supra.* But we were advised on oral argument that Texas provides no such remedy and that Parker has no known method of removing the civil disabilities that follow from the unconstitutional judgment of conviction. He may be pardoned. But pardons are matters of grace. There is no remedy which he can claim as a matter of right, unless it is this one. I cannot therefore be party to turning him from this Court empty-handed.

Any judgment *nunc pro tunc* indulges in a fiction. But it is a useful one, advancing the ends of justice. A man who claims to be unlawfully in the custody of X is not required to start all over again if X has died and Y has been substituted in X's place. We treat the *habeas corpus* petition as the facts were when the issue was drawn and enter judgment *nunc pro tunc* "as of that day." *Quon Quon Poy* v. *Johnson,* 273 U. S. 352, 359. The same is done when other parties die before final decision. See *Mitchell* v. *Overman,* 103 U. S. 62; *Harris* v. *Commissioner,* 340 U. S. 106, 112–113. These cases can all be distinguished from the present one. But the principle

[5] The fact that there are other felony convictions which would be unaffected by our action seems to me to be immaterial. Petitioner is entitled here and now to start untangling the skein. If we grant relief, we will have undone the wrong which our own delay made possible. We have no way of knowing what other measures may be available to relieve petitioner of the stigma of the other felonies. Only if we were certain (as we are not) that there are or will be none could we fail to give him relief against the wrong done here by the processes of the law.

is deep in our jurisprudence and was stated long ago in *Mitchell* v. *Overman, supra,* pp. 64–65, as follows:

> "[T]he rule established by the general concurrence of the American and English courts is, that where the delay in rendering a judgment or a decree arises from the act of the court, that is, where the delay has been caused either for its convenience, or by the multiplicity or press of business, either the intricacy of the questions involved, or of any other cause not attributable to the laches of the parties, the judgment or the decree may be entered retrospectively, as of a time when it should or might have been entered up. In such cases, upon the maxim *actus curiae neminem gravabit,*—which has been well said to be founded in right and good sense, and to afford a safe and certain guide for the administration of justice,—it is the duty of the court to see that the parties shall not suffer by the delay. A *nunc pro tunc* order should be granted or refused, as justice may require in view of the circumstances of the particular case."

It is the fault of the courts, not Parker's fault, that final adjudication in this case was delayed until after he had served his sentence. Justice demands that he be given the relief he deserves. Since the custody requirement, if any, was satisfied when we took jurisdiction of the case, I would grant the relief as of that date.

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NEEDELMAN *v.* UNITED STATES.

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

No. 278. Argued April 25–26, 1960.—Decided May 16, 1960.

Since the record does not adequately present the questions tendered in the petition, the writ of certiorari is dismissed as improvidently granted.

Reported below: 261 F. 2d 802.

Herbert A. Warren, Jr. argued the cause for petitioner. With him on the brief were *Hilton R. Carr, Jr.* and *A. C. Dressler.*

Oscar H. Davis argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Jerome M. Feit.*

PER CURIAM.

After hearing oral argument, and further study of the record, we conclude that the record does not adequately present the questions tendered in the petition. Accordingly the writ is dismissed as improvidently granted.

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

Considering the volume of cases which invoke the Court's discretionary jurisdiction—as of today 1,091 such cases have been passed on during this Term—it would be indeed surprising if in each Term there were not two or three instances of petitions which, after passing through the preliminary sifting process, did not survive the scrutiny of oral argument. See the cases collected in *Rice* v. *Sioux City Cemetery,* 349 U. S. 70, 77–78, and,

more recently, *Triplett* v. *Iowa,* 357 U. S. 217, *Joseph* v. *Indiana,* 359 U. S. 117, and *Phillips* v. *New York, ante,* p. 456. But this is not one of them. The specific questions which were presented by the petition for certiorari are not now found to be frivolous nor do they raise disputed questions of fact, nor does the record otherwise appropriately preclude answers to them. In my view they call for answers against the claims of the petitioner and I would therefore affirm the judgment. In view of the disposition of the case elaboration is not called for.

UNITED STATES *v.* ALABAMA ET AL.

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

No. 398. Argued May 2, 1960.—Decided May 16, 1960.

Alleging a course of racially discriminatory practices calculated to deprive Negro citizens of their voting rights, the United States brought an action for declaratory and injunctive relief under the Civil Rights Act of 1957 against the Board of Registrars of an Alabama county, the individual members thereof and the State of Alabama. The District Court dismissed the complaint, holding, *inter alia*, that the Civil Rights Act of 1957 did not authorize the action against the State. The Court of Appeals affirmed, and this Court granted certiorari. Before the case was heard in this Court, the Civil Rights Act of 1957 was amended so as expressly to authorize such actions to be brought against a State. *Held:* By virtue of that amendment, which is to be applied to this case, the District Court now has jurisdiction to entertain this action against the State. Accordingly, both of the judgments below are vacated and the case is remanded to the District Court with instructions to reinstate the action as to the State. Pp. 602–604.

267 F. 2d 808, judgments vacated and case remanded.

Solicitor General Rankin argued the cause for the United States. With him on the brief were *Acting Assistant Attorney General Ryan, Harold H. Greene, D. Robert Owen* and *David Rubin.*

Gordon Madison and *Nicholas S. Hare,* Assistant Attorneys General of Alabama, argued the cause for respondents. With them on the brief were *MacDonald Gallion,* Attorney General, and *Lawrence K. Andrews.*

PER CURIAM.

Alleging a course of racially discriminatory practices calculated to deprive Negro citizens of their voting rights in violation of the Fifteenth Amendment to the Constitution of the United States and Part IV of the Civil

Rights Act of 1957, 71 Stat. 637, 42 U. S. C. § 1971 (a),[1] the United States, proceeding under 42 U. S. C. § 1971 (c),[2] brought this action against the Board of Registrars of Macon County, Alabama, and the two individual respondents as members thereof, for declaratory and injunctive relief. Thereafter the Government amended its complaint so as to join the State of Alabama as a party defendant.

The District Court dismissed the complaint as to all defendants. It held (1) that the individual respondents had been sued only as Registrars, and that having under Alabama law effectively resigned their offices they were not suable in their official capacities; (2) that the Board of Registrars was not a suable legal entity; and (3) that the Civil Rights Act of 1957 did not authorize this action against the State. 171 F. Supp. 720. The Court of Appeals, sustaining each of these holdings, affirmed. 267

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[1] Section 1 of the Fifteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

42 U. S. C. § 1971 (a) provides: "All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

[2] 42 U. S. C. § 1971 (c) provides: "Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) . . . the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person."

F. 2d 808. Because of the importance of the issues involved we brought the case here. 361 U. S. 893.

Shortly before the case was heard in this Court on May 2, 1960, Congress passed the Civil Rights Act of 1960. The bill was signed by the President on May 6, 1960, and has now become law. Act of May 6, 1960, 74 Stat. 86. Among other things § 601 (b) of that Act amends 42 U. S. C. § 1971 (c) by expressly authorizing actions such as this to be brought against a State.[3] Under familiar principles, the case must be decided on the basis of law now controlling, and the provisions of § 601 (b) are applicable to this litigation. *American Foundries* v. *Tri-City Council,* 257 U. S. 184, 201; *Hines* v. *Davidowitz,* 312 U. S. 52, 60; see also *Reynolds* v. *United States,* 292 U. S. 443, 449.

We hold that by virtue of the provisions of that section the District Court has jurisdiction to entertain this action against the State. In so holding we do not reach, or intimate any view upon, any of the issues decided below, the merits of the controversy, or any defenses, constitutional or otherwise, that may be asserted by the State.

Accordingly, the judgments of the Court of Appeals and the District Court will be vacated, and the case remanded to the District Court for the Middle District of Alabama with instructions to reinstate the action as to the State of Alabama, and for further proceedings consistent with this opinion.

It is so ordered.

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[3] Section 601 (b) provides: "Whenever, in a proceeding instituted under this subsection [42 U. S. C. § 1971 (c)] any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a), the act or practice shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State."

LOCAL 24, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL–CIO, ET AL. *v.* OLIVER ET AL.

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

No. 813. Decided May 16, 1960.

Ohio's antitrust law may not be applied to prevent the contracting parties from carrying out a collective bargaining agreement upon a subject matter as to which the National Labor Relations Act directs them to bargain. *Teamsters Union* v. *Oliver*, 358 U. S. 283. Therefore, certiorari is granted and the judgment below is reversed. Pp. 605–606.

170 Ohio St. 207, 163 N. E. 2d 383, reversed.

David Previant, Robert C. Knee, Bruce Laybourne and *David Leo Uelmen* for petitioners.

Bernard J. Roetzel and *Charles R. Iden* for respondents.

PER CURIAM.

The motion for leave to use the record in No. 49, October Term, 1958, is granted. The petition for certiorari is also granted. After our remand to the Court of Appeals of the State of Ohio, Ninth Judicial District, for proceedings not inconsistent with the opinion of this Court, 358 U. S. 283, the Court of Appeals set aside its previous order "as it concerns and applies to Revel Oliver, appellee, as a lessor-driver" but continued the order in full force and effect "as it concerns and applies to Revel Oliver, appellee, as a lessor-owner and employer of drivers of his equipment." We read the judgment of the Court of Appeals as enjoining petitioners and respondents A. C. E. Transportation Co. and Interstate Truck Service, Inc., from enforcing against respondent Oliver those parts of Article

32 which provide that hired or leased equipment, if not owner-driven, shall be operated only by employees of the certificated or permitted carriers and require those carriers to use their own available equipment before hiring any extra equipment. Art. XXXII, §§ 4 and 5, 358 U. S., at 298–299. While we do not think the issue was tendered to us when the case was last here, we are of opinion that these provisions are at least as intimately bound up with the subject of wages as the minimum rental provisions we passed on then. Accordingly, as in the previous case, we hold that Ohio's antitrust law here may not "be applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain." 358 U. S., at 295.

The judgment accordingly is

Reversed.

MR. JUSTICE WHITTAKER dissents.

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

WILDE *v.* WYOMING ET AL.

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

No. 645, Misc. Decided May 16, 1960.

Certiorari granted; judgment vacated; and case remanded for hearing on petitioner's allegations in his petition for writ of habeas corpus that he "had no counsel present" when he pleaded guilty to second-degree murder and that the prosecutor suppressed testimony favorable to petitioner.

Petitioner *pro se.*

Norman B. Gray, Attorney General of Wyoming, and *W. M. Haight,* Deputy Attorney General, for respondents.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. In petitions for writs of habeas corpus, filed with the Second Judicial District Court of the State of Wyoming and with the Wyoming Supreme Court, the petitioner alleged, among other grounds for relief, that his plea of guilty to second degree murder in December 1945, upon which he received a life sentence, was induced when he "had no counsel present" and that the prosecutor wilfully suppressed the testimony of two eyewitnesses to the alleged crime which would have exonerated the petitioner. It does not appear from the record that an adequate hearing on these allegations was held in the District Court, or any hearing of any nature in, or by direction of, the Supreme Court. We find nothing in our examination of the record to justify the denial of hearing on these allegations. The judgment is therefore vacated and the case is remanded for a hearing thereon. *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U. S. 116; *Sublett* v. *Adams,* 362 U. S. 143.

McMORRAN, SUPERINTENDENT OF PUBLIC WORKS OF NEW YORK, *v.* TUSCARORA NATION OF INDIANS, ALSO KNOWN AS TUSCARORA INDIAN NATION.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 4. Decided May 16, 1960.

Judgment vacated and case remanded to the District Court with instructions to dismiss the complaint as moot.

Reported below: 257 F. 2d 885.

Louis J. Lefkowitz, Attorney General of New York, *Paxton Blair,* Solicitor General, and *Julius L. Sackman* for appellant.

Arthur Lazarus, Jr. and *Eugene Gressman* for appellee.

Thomas F. Moore, Jr. for the Power Authority of the State of New York, as *amicus curiae.*

PER CURIAM.

Upon the suggestion of mootness, the judgment of the Court of Appeals is vacated and the case is remanded to the District Court with instructions to dismiss the complaint as moot.

HELM ET AL. *v.* ARIZONA.

APPEAL FROM THE SUPREME COURT OF ARIZONA.

No. 768. Decided May 16, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 86 Ariz. 275, 345 P. 2d 202.

Irving A. Jennings for appellants.

Wade Church, Attorney General of Arizona, *Leslie C. Hardy,* Chief Assistant Attorney General, and *Jay Dushoff,* 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.

LEVINE *v.* UNITED STATES.

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

No. 164. Argued March 22, 1960.—Decided May 23, 1960.

Subpoenaed to testify before a federal grand jury, petitioner refused, on grounds of possible self-incrimination, to answer questions relevant to the grand jury's inquiry. The grand jury sought the aid of the district judge, who heard arguments on the subject, ruled that petitioner would be accorded immunity as extensive as the privilege he had asserted, and ordered him to answer the questions. After returning to the grand 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 one year. During these proceedings, everyone was excluded from the courtroom except petitioner, his counsel, the grand jury, government counsel, the judge and the court reporter; but no objection to the exclusion of the general public was made at any stage of the proceedings. *Held:* In the circumstances of this case, exclusion of the public from the courtroom when petitioner was adjudged guilty of criminal contempt and sentenced did not invalidate his conviction. Pp. 611–620.

(a) A proceeding for criminal contempt under Rule 42 (a) of the Federal Rules of Criminal Procedure is not a "criminal prosecution" within the meaning of the Sixth Amendment, which explicitly guarantees the right to a "public trial" only for "criminal prosecutions." P. 616.

(b) It was not error for the judge to clear the courtroom initially when the grand jury appeared before him for the second time seeking his assistance in compelling petitioner to testify; and, in light of the presence of petitioner's counsel and his failure to object to the continued exclusion of the public, failure of the judge to reopen the courtroom to the general public on his own motion before adjudging petitioner in contempt and sentencing him did not violate the Due Process Clause of the Fifth Amendment. Pp. 616–620.

267 F. 2d 335, affirmed.

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

Philip R. Monahan argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Robert S. Erdahl.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a prosecution for contempt arising from petitioner's refusal to answer a series of questions propounded to him by a federal grand jury. In every respect but one, this case is a replica of *Brown* v. *United States,* 359 U. S. 41, and as to all common issues it is controlled by that case. In *Brown,* however, we expressly declined to decide the effect of claimed "secrecy" upon proceedings culminating in the petitioner's sentencing for contempt, "because the record does not show this to be the fact." 359 U. S., at 51, n. 11. Here, it appears that the contemptuous conduct, the adjudication of guilt, and the imposition of sentence all took place after the public had been excluded from the courtroom, in what began and was continued as "a Grand Jury proceeding." The effect of this continuing exclusion in the circumstances of the case is the sole question presented.

On the morning of April 18, 1957, pursuant to a subpoena, petitioner appeared as a witness before a federal grand jury in the Southern District of New York engaged in investigating violations of the Interstate Commerce Act. He was asked six questions relevant to the grand jury's investigation. After consultation with his attorney, who was in an anteroom, he refused to answer them on the ground that they might tend to incriminate him. He persisted in this refusal after having been directed to answer by the foreman of the grand jury and advised by

government counsel that applicable statutes gave him complete immunity from prosecution concerning any matter as to which he might testify. See 49 U. S. C. § 305 (d).

Later that day the grand jury, government counsel, petitioner and his attorney appeared before Judge Levet, sitting in the District Court for the Southern District of New York, the grand jury having sought "the aid and assistance of the Court, in a direction to a witness, Morry Levine, who has this morning appeared before the Grand Jury and declined to answer certain questions that have been put to him." The record of the morning's proceedings before the grand jury was read. After argument by counsel, the judge ruled that the adequate immunity conferred by statute deprived petitioner of the right to refuse to answer the questions put to him. Petitioner was ordered to appear before the grand jury on April 22, and was directed by the court then to answer the questions.

On the morning of April 22 petitioner appeared before the grand jury. The questions were again put to him and he again refused to answer. Once again the grand jury, government counsel, petitioner and his counsel went before Judge Levet, for "the assistance of the Court in regard to the witness Morry Levine." At this time the record shows the following:

> "The Court: Will those who have no other business in the courtroom please leave now? I have a Grand Jury proceeding.
>
> "The Clerk: The Marshal will clear the court room.
>
> "(Court room cleared by the Marshals.)"

Petitioner, his counsel, the grand jury, government counsel and the court reporter remained. Petitioner objected to further participation by the court in the process of

compelling his testimony, except according to the procedures prescribed by Rule 42 (b) of the Federal Rules of Criminal Procedure. That provision, which relates to contempts generally, excluding those "committed in the actual presence of the court" as to which the judge certifies "that he saw or heard the conduct constituting the contempt," provides in effect for a conventional trial. In petitioner's view the court was compelled to regard his contempt, if any, as having already been committed out of the presence of the court, through petitioner's disobedience before the grand jury that morning of the court's order of April 18.

The judge, however, did not treat petitioner's renewed refusal to answer the grand jury's questions as a definitive contempt. He chose to proceed just as he had two weeks earlier in the case of Brown, reviewed here as *Brown* v. *United States, supra,* 359 U. S. 41. The morning's grand jury proceedings, showing petitioner's refusals to answer, were read, and petitioner was ordered by the judge to take the stand. The court indicated it was proceeding as "[t]he Court and the Grand Jury" "in accordance with Rule 42 (a)," which relates to the procedure in cases of contempt "committed in the actual presence of the court." Over objection, the court then put to petitioner the six questions which he had refused to answer when propounded by the grand jury. Petitioner again refused to answer these questions on the claim of the privilege against self-incrimination. In answer to a question by the court he stated that he would continue to refuse on that ground should the grand jury again put the questions to him. Government counsel asked that petitioner be adjudged in contempt "committed in the physical presence of the Judge." The court asked for reasons "why I should not so adjudicate this witness in contempt." Petitioner's counsel made three

points: (1) that the procedures had not been in accordance with "the requirements of due process"; (2) that the procedures had not followed the requirements of Rule 42 (b) of the Federal Rules of Criminal Procedure; and (3) that, on the merits of the charge, the statutory immunity was not sufficiently extensive to deprive petitioner of his privilege not to answer. No reference was made to the exclusion of the general public from the proceedings. Petitioner was adjudicated in contempt and, after submission by counsel of views regarding sentence, one year's imprisonment was imposed. The conviction was affirmed by the Court of Appeals, 267 F. 2d 335, and we granted certiorari, 361 U. S. 860, limiting our grant to the question left open in *Brown* v. *United States,* namely, whether the "secrecy" of the proceedings offended either the Due Process Clause of the Fifth Amendment of the Constitution or the public-trial requirement of the Sixth Amendment.

The course of proceeding followed by the District Court in this case for compelling petitioner's testimony was the one approved in *Brown.* Specifically, it was established by that case that, after petitioner had disobeyed the court's direction to answer the grand jury's questions before that body, it was proper for the court, upon application of the grand jury, (1) to disregard any contempt committed outside its presence; (2) to put the questions directly to petitioner in the court's presence as well as in the presence of the grand jury; and (3) to punish summarily under Rule 42 (a) as a contempt committed "in the actual presence of the court" petitioner's refusal thereupon to answer.

It was surely not error for the judge initially to have cleared the courtroom on April 22 when the grand jury appeared before him for the second time seeking his "assistance . . . in regard to the witness Morry Levine."

The secrecy of grand jury proceedings is enjoined by statute (see 18 U. S. C. § 1508, and Federal Rules of Criminal Procedure 6 (d) and (e)), and a necessary initial step in the proceedings was to read the record of the morning's grand jury proceedings. The precise question involved in this case, therefore, is whether it was error, once the courtroom had been properly, indeed necessarily, cleared, for petitioner's contempt, summary conviction and sentencing to occur without inviting the general public back into the courtroom.

From the very beginning of this Nation and throughout its history the power to convict for criminal contempt has been deemed an essential and inherent aspect of the very existence of our courts. The First Congress, out of whose 95 members 20, among them some of the most distinguished lawyers, had been members of the Philadelphia Convention, explicitly conferred the power of contempt upon the federal courts. Section 17 of the Judiciary Act of 1789, 1 Stat. 73, 83. That power was recognized by this Court as early as 1812, in a striking way. *United States* v. *Hudson,* 7 Cranch 32, 34. As zealous a guardian of the procedural safeguards of the Bill of Rights as the first Mr. Justice Harlan, in sustaining the power summarily to punish contempts committed in the face of the court, described the power in this way: "the offender may, in . . . [the court's] discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred; . . . such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions." *Ex parte Terry,* 128 U. S. 289, 313 (1888). It is a particular exercise of this power of summary punishment of contempt committed in the court's presence which is at issue in this case. This Court has not been wanting in

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effective alertness to check abusive exercises of that power by federal judges. See *Cooke* v. *United States,* 267 U. S. 517; *Offutt* v. *United States,* 348 U. S. 11. It would, however, be throwing the baby out with the bath to find it necessary, in the name of the Constitution, to strangle a power "absolutely essential" for the functioning of an independent judiciary, which is the ultimate reliance of citizens in safeguarding rights guaranteed by the Constitution.

Procedural safeguards for criminal contempts do not derive from the Sixth Amendment. Criminal contempt proceedings are not within "all criminal prosecutions" to which that Amendment applies. *Ex parte Terry,* 128 U. S. 289, 306–310; *Cooke* v. *United States,* 267 U. S. 517, 534–535; *Offutt* v. *United States,* 348 U. S. 11, 14. But while the right to a "public trial" is explicitly guaranteed by the Sixth Amendment only for "criminal prosecutions," that provision is a reflection of the notion, deeply rooted in the common law, that "justice must satisfy the appearance of justice." *Offutt* v. *United States,* 348 U. S. 11, at 14. Accordingly, due process demands appropriate regard for the requirements of a public proceeding in cases of criminal contempt, see *In re Oliver,* 333 U. S. 257, as it does for all adjudications through the exercise of the judicial power, barring narrowly limited categories of exceptions such as may be required by the exigencies of war, see Amendment to Rule 46 of the Admiralty Rules, June 8, 1942, 316 U. S. 717, revoked May 6, 1946, 328 U. S. 882, or for the protection of children, see 18 U. S. C. § 5033.

Inasmuch as the petitioner's claim thus derives from the Due Process Clause and not from one of the explicitly defined procedural safeguards of the Constitution, decision must turn on the particular circumstances of the case, and not upon a question-begging because abstract and

absolute right to a "public trial." Cf. *Snyder* v. *Massachusetts,* 291 U. S. 97, 114–117. The narrow question is whether, in light of the facts that the grand jury, petitioner and his counsel were present throughout and that petitioner never specifically made objection to the continuing so-called "secrecy" of the proceedings or requested that the judge open the courtroom, he was denied due process because the general public remained excluded from the courtroom.

The grand jury is an arm of the court and its *in camera* proceedings constitute "a judicial inquiry." *Hale* v. *Henkel,* 201 U. S. 43, 66. "The Constitution itself makes the grand jury a part of the judicial process. It must initiate prosecution for the most important federal crimes. It does so under general instructions from the court to which it is attached and to which, from time to time, it reports its findings." *Cobbledick* v. *United States,* 309 U. S. 323, 327. Unlike an ordinary judicial inquiry, where publicity is the rule, grand jury proceedings are secret. In the ordinary course, therefore, contempt of the court committed through a refusal to answer questions put before the grand jury does not occur in a public proceeding. Publicity fully satisfying the requirements of due process is achieved in such a case when a public trial upon notice is held on the charge of contempt under Rule 42 (b) of the Federal Rules of Criminal Procedure.

Brown v. *United States, supra,* established that a grand jury as an arm of the court has available to it another course to vindicate its authority over a lawlessly recalcitrant witness. Appeal may be made to the court under whose aegis the grand jury sits to have the witness ordered to answer the grand jury's inquiries in the judge's physical presence, so that the court's persuasive exertion to induce obedience, and its power summarily to commit for contempt should its authority be ignored, may be brought

to bear upon him. Since such a summary adjudication of contempt occurs in the midst of a grand jury proceeding, a clash may arise between the interest, sanctioned by history and statute, in preserving the secrecy of grand jury proceedings, and the interest, deriving from the Due Process Clause, in preserving the public nature of court proceedings.

In the present case grand jury secrecy freely gave way insofar as petitioner's counsel was present and was permitted to be fully active in behalf of his client throughout the proceedings before Judge Levet. Petitioner had ample notice of the court's intention to put the grand jury's questions directly to him, and to proceed against him summarily should he persist in his refusal to answer. Had petitioner requested, and the court denied his wish, that the courtroom be opened to the public before the final stage of these proceedings we would have a different case. Petitioner had no right to have the general public present while the grand jury's questions were being read. However, after the record of the morning's grand jury proceedings had been read, and the six questions put to petitioner with a direction that he answer them in the court's presence, there was no further cause for enforcing secrecy in the sense of excluding the general public. Having refused to answer each question in turn, and having resolved not to answer at all, petitioner then might well have insisted that, as summary punishment was to be imposed, the courtroom be opened so that the act of contempt, that is, his definitive refusal to comply with the court's direction to answer the previously propounded questions, and the consequent adjudication and sentence might occur in public. See *Cooke* v. *United States,* 267 U. S. 517, 534–536. To repeat, such a claim evidently was not in petitioner's thought, and no request to open the courtroom was made at any stage of the proceedings.

The continuing exclusion of the public in this case is not to be deemed contrary to the requirements of the Due Process Clause without a request having been made to the trial judge to open the courtroom at the final stage of the proceeding, thereby giving notice of the claim now made and affording the judge an opportunity to avoid reliance on it. This was not a case of the kind of secrecy that deprived petitioner of effective legal assistance and rendered irrelevant his failure to insist upon the claim he now makes. Counsel was present throughout, and it is not claimed that he was not fully aware of the exclusion of the general public. The proceedings properly began out of the public's presence and one stage of them flowed naturally into the next. There was no obvious point at which, in light of the presence of counsel, it can be said that the onus was imperatively upon the trial judge to interrupt the course of proceedings upon his own motion and establish a conventional public trial. We cannot view petitioner's untenable general objection to the nature of the proceedings by invoking Rule 42 (b) as constituting appropriate notice of an objection to the exclusion of the general public in the circumstances of this proceeding under Rule 42 (a).

This case is wholly unlike *In re Oliver,* 333 U. S. 257. This is not a case where it is or could be charged that the judge deliberately enforced secrecy in order to be free of the safeguards of the public's scrutiny; nor is it urged that publicity would in the slightest have affected the conduct of the proceedings or their result. Nor are we dealing with a situation where prejudice, attributable to secrecy, is found to be sufficiently impressive to render irrelevant failure to make a timely objection at proceedings like these. This is obviously not such a case. Due regard generally for the public nature of the judicial process does not require disregard of the solid demands of the fair

administration of justice in favor of a party who, at the appropriate time and acting under advice of counsel, saw no disregard of a right, but raises an abstract claim only as an afterthought on appeal.

Affirmed.

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

The Court here upholds the petitioner's conviction and imprisonment for contempt of court in refusing to answer grand jury questions, although admitting that "the contemptuous conduct, the adjudication of guilt, and the imposition of sentence all took place after the public had been excluded from the courtroom, in what began and was continued as 'a Grand Jury proceeding.'" Stated not quite so euphemistically the Court is simply saying that this petitioner was summarily convicted and sentenced to a one-year prison term after a "trial" from which the public was excluded—a governmental trial technique that liberty-loving people have with great reason feared and hated in all ages.

This Court condemned such secret "trials" 12 years ago in the case of *In re Oliver,* 333 U. S. 257. There Oliver had been convicted by a Michigan state court and sentenced to jail for 60 days on a charge of contempt based on his refusal to answer questions propounded by a one-man grand jury. Since the public had been excluded from Oliver's "trial" we were squarely faced with this precise question: "Can an accused be tried and convicted for contempt of court in grand jury secrecy?" *Id.,* at 265–266. Our answer was an emphatic "No," although MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON dissented. We held that Michigan had denied Oliver due process of law guaranteed by the Fourteenth Amendment by convicting him of contempt in a trial from which the

public was excluded. In the course of our decision we said this:

> "Counsel have not cited and we have been unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country. Nor have we found any record of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641, and whether that court ever convicted people secretly is in dispute. Summary trials for alleged misconduct called contempt of court have not been regarded as an exception to this universal rule against secret trials, unless some other Michigan one-man grand jury case may represent such an exception." *Id.*, 266.

It seems apparent, therefore, that the Court in upholding petitioner's sentence for contempt here is not only repudiating our *Oliver* decision in whole or in part but is at the same time approving a secret trial procedure which apologists for the Star Chamber have always been careful to deny even that unlimited and unlamented court ever used. The Court holds that petitioner's secret trial here violated neither the Due Process Clause of the Fifth Amendment nor the Sixth Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." Certainly the one-year prison sentence for criminal contempt here, like the three-year criminal contempt sentence in *Green* v. *United States,* 356 U. S. 165, has all the earmarks and the consequences of a plain, ordinary criminal prosecution. *Id.*, 193 (dissenting opinion).

In the *Green* case I asked for a reappraisal of the whole doctrine of summary contempt trials. I repeat that "I cannot help but believe that this arbitrary power

to punish by summary process, as now used, is utterly irreconcilable with first principles underlying our Constitution and the system of government it created . . . ." *Green* v. *United States, supra,* at 208. This case illustrates once more the dangers of such trials and the fact that it is nothing but a fiction to say that by labeling a prosecution as one for "contempt" it is changed from that which it actually is—a criminal prosecution for criminal punishment—a procedure which is being used more and more each year as a substitute for trials with Bill of Rights safeguards. The length to which the Court is going in this case—depriving petitioner of the specific public trial safeguard of the Sixth Amendment and holding that he has no more than whatever measure of protection the Court chooses to give him under its flexible interpretation of the Due Process Clause of the Fifth Amendment—is shown by its express declaration that the Sixth Amendment's guarantee of a public trial for those charged with a crime provides no protection at all if the crime charged is labeled "contempt." And the Court cites no case holding that the public trial provision of that Amendment does not apply to criminal contempt proceedings.

I wholly reject the idea that the presence of any power so awesome and arbitrary as "criminal contempt" has grown to be, as nourished by courts, is essential to preserve the independence of the judiciary and I am constrained to say that such a plea of necessity has a strange sound when voiced by our independent judiciary dedicated to fair trials in accordance with ancient safeguards. It is pertinent here to repeat the statement of one of our great lawyers, Edward Livingston, who said: " 'Not one of the oppressive prerogatives of which the crown has been successively stripped, in England, but was in its day, defended on the plea of necessity. Not one of the attempts to destroy them, but was deemed a hazardous

innovation.' " *Green* v. *United States, supra,* at 214 (dissenting opinion).

In the closing part of its opinion the Court indicates that its decision rests to some extent upon a failure of petitioner to make the proper kind of objection to the secrecy of his trial. His objection is referred to as "an abstract claim [raised] only as an afterthought on appeal." The Court thinks that the trial judge was not given "an opportunity to avoid reliance on [the claim now made]." The record shows, however, that on the two occasions petitioner was brought before the court, he requested a trial according to due process, notice and specification of the charges against him, an opportunity to prepare his defenses, an adjournment to obtain compulsory process and subpoena witnesses as well as, in general, proceedings under Rule 42 (b), which undoubtedly calls for a public trial. Petitioner's objection seems sufficient to me to raise the extremely important point of his constitutional right to a public trial.

Despite the Court's decision that petitioner's repeated claims for constitutional procedures were not enough to raise the constitutionality of his secret "trial," there is an intimation in the Court's opinion that maybe at some future time, in some future contempt conviction, the Court would frown upon exclusion of the public from some part of a contempt trial such as this. Here it is said, however, "The proceedings properly began out of the public's presence and one stage of them flowed naturally into the next. There was no obvious point at which, in light of the presence of counsel, it can be said that the onus was imperatively upon the trial judge to interrupt the course of proceedings upon his own motion and establish a conventional public trial." The theory of the Court here seems to be that since grand jury hearings in the grand jury room are secret, the grand jury's proceedings in court against allegedly recalcitrant witnesses may

also be in secret. But surely this cannot be. The grand jury has to report to the judge to invoke his assistance and it did so in this case, bringing Levine along. The grand jury then preferred charges against him to the court. To say that grand jury secrecy extends into the courtroom is wholly to ignore the difference between secrecy of grand jury deliberations and votes, and secrecy of a trial for contempt. Not only are the grand jury deliberations supposed to be free from the intrusions of others, but the idea of a grand jury is one of an independent body, which even the judge shall not be allowed to interfere with or control. See, *e. g., Stirone* v. *United States,* 361 U. S. 212, 218. The grand jury did not enter the courtroom to deliberate or to vote; it went there and took the petitioner there in order to ask the court to compel him to testify under penalty of contempt. At that moment the grand jury deliberations were temporarily ended and a court proceeding against petitioner began. It was then that there arose petitioner's constitutional right to be free from secret procedures gravely jeopardizing his liberty or property.[1] The judge has no more right or power under the law to intrude on the secret deliberations of a grand jury than anyone else. Grand juries, as this Court has said, " '. . . are not appointed for the prosecutor or for the court; they are appointed for the government and for the people . . . .' " *Hale* v. *Henkel,* 201 U. S. 43, 61. See also *Costello* v. *United States,* 350 U. S. 359, 362. When the grand jury came into the courtroom with the petitioner it was to get immediate action against the petitioner under its charges, which the Court now holds the judge was entitled to try summarily and secretly without further notice. This was the kind of trial from which

[1] I omit the word "life" from the usual phrase "life, liberty or property" because the courts have not yet said that their vast power to punish for contempt extends to taking the life of the convicted defendant.

the public should not be excluded if we are to follow constitutional commands. In fact, I believe, as I said in *Green* v. *United States, supra,* that at the very least a man whose liberty may be taken away for a period of months or years as punishment, is entitled to a full-fledged, constitutional, Bill of Rights trial.[2]

The Court seems to conclude its holding by invoking the doctrine of error without injury. In my judgment it is scant respect for the constitutional command that trials be had in public to look at the circumstances of the trial and conviction of a man tried in secret and approve the trial on the ground that "anyhow he wasn't hurt." I think every man is hurt when any defendant in America is convicted and sent to the penitentiary after a secret "trial" which is condemned by the Constitution's requirement of public trials as well as its command that all trials be conducted according to due process of law.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS joins, dissenting.

The Court's opinion makes it plain that the petitioner was adjudicated guilty of criminal contempt through a proceeding from which the public was excluded. And the whole Court is agreed that, whether petitioner's right is founded on the Fifth or the Sixth Amendment, he possessed a right, guaranteed by the Constitution, that this adjudication of his guilt of crime be made in public.

But the Court concludes that despite this, the petitioner is not entitled to our judgment of reversal because

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[2] It is to be borne in mind that petitioner is not to be put in jail with the keys in his pocket, so that he would be released immediately upon complying with the court's valid order, see *Brown* v. *United States,* 359 U. S. 41, 55 (dissenting opinion), but is being punished by a year's imprisonment for a past and completed offense. See, *id.,* 53 (dissenting opinion); *Green* v. *United States, supra,* at 197 (dissenting opinion).

he did not object in precise enough terms to this infringement of his constitutional rights. Its ruling is, I submit, a radical departure from the principles which have prevailed, and should continue to prevail, in this Court respecting the waiver of a criminal defendant's constitutional procedural rights. The key to the matter has been the defendant's consent—his "express, intelligent consent." *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 277. The special interest of the public in the publicity of adjudications of guilt of crime has been repeatedly pointed out judicially, see *United States* v. *Kobli,* 172 F. 2d 919, 924; *Davis* v. *United States,* 247 F. 394, 395–396; *Neal* v. *State,* 86 Okla. Crim. 283, 289, 192 P. 2d 294, 297, and this has led some to argue that even the defendant's express consent should not suffice to permit proceedings to be had in secret. *Kirstowsky* v. *Superior Court,* 143 Cal. App. 2d 745, 300 P. 2d 163; *United Press Assns.* v. *Valente,* 308 N. Y. 71, 93, 123 N. E. 2d 777, 788 (dissenting opinion). But though the defendant's power to waive the constitutional protection be assumed, this consideration underscores how imperative is the requirement that the waiver of publicity be a meaningful one, based on real consent—be part of the "defendant's own conduct of his defense." *Id.,* at 81, 123 N. E. 2d, at 780 (majority opinion). The waiver must be one based on the defendant's conclusion that "in his particular situation his interests will be better served by foregoing the privilege than by exercising it." *United States* v. *Sorrentino,* 175 F. 2d 721, 723.

This requirement could not by the greatest stretch of the imagination be said to have been met here. Here petitioner's counsel by no means consented to the proceedings, but repeatedly made the most fundamental objections to the procedure whereby his client was being adjudicated guilty of crime, based on the Criminal Rules and on the very provision of the Constitution which the

Court today finds applicable. If the objection had been sustained, and the procedure contended for adopted, the error now laid bare would not have been committed. Whether the objection was well taken on its own grounds is irrelevant, since it is consent that must be found. The question is not whether the trial court was apprised of its error in the talismanic language the Court now finds in retrospect to have been essential. There are, to be sure, trial errors as to which specific objection is required of counsel. But where fundamental constitutional guarantees are omitted, the question is rather whether consent to proceed without the constitutional protection can be found. It is patent here that it cannot. Of course, this principle is hardly to be altered by the Court's transparent semantic device of phrasing the constitutional right of this defendant as one that did not come into existence until he made explicit request that he have its benefits.* The judgment should be reversed.

*Apparently through the same device the Court has avoided the settled rule of the federal courts that a showing of prejudice is not necessary for reversal of a conviction not had in public proceedings. *Davis* v. *United States*, 247 F. 394, 398–399 (C. A. 8th Cir.); *Tanksley* v. *United States*, 145 F. 2d 58, 59 (C. A. 9th Cir.); *United States* v. *Kobli*, 172 F. 2d 919, 921 (C. A. 3d Cir.). See *People* v. *Jelke*, 308 N. Y. 56, 67–68, 123 N. E. 2d 769, 775.

ROHR AIRCRAFT CORP. *v.* COUNTY OF SAN DIEGO ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 295. Argued March 30, 1960.—Decided May 23, 1960.

1. In this case, in which a taxpayer did not explicitly challenge a state tax statute as being repugnant to the Federal Constitution, treaties or statutes, but challenged a local tax assessment on the ground that it infringed the taxpayer's federal rights, privileges or immunities, this Court did not have jurisdiction under 28 U. S. C. § 1257 of an appeal from a decision of a state Supreme Court sustaining the validity of the tax; but the appeal was treated under 28 U. S. C. § 2103 as a petition for certiorari, and certiorari was granted. Pp. 629–630.
2. Certain real estate owned by the Reconstruction Finance Corporation and subjected by § 8 of the Reconstruction Finance Corporation Act to state and local taxation was declared surplus and surrendered to the War Assets Administration for disposal under the provisions of the Surplus Property Act of 1944, which, *inter alia*, authorized the War Assets Administration and its successor, the General Services Administration, to make disposition of the property on such terms as it saw fit and to execute and deliver all necessary papers incident to transfer of title. *Held:* Even before execution of a quitclaim deed transferring title from the Reconstruction Finance Corporation to the United States, such real estate had ceased to be subject to state and local taxation as "real property of the Reconstruction Finance Corporation," even though the property was leased to a private lessee in the name of both the Reconstruction Finance Corporation and the United States. Pp. 630–636.

51 Cal. 2d 759, 336 P. 2d 521, reversed.

Leroy A. Wright argued the cause and filed a brief for appellant.

Manuel L. Kugler and *Henry A. Dietz* argued the cause for appellees. With them on the brief were *Carroll H. Smith* and *Duane J. Carnes.*

Myron C. Baum argued the cause for the United States, as *amicus curiae,* urging reversal. On the brief were *Solicitor General Rankin, Assistant Attorney General Rice* and *John J. McCarthy.*

MR. JUSTICE CLARK delivered the opinion of the Court.

The question to be decided is whether real property declared to be surplus under the Surplus Property Act of 1944, 58 Stat. 765, but the record title to which is in the Reconstruction Finance Corporation, continues to be subject to local taxation under the exemption of § 8 of the Reconstruction Finance Corporation Act, 47 Stat. 5.[1] The Supreme Court of California and the Supreme Court of Michigan[2] have held that it does. The Court of Claims has reached the opposite conclusion.[3] In view of this conflict we agreed to hear this case, but postponed consideration of the question of jurisdiction to the hearing on the merits. 361 U. S. 859.

On the question of jurisdiction, we believe that appellant did not make the required "explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws. . . . And it has long been settled that an attack

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[1] Section 8 (as amended):

". . . any real property of the Corporation shall be subject to . . . State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed." 61 Stat. 205; 15 U. S. C. § 607.

[2] *Continental Motors Corp.* v. *Township of Muskegon,* 346 Mich. 141, 77 N. W. 2d 370.

[3] *Board of County Comm'rs of Sedgwick County* v. *United States,* 123 Ct. Cl. 304, 105 F. Supp. 995. In a case involving property in a similar posture, the Ninth Circuit reached a result in accord with *Sedgwick County,* and contrary to the California and Michigan courts. *United States* v. *Shofner Iron & Steel Works,* 168 F. 2d 286. In *Shofner,* the ultimate issue was not tax immunity, but ejectment of a defendant from government property.

upon a tax assessment or levy, such as [appellant] here made, on the ground that it infringes a taxpayer's federal rights, privileges, or immunities, will not sustain an appeal . . . ." *Charleston Federal Savings & Loan Assn.* v. *Alderson,* 324 U. S. 182, 185 (1945).[4] The appeal is therefore dismissed. While the case is not properly here by appeal, we treat the same as a petition for certiorari under 28 U. S. C. § 2103.[5] The petition is granted. On the merits, we conclude that the property involved is not within the waiver provision of the federal Act.

The language of § 8 of the Reconstruction Finance Corporation Act was borrowed from earlier federal legislation dealing with federal financial institutions.[6] The congressional policy appears to have been to waive tax

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[4] 28 U. S. C. § 1257 provides:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . . . .

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States."

[5] 28 U. S. C. § 2103:

"If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. . . ."

[6] See 13 Stat. 99, 111, 12 U. S. C. § 548 (national banking associations); 38 Stat. 251, 258, 12 U. S. C. § 531 (Federal Reserve Banks); 39 Stat. 380, 12 U. S. C. §§ 931, 933 (Federal Land Banks); 42 Stat. 1469, 12 U. S. C. § 1261 (National Agricultural Credit Corporation).

exemption on real property owned by government corporations whose functions were primarily financial in nature. Originally conceived for the purpose of making loans to distressed business concerns, the Reconstruction Finance Corporation was in this category. Apparently Congress was concerned that property obtained by the Corporation through its financial operations in aid of economic recovery policies would lose its taxable status. Through § 8, therefore, Congress preserved the right of state and local governmental bodies to tax property even though it came into the hands of the Corporation. Success crowned the economic efforts of the Corporation, and, as the country approached the critical period immediately preceding its entry into World War II, Congress in 1940 extended the Corporation's functions to include the stockpiling of critical supplies and the operation of plants engaged in the manufacture of war material. 54 Stat. 573. It was soon apparent that large tracts of land would be necessary in this operation, and the waiver was extended to the real estate holdings of the Defense Plant Corporation, a subsidiary of the Reconstruction Finance Corporation. 55 Stat. 248.

The termination of the war quickly threw substantial portions of such property into disuse, there being no further need for the mass production of war material. The President created the War Assets Administration for the purpose of disposing of all government surplus property.[7] After March 25, 1946, government agencies possessing property surplus to official needs were required so to declare it and to transfer it to the Administration for disposal.[8] By declaration of May 29, 1946, the Reconstruction Finance Corporation declared the subject property to be surplus to its needs and responsibilities. Under

[7] See Exec. Order No. 9689, dated Jan. 31, 1946, 11 Fed. Reg. 1265.
[8] See Surplus Property Act of 1944, 58 Stat. 765.

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the Surplus Property Act, this declaration transferred [9] to the War Assets Administration the functions of: caring for and handling the property pending disposal (§ 3 (g) and § 6); making disposition of the property on such terms as it saw fit (§ 9 (b) and § 15 (a)), including donation under certain conditions (§ 13 (b)); and the power of execution and delivery of all necessary papers incident to transfer of title (§ 15 (b)). It further provided that all funds derived from such disposition would be covered into the United States Treasury as miscellaneous receipts (§ 30 (a)). Pursuant to this declaration by the Reconstruction Finance Corporation, the War Assets Administration took possession of this property on May 29, 1946, and its successor, the General Services Administration,[10] retained possession until September 1, 1949, during which period the property was used as a storage depot and a sales center for surplus property held by the Administration. On the latter date, the property was leased to appellant's predecessor. The lease described the lessor as the "Reconstruction Finance Corporation . . . and the United States of America, both acting by and through the General Services Administrator under . . . the Surplus Property Act of 1944."

Appellees assessed ad valorem real property taxes on the realty against the Reconstruction Finance Corporation, as owner, for the fiscal tax years 1951 to 1955, inclusive. Appellant paid the taxes [11] and filed this suit after claims for refund had been denied. The trial court

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[9] The Act did not require the execution of a deed to the Administration.

[10] As of July 1, 1949, Congress transferred all of the functions of the War Assets Administration to the General Services Administration. See Federal Property and Administrative Services Act of 1949, c. 288, 63 Stat. 377.

[11] By the terms of the lease, the lessee undertook to pay all taxes legally assessed against the property.

entered judgment against appellant. On appeal, the Supreme Court of California affirmed the judgment of the trial court, and denied the claim for refund. 51 Cal. 2d 759, 336 P. 2d 521.

There would be no question as to the exemption of the real property involved had the record title been in the name of the United States. Since March 17, 1955, in fact, it has been so recorded; on that date the Reconstruction Finance Corporation executed and recorded a quitclaim deed to the United States.

The Supreme Court of California correctly posed as the underlying question, "whether the land ceased to be 'real property of the' Reconstruction Finance Corporation" after it was declared surplus and became subject to the provisions of the Surplus Property Act of 1944. That court found that, since no deed was executed transferring title out of the Reconstruction Finance Corporation until 1955, it remained "property of the Corporation" and hence subject to taxation until that time. We believe the court placed too much reliance on the fact that the bare record title to the property remained in the name of the Corporation.

It appears to us that the purpose of the waiver provision was to permit taxation of real property being used by the Reconstruction Finance Corporation in the performance of its functions. Such use was terminated when the property was declared surplus in 1946. At that time another agency of the Government took both the occupancy and complete control of the property for the purpose of management and disposition. The Reconstruction Finance Corporation, under the specific provisions of the Surplus Property Act, thereby lost all power and control over the property, which came into the hands of the Administrator for the account of the United States, any proceeds therefrom being ordered paid into the United States Treasury. Thereafter, the Administrator elected,

as he had the statutory power to do, to lease the property to appellant's predecessor. The real property, however, remained in the account of the United States, not the Reconstruction Finance Corporation. As the Supreme Court of California recognized, the general rule is "that lands owned by the United States of America or its instrumentalities are immune from state and local taxation." We think that the land here was "owned" by the United States.

We believe that California overlooks the fact that, while the 1949 lease was formally made in the name of both the United States and the Reconstruction Finance Corporation, as lessors, it recited on its face that the property was "surplus property of the Government of the United States" and subject to the Surplus Property Act of 1944. Furthermore, this lease noted that the property had "been assigned to War Assets Administration for disposal," and that "the Department of Air Force has determined that the use of the leased premises by the Lessee herein is necessary for the production of military equipment for the National Defense." Moreover, the property had been occupied by the War Assets Administration during the two years immediately preceding its lease. The appellees' contention seems to be that, since the lease was in the name of the Reconstruction Finance Corporation as well as the United States, the land was "property of the Corporation." We hardly think such a conclusion inevitable. We believe that the appropriate test would turn on practical ownership of the property rather than the naked legal title. This is the more necessary with respect to public property where the record title may often be in a government agency or department—or, for that matter, in an official of the Government—rather than in the name of the United States. Here the Reconstruction Finance Corporation had no proprietary interest in the property, no possession or control thereof, was performing none of

its functions with regard thereto, and could receive none of the income or future benefits therefrom. Even though it held the record title, such holding, under the circumstances here, could be only for the benefit of the United States. All of the incidents of beneficial ownership ended by the express mandate of the statute when the property was declared surplus and transferred to another agency for disposition.

When confronted with the same issue as presented by the instant case, the Court of Claims reached a conclusion directly contrary to that of the Supreme Court of California. *Board of County Comm'rs of Sedgwick County* v. *United States,* 123 Ct. Cl. 304, 105 F. Supp. 995. The Court of Claims there noted that, after the declaration of surplus, the Reconstruction Finance Corporation had no "physical possession, control, or custody of the property. It had neither the use nor the right to use the property." The court went on to conclude that "[t]here is no indication that Congress intended to waive immunity from taxation under these circumstances." 123 Ct. Cl., at 324, 105 F. Supp., at 1001. We agree with the Court of Claims "that the cloak of immunity descended upon the property [when it was declared surplus] and no tax liability for the property could arise thereafter." 123 Ct. Cl., at 324, 105 F. Supp., at 1002.

Since the crucial element is the intent of Congress, it is important to note the enactment of a 1955 statute providing the States relief from the effects of federal immunity. 40 U. S. C. §§ 521–524. The congressional declaration of purpose in that statute "recognizes that the transfer of real property having a taxable status from the Reconstruction Finance Corporation . . . to another Government department has often operated to remove such property from the tax rolls . . . ." "Transfer" was defined to include "a transfer of custody and control of, or accountability for the care and handling of," the prop-

erty, as well as "transfer of legal title." The statute goes on to provide for certain payments in lieu of taxes where such a transfer occurs. The relevance of this statute lies in a congressional sanction of the rule of the *Sedgwick County* case, construing the waiver provision.

We cannot say that Congress in 1932 intended to waive the tax exemption on "real property of the Corporation" after the Corporation found the property surplus to its needs and responsibilities and transferred it to another agency, for management and disposition as United States property. To say that the Government's land remained taxable merely because no formal deed was executed transferring title, either to itself or any of its designated agencies, would but make a local tollgate of a technicality.

Nor can we agree that the short administrative practice claimed here continued the waiver in effect. Even if the responsible agency had permitted the paper title to the Government's property to remain in the Reconstruction Finance Corporation for the sole purpose of allowing it to be taxed, the congressional mandate in the Surplus Property Act of 1944 could not be overridden. As to such matters, any adjustments between the federal and the local governments are strictly legislative ones for the Congress, *United States* v. *City of Detroit,* 355 U. S. 466, 474 (1958), and not within the discretion of the executive agencies.

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

Reversed and remanded.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent.

WILLIAMS *v.* LaVALLEE, WARDEN.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 833, Misc. Decided May 23, 1960.

Appeal dismissed for want of jurisdiction.
Reported below: — F. 2d —.

PER CURIAM.

The appeal is dismissed for want of jurisdiction.

SIMS MOTOR TRANSPORT LINES, INC., *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 823. Decided May 23, 1960.

183 F. Supp. 113, affirmed.

Harold T. Halfpenny and *Mary Shaw* for appellant.

Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon, Henry Geller and *Robert W. Ginnane* for the United States and the Interstate Commerce Commission.

Roland Rice and *Franklin R. Overmyer* for Holland Motor Express, Inc., et al.

PER CURIAM.

The motions of Holland Motor Express, Inc., et al., for leave to be named parties appellee and for leave to file a motion to affirm are granted. The motions to affirm are granted and the judgment is affirmed.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 637 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 29 THROUGH MAY 23, 1960.

FEBRUARY 29, 1960.

Miscellaneous Orders.

No. 130. NIUKKANEN, ALIAS MACKIE, *v.* MCALEXANDER, ACTING DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. Certiorari, 361 U. S. 808, to the United States Court of Appeals for the Ninth Circuit. The motion of the American Committee for Protection of Foreign Born for leave to file brief, as *amicus curiae,* is granted. *Blanch Freedman* for movant. Reported below: 265 F. 2d 825.

No. 689, Misc. WOLFE *v.* SACKS, WARDEN; and
No. 713, Misc. HOYLAND *v.* MADIGAN, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

Probable Jurisdiction Noted.

No. 434, Misc. FERGUSON *v.* GEORGIA. Appeal from the Supreme Court of Georgia. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Case transferred to the appellate docket. *Paul James Maxwell* for appellant. *Eugene Cook,* Attorney General of Georgia, and *John T. Ferguson,* Deputy Assistant Attorney General, for appellee. Reported below: 215 Ga. 117, 109 S. E. 2d 44.

Certiorari Granted. (*See also No. 667, ante, p. 58.*)

No. 593. CHAUNT *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *Joseph Forer, David Rein* and *John W. Porter* for petitioner. *Solicitor General Rankin, As-*

sistant Attorney General Wilkey, Beatrice Rosenberg and *Jerome M. Feit* for the United States. Reported below: 270 F. 2d 179.

No. 582. ARO MANUFACTURING CO., INC., ET AL. *v.* CONVERTIBLE TOP REPLACEMENT CO., INC. C. A. 1st Cir. Certiorari granted. *David Wolf* for petitioners. *Elliott I. Pollock* for respondent. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Charles H. Weston* and *Richard H. Stern* filed a brief for the United States, as *amicus curiae,* in support of the petition. Reported below: 270 F. 2d 200.

Certiorari Denied.

No. 492. CROSS *v.* PASLEY. C. A. 8th Cir. Certiorari denied. *Martin B. Dickinson* for petitioner. *Albert Thomson* for respondent. Reported below: 270 F. 2d 88.

No. 585. RICHARDSON *v.* BRUNNER. Court of Appeals of Kentucky. Certiorari denied. *Frank E. Haddad, Jr.* for petitioner. *Thomas Ellis Lodge* for respondent. Reported below: 327 S. W. 2d 572, 328 S. W. 2d 530.

No. 589. FARNSWORTH ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *James D. Carpenter* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott* for respondent. Reported below: 270 F. 2d 660.

No. 644. SKINNER *v.* UNITED STATES. C. A. 2d 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: 272 F. 2d 607.

No. 622. RUBENFIELD *v.* WATSON, COMMISSIONER OF PATENTS. United States Court of Customs and Patent Appeals. Certiorari denied. *Bruce B. Krost* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for respondent. Reported below: 47 C. C. P. A. (Pat.) 701, 270 F. 2d 391.

No. 640. TILLMAN, ADMINISTRATRIX, *v.* ANDERSON, SECRETARY OF THE TREASURY, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John Wattawa* and *Borris M. Komar* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for respondents. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

No. 649. FARM AND HOME AGENCY, INC., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 7th Cir. Certiorari denied. *Myer H. Gladstone* for petitioners. *Solicitor General Rankin, Thomas G. Meeker* and *David Ferber* for respondent. Reported below: 270 F. 2d 891.

No. 642. SAXNER ET AL., DOING BUSINESS AS PHIL'S TAVERN, ET AL. *v.* WAYNICK ET AL. C. A. 7th Cir. Certiorari denied. *Harold Orlinsky* and *Seymour J. Layfer* for petitioners. Reported below: 269 F. 2d 322.

No. 651. BERRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William F. Walsh* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 271 F. 2d 775.

No. 670. PEOPLES LOAN & FINANCE CORP. *v.* LAWSON. C. A. 5th Cir. Certiorari denied. *Louis Regenstein, Jr.* for petitioner. *Oscar M. Smith* for respondent. Reported below: 271 F. 2d 529.

No. 641. LASH *v.* NIGHOSIAN, REVENUE AGENT, INTERNAL REVENUE SERVICE. C. A. 1st Cir. Certiorari denied. *Jacob Spiegel* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Meyer Rothwacks* for respondent. Reported below: 273 F. 2d 185.

No. 647. UNITED PACKINGHOUSE WORKERS OF AMERICA *v.* MAURER-NEUER, INC. C. A. 10th Cir. Certiorari denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application. *Eugene Cotton* and *Richard F. Watt* for petitioner. Reported below: 272 F. 2d 647.

No. 39, Misc. GIRON *v.* TINSLEY, WARDEN. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *Gerald Harrison,* Assistant Attorney General, for respondent.

No. 310, Misc. TAG *v.* ROGERS, ATTORNEY GENERAL, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Charles Bragman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Townsend, Irving Jaffe* and *Paul E. McGraw* for respondents. Reported below: 105 U. S. App. D. C. 387, 267 F. 2d 664.

No. 321, Misc. KELLY ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *James J. Laughlin* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 269 F. 2d 448.

No. 403, Misc. MORRISON *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *David H. Caplow* for petitioner.

No. 324, Misc. MCGILL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Frederick Bernays Wiener* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 106 U. S. App. D. C. 136, 270 F. 2d 329.

No. 372, Misc. POWERS *v.* LANGLOIS, WARDEN. Supreme Court of Rhode Island. Certiorari denied. Reported below: —— R. I. ——, 153 A. 2d 535.

No. 474, Misc. BURLEY *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Petitioner *pro se.* *C. Ferdinand Sybert,* Attorney General of Maryland, and *James H. Norris, Jr.,* Special Assistant Attorney General, for respondent. Reported below: 220 Md. 670, 154 A. 2d 924.

No. 523, Misc. TRENT *v.* BLALOCK, SUPERINTENDENT, SOUTHWESTERN STATE HOSPITAL. C. A. 4th Cir. Certiorari denied. Reported below: 271 F. 2d 510.

No. 528, Misc. SCOTT *v.* HEHLE, SHERIFF, ET AL. Supreme Court of Appeals of West Virginia. Certiorari denied. *Fred G. Minnis* for petitioner.

No. 529, Misc. BEY *v.* MARONEY, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 682, Misc. COX *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 582, Misc. EVE *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 642, Misc. PHILLIPS *v.* CARROLL, JUDGE OF THE CIRCUIT COURT OF MCHENRY COUNTY. Supreme Court of Illinois. Certiorari denied.

No. 666, Misc. HOBBS *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 220 Md. 685, 155 A. 2d 70.

No. 736, Misc. BESMEL *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 6, Misc. BRYANT *v.* OHIO. Petition for writ of certiorari to the Supreme Court of Ohio denied in the light of the representation made by respondent in its brief in opposition that "Petitioner may at this time perfect an appeal to the Supreme Court of Ohio *in forma pauperis*, which appeal will be heard by that Court." Petitioner *pro se*. *Mathias H. Heck* and *Herbert M. Jacobson* for respondent.

Rehearing Denied.

No. 495. STUART ET AL. *v.* WILSON, ATTORNEY GENERAL OF TEXAS, ET AL., 361 U. S. 232;

No. 575. FIRST NATIONAL CITY BANK OF NEW YORK *v.* INTERNAL REVENUE SERVICE, 361 U. S. 948; and

No. 578. MANNINA *v.* INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL., 361 U. S. 943. Petitions for rehearing denied.

No. 426. MORRISON *v.* CALIFORNIA, 361 U. S. 900. Motion for leave to file a second petition for rehearing denied.

No. 529, October Term, 1955. DeSylva *v.* Ballentine, Guardian, 351 U. S. 570. The motion for leave to file a petition for rehearing in the nature of a bill of review is denied. Mr. Justice Brennan, Mr. Justice Whittaker and Mr. Justice Stewart took no part in the consideration or decision of this application.

No. 291, Misc., October Term, 1953. Pollack *v.* Aspbury et al., 347 U. S. 914;

No. 251, Misc., October Term, 1954. Pollack *v.* Aspbury et al., 348 U. S. 903;

No. 364, Misc., October Term, 1954. Pollack *v.* Aspbury et al., 348 U. S. 954;

No. 532, Misc., October Term, 1954. Pollack *v.* Aspbury et al., 349 U. S. 940; and

No. 371, Misc., October Term, 1957. Pollack *v.* City of Newark, New Jersey, et al., 355 U. S. 964. Motions for leave to file petitions for rehearing denied. Mr. Justice Brennan, Mr. Justice Whittaker and Mr. Justice Stewart took no part in the consideration or decision of these applications.

March 7, 1960.

Miscellaneous Orders.

No. 55. United States *v.* Kaiser. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit; and

No. 376. Commissioner of Internal Revenue *v.* Duberstein et al. Certiorari, 361 U. S. 923, to the United States Court of Appeals for the Sixth Circuit. The motion of Bernice Curry Myers for leave to file brief, as *amicus curiae,* is denied. *Bennett Boskey* for Bernice Curry Myers. Reported below: No. 55, 262 F. 2d 367; No. 376, 265 F. 2d 28.

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No. 4, Original. NEW YORK *v.* ILLINOIS ET AL. The report of the Special Master is received and ordered filed. The motion of the complainant for leave to file a supplemental and amended complaint is granted and the defendants are allowed 45 days within which to file answers thereto. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, *Richard H. Shepp,* Assistant Attorney General, and *Randall J. Le Boeuf, Jr.,* Special Assistant Attorney General, for complainant. *Grenville Beardsley,* Attorney General of Illinois, *William C. Wines,* Assistant Attorney General, *Lawrence J. Fenlon, Peter G. Kuh, George A. Lane, Joseph B. Fleming, Joseph H. Pleck* and *Thomas M. Thomas* for defendants.

No. 633. WRIGHT *v.* OHIO. The motion to withhold issuance of the order (361 U. S. 964) denying certiorari to the Supreme Court of Ohio is denied. *Melvin Edward Schaengold* for petitioner. *C. Watson Hover* and *Harry C. Schoettmer* for respondent.

No. 557, Misc. HURLEY *v.* HAGAN, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus denied.

No. 133, Misc. MASSENGALE *v.* ROGERS, ATTORNEY GENERAL, ET AL. Motion for leave to file petition for writ of habeas corpus denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application. Petitioner *pro se. Solicitor General Rankin, Acting Assistant Attorney General Ryan, Harold H. Greene* and *David Rubin* for respondent Rogers.

No. 451, Misc. CULVER *v.* GOODMAN, 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. 406, Misc., ante, p. 143.*)

No. 659. ROBERT LAWRENCE CO., INC., *v.* DEVONSHIRE FABRICS, INC. C. A. 2d Cir. Certiorari granted. *Sigmund Timberg* for petitioner. *David I. Shivitz* for respondent. Reported below: 271 F. 2d 402.

No. 666. MICHALIC *v.* CLEVELAND TANKERS, INC. C. A. 6th Cir. Certiorari granted. *S. Eldridge Sampliner* and *Harvey Goldstein* for petitioner. *Lucian Y. Ray* for respondent. Reported below: 271 F. 2d 194.

No. 67, Misc. BAILEY *v.* ALVIS, WARDEN. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Ohio granted. Case transferred to the appellate docket.

No. 423, Misc. CAMPBELL ET AL. *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit granted limited to Question No. 5 presented by the petition which reads as follows:

"Whether production of a statement which was read and signed by a government witness is excused after a complete foundation for it is made under 18 U. S. C. 3500 on the ground that the only document in the possession of the prosecutor is a summary by an F. B. I. Agent and not the statement signed by the witness without any showing as to what became of the original statement."

The case is transferred to the appellate docket.

Lawrence F. O'Donnell, Melvin S. Louison and *Leonard Louison* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 269 F. 2d 688.

No. 661. KONIGSBERG *v.* STATE BAR OF CALIFORNIA ET AL. Motion to use record in No. 5, October Term, 1956, granted. Motion of American Civil Liberties Union of Southern California for leave to file brief, as *amicus curiae,* granted. Petition for writ of certiorari to the Supreme Court of California granted. *Edward Mosk* and *Samuel Rosenwein* for petitioner. *Frank B. Belcher* and *Ralph E. Lewis* for respondents. *A. L. Wirin* and *Hugh R. Manes* for the American Civil Liberties Union of Southern California. Reported below: 52 Cal. 2d 769, 344 P. 2d 777.

No. 319, Misc. MCNEAL *v.* CULVER, STATE PRISON CUSTODIAN. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Florida granted. Case transferred to the appellate docket. Petitioner *pro se. Richard W. Ervin,* Attorney General of Florida, and *Odis M. Henderson,* Assistant Attorney General, for respondent. Reported below: 113 So. 2d 381.

Certiorari Denied. (*See also No. 451, Misc., supra.*)

No. 637. DOESKIN PRODUCTS, INC., ET AL. *v.* PETTIT ET AL., TRUSTEES. C. A. 2d Cir. Certiorari denied. *Alexander Boskoff* for petitioners. *George C. Levin* for respondents. *Solicitor General Rankin, Thomas G. Meeker* and *David Ferber* for the Securities and Exchange Commission in opposition. Reported below: 270 F. 2d 95, 699.

No. 653. MEYERS ET AL. *v.* FAMOUS REALTY, INC., ET AL. C. A. 2d Cir. Certiorari denied. *Richard Swan Buell* for petitioners. *Whitney North Seymour* for respondents. Reported below: 271 F. 2d 811.

No. 648. CHAN WING CHEUNG, ALIAS BILL WOO, *v.* HAGERTY, OFFICER IN CHARGE, U. S. IMMIGRATION AND NATURALIZATION SERVICE. C. A. 1st Cir. Certiorari denied. *Peyton Ford* and *J. Howard McGrath* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *J. F. Bishop* for respondent. Reported below: 271 F. 2d 903.

No. 654. DYESTUFFS & CHEMICALS, INC., *v.* FLEMMING, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 8th Cir. Certiorari denied. *Paul C. Warnke, Robert L. Randall* and *Earl Susman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *William W. Goodrich* for respondent. Reported below: 271 F. 2d 281.

No. 656. HIRSCHKOWITZ ET AL. *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Jerome B. Goldman* for petitioners. *John T. Corrigan* for respondent.

No. 657. J. A. FOLGER & Co. *v.* UNITED FRUIT Co. C. A. 5th Cir. Certiorari denied. *Eberhard P. Deutsch* and *René H. Himel, Jr.* for petitioner. *John W. Sims* for respondent. Reported below: 270 F. 2d 666.

No. 658. COLLINS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Edmund E. Shepherd, George S. Fitzgerald* and *Henry G. Singer* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 272 F. 2d 650.

No. 400, Misc. KNIGHT *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. Reported below: 113 So. 2d 835.

No. 660. TRAVELERS INDEMNITY CO. ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. *Tudor W. Hampton* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Morton Hollander* and *John G. Laughlin, Jr.* for the United States. Reported below: 271 F. 2d 521.

No. 145, Misc. BREST *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 266 F. 2d 879.

No. 292, Misc. MARKS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se. Charles W. Manning* for respondent. Reported below: 6 N. Y. 2d 67, 160 N. E. 2d 26.

No. 364, Misc. COLLINS *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: 269 F. 2d 745.

No. 457, Misc. MARTIN *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* and *Beatrice Rosenberg* for the United States. Reported below: 106 U. S. App. D. C. 233, 271 F. 2d 499.

No. 481, Misc. FERNANDEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: —— F. 2d ——.

No. 382, Misc. BABOURIS *v.* ESPERDY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 269 F. 2d 621.

No. 429, Misc. MCMORRIS *v.* MARONEY, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 461, Misc. MORICONI *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 483, Misc. EX PARTE HOLLIS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 505, Misc. TAYLOR *v.* RIVERS, DISTRICT OF COLUMBIA BOARD OF PAROLE, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Acting Assistant Attorney General Ryan* and *Harold H. Greene* for respondents.

No. 525, Misc. BIRCHFIELD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States.

No. 549, Misc. HOUSE *v.* MAYO, STATE PRISON CUSTODIAN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Richard W. Ervin*, Attorney General of Florida, and *George R. Georgieff*, Assistant Attorney General, for respondent.

No. 551, Misc. HERNANDEZ ET AL. *v.* WARDEN, NEW YORK CITY PRISON. C. A. 2d Cir. Certiorari denied. Petitioners *pro se*. *Charles W. Manning* for respondent.

No. 555, Misc. O'CONNOR *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 *Robert G. Maysack* for the United States.

No. 556, Misc. TRINCI *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 565, Misc. HALL *v.* GEORGIA. Supreme Court of Georgia. Certiorari denied. *Max Dean* for petitioner. Reported below: 215 Ga. 375, 110 S. E. 2d 661.

No. 578, Misc. NELSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 17 Ill. 2d 509, 162 N. E. 2d 390.

No. 599, Misc. BENJAMIN *v.* MINNESOTA. Supreme Court of Minnesota. Certiorari denied. Reported below: 257 Minn. 1, 99 N. W. 2d 786.

No. 608, Misc. SHOEMAKE *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

Rehearing Denied.

No. 580. DONNELLY *v.* DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY ET AL., 361 U. S. 949; and

No. 419, Misc. VAN HORN *v.* HOME OF THE AGED AND ORPHANS OF THE BALTIMORE CONFERENCE, METHODIST CHURCH, SOUTH, INC., ET AL., 361 U. S. 949. Petitions for rehearing denied.

MARCH 21, 1960.

Miscellaneous Orders.

No. —. IN RE BRENNER. George A. Brenner, Esquire, of New York, New York, having resigned as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice in this Court.

No. 139. KIMM *v.* HOY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. Certiorari, 361 U. S. 807, to the United States Court of Appeals for the Ninth Circuit. The motion to substitute George K. Rosenberg, District Director, Immigration and Naturalization Service, in the place of Richard C. Hoy as the party respondent is granted. *Joseph Forer* for petitioner-movant. Reported below: 263 F. 2d 773.

No. 258. INTERNATIONAL ASSOCIATION OF MACHINISTS ET AL. *v.* STREET ET AL. Appeal from the Supreme Court of Georgia. (Probable jurisdiction noted, 361 U. S. 807.) The motions of Railway Labor Executives' Association and the American Federation of Labor and Congress of Industrial Organizations for leave to file briefs, as *amicus curiae,* are granted. *Clarence M. Mulholland, Edward J. Hickey, Jr.* and *James L. Highsaw* for the Railway Labor Executives' Association. *J. Albert Woll, Theodore J. St. Antoine* and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations. *E. Smythe Gambrell* and *W. Glen Harlan* for individual appellees in opposition.

No. 415, Misc. JOHNSON *v.* UTAH;

No. 602, Misc. RICHARDSON *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY; and

No. 658, Misc. TWEEDY *v.* TAYLOR, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 187. MALOY ET UX. *v.* FIRST FEDERAL SAVINGS & LOAN ASSN. OF WEST PALM BEACH, 361 U. S. 824, 858, 898, 926. The motion for order vacating order denying motion for leave to file a second petition for rehearing is denied. The motion for order directing the District Court of Appeal, Second District of Florida, to recall and vacate mandate, etc., is denied. Petitioners-movants *pro se.*

No. 579, Misc. WYERS *v.* MICHIGAN ET AL.; and

No. 780, Misc. CURNYN *v.* WARDEN, MARYLAND PENITENTIARY, ET AL. Motions for leave to file petitions for writs of certiorari denied.

No. 342, Misc. CLAYTON *v.* CALIFORNIA ET AL. Motion for leave to file petition for writ of certiorari and other relief denied. Petitioner *pro se.* *Stanley Mosk,* Attorney General of California, and *Doris H. Maier,* Deputy Attorney General, for respondents.

No. 532, Misc. PARKS, TRUSTEE FOR GULF TRANSPORTATION CO., *v.* JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA. Motion for leave to file petition for writ of prohibition and/or mandamus denied. *James E. Ross* for petitioner. *Eberhard P. Deutsch* and *Malcolm W. Monroe* for B. F. Leaman & Sons, Inc., in opposition.

Certiorari Granted. (*See also No. 546, Misc., ante, p. 216.*)

No. 668. GOMILLION ET AL. *v.* LIGHTFOOT, MAYOR OF THE CITY OF TUSKEGEE, ET AL. C. A. 5th Cir. Certiorari granted. *Robert L. Carter, Fred D. Gray* and *Arthur D. Shores* for petitioners. *Thomas B. Hill, Jr.* and *James J. Carter* for respondents. *Solicitor General Rankin* filed a memorandum for the United States, as *amicus curiae,* in support of petitioners. Reported below: 270 F. 2d 594.

No. 674. McPHAUL *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted. *Ernest Goodman* and *Geo. W. Crockett, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Yeagley, Kevin T. Maroney* and *George B. Searls* for the United States. Reported below: 272 F. 2d 627.

No. 689. TIMES FILM CORP. *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari granted. *Felix J. Bilgrey* for petitioner. *John C. Melaniphy* and *Sidney R. Drebin* for respondents. Reported below: 272 F. 2d 90.

Certiorari Denied.

No. 621. ZALCMANIS ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Robert H. Law, Jr.* and *Joseph T. Arenson* for petitioners. *Solicitor General Rankin* and *Assistant Attorney General Rice* for the United States. Reported below: —— Ct. Cl. ——, 173 F. Supp. 355.

No. 655. MURRELL *v.* WHITE. C. A. 5th Cir. Certiorari denied. *W. O. Murrell, Sr.*, petitioner, *pro se*. *Houston White*, respondent, *pro se*. Reported below: 271 F. 2d 253.

No. 663. GINSBURG *v.* GOURLEY, CHIEF JUDGE, U. S. DISTRICT COURT. C. A. 3d Cir. Certiorari denied. *Paul Ginsburg*, petitioner, *pro se*.

No. 672. GRUNDLER ET AL. *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. *Herbert E. Rosenberg* and *Edward Norwalk* for petitioners. *Malcolm B. Seawell*, Attorney General of North Carolina, and *Ralph Moody*, Assistant Attorney General, for respondent. Reported below: 251 N. C. 177, 111 S. E. 2d 1.

No. 669. ALBAUGH *v.* DISTRICT OF COLUMBIA ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William A. Albaugh*, petitioner, *pro se*. *Chester H. Gray, Milton D. Korman* and *Hubert B. Pair* for respondents. Reported below: 106 U. S. App. D. C. 393, 273 F. 2d 518.

No. 675. FRANKENSTEIN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Dan C. Flanagan* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Robert N. Anderson* for respondent. Reported below: 272 F. 2d 135.

No. 676. SHONGUT ET AL. *v.* GOLDEN. C. A. 2d Cir. Certiorari denied. *Paul Bauman* for petitioners. *Milton M. Eisenberg, George A. Elber* and *George Pollack* for respondent. Reported below: 270 F. 2d 238.

No. 691. REYNOLDS METALS CO. *v.* MARTIN ET AL. Supreme Court of Oregon. Certiorari denied. *Gustav B. Margraf* for petitioner. *George W. Mead* for respondents. Reported below: 221 Ore. 86, 342 P. 2d 790.

No. 464, Misc. JONES *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: 106 U. S. App. D. C. 227, 271 F. 2d 493.

No. 677. MURYN *v.* NEW YORK CENTRAL RAILROAD CO. C. A. 2d Cir. Certiorari denied. *Herbert K. Kanarek* for petitioner. *Gerald E. Dwyer* for respondent. Reported below: 270 F. 2d 645.

No. 671. FITZGERALD, TRUSTEE IN BANKRUPTCY, *v.* FIDELITY & DEPOSIT COMPANY OF MARYLAND. C. A. 10th Cir. Certiorari denied. *Winston S. Howard* for petitioner. *Frank E. Horka* for respondent. Reported below: 272 F. 2d 121.

No. 680. HAMRICK, TRUSTEE, *v.* INDIANAPOLIS HUMANE SOCIETY, INC. C. A. 7th Cir. Certiorari denied. *P. Eugene Smith* for petitioner. *William M. Osborn* for respondent. Reported below: 273 F. 2d 7.

No. 681. WEYERHAEUSER STEAMSHIP CO. *v.* YANOW. C. A. 9th Cir. Certiorari denied. *Lasher B. Gallagher* for petitioner. *Ben Anderson* and *Nels Peterson* for respondent. Reported below: 274 F. 2d 274.

No. 682. NORWICH PHARMACAL CO. *v.* STERLING DRUG, INC. C. A. 2d Cir. Certiorari denied. *Lewis C. Ryan, Philip T. Seymour* and *George A. Elber* for petitioner. *John T. Cahill* and *James A. Fowler, Jr.* for respondent. Reported below: 271 F. 2d 569.

No. 683. INTERNATIONAL TERMINAL OPERATING CO., INC., *v.* WATERMAN STEAMSHIP CO. C. A. 2d Cir. Certiorari denied. *Lowell Wadmond* for petitioner. *Edward J. Behrens* for respondent. Reported below: 272 F. 2d 15.

No. 684. ROBINSON, ADMINISTRATRIX, *v.* GULF, COLORADO & SANTA FE RAILWAY CO. Court of Civil Appeals of Texas, Second Supreme Judicial District. Certiorari denied. *Henry D. Akin, Jr.* for petitioner. *Luther Hudson* for respondent. Reported below: 325 S. W. 2d 432.

No. 719. EVANS *v.* BRUSSEL ET AL. Supreme Court of Missouri. Certiorari denied. *Anne M. Evans,* petitioner, *pro se. Freeman L. Martin* for the City of St. Louis, respondent. Reported below: 330 S. W. 2d 788.

No. 685. MOHR, DOING BUSINESS AS NATIONAL RESEARCH CO., ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 9th Cir. Certiorari denied. *Murray M. Chotiner* for petitioners. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon, Daniel J. McCauley, Jr.* and *Alan B. Hobbes* for respondent. Reported below: 272 F. 2d 401.

No. 693. WILLIAMSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Wesley Asinof* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Philip R. Monahan* for the United States. Reported below: 272 F. 2d 495.

No. 673. WILLIAMS ET AL. *v.* COOPERATIVE FARM CHEMICALS ASSOCIATION ET AL. Supreme Court of Kansas. Certiorari denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application. *David Previant* for petitioners. *Carl E. Enggas* for respondents. Reported below: 185 Kan. 410, 345 P. 2d 709.

No. 312, Misc. YOUNG *v.* TEXAS ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 355, Misc. RIVERS *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: 270 F. 2d 435.

No. 360, Misc. OWENS *v.* MCGEE, DIRECTOR, DEPARTMENT OF CORRECTIONS OF CALIFORNIA, ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, and *Doris H. Maier*, Deputy Attorney General, for respondents.

No. 15, Misc. ARRELLANO-FLORES *v.* HOY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Fred Okrand* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *J. F. Bishop* for respondent. Reported below: 262 F. 2d 667.

No. 363, Misc. NEAL *v.* EVENSEN, CLERK, U. S. DISTRICT COURT. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Stanley Mosk,* Attorney General of California, *Doris H. Maier* and *Raymond M. Mamboisse,* Deputy Attorneys General, for respondent.

No. 455, Misc. EARNSHAW *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.

No. 469, Misc. CROW *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied.

No. 486, Misc. TORRES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Daniel G. Marshall* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 270 F. 2d 252.

No. 503, Misc. TOWNSEND *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. Reported below: 271 F. 2d 445.

No. 485, Misc. IN RE BUNDY ET AL. C. A. 9th Cir. Certiorari denied.

No. 510, Misc. O'BRIEN *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 545, Misc. POLUR *v.* KANNER ET AL., CONSTITUTING THE STATE BOARD OF BAR EXAMINERS OF THE STATE OF FLORIDA, ET AL. Supreme Court of Florida. Certiorari denied. Petitioner *pro se*. *Richard W. Ervin*, Attorney General of Florida, *Ralph M. McLane*, Assistant Attorney General, and *Irving W. Wheeler*, Special Assistant Attorney General, for respondents.

No. 550, Misc. CHAVIGNY *v.* FLORIDA. Supreme Court of Florida. Certiorari denied.

No. 558, Misc. LAWLOR ET AL., TRADING AS INDEPENDENT POSTER EXCHANGE, *v.* NATIONAL SCREEN SERVICE CORP. ET AL. C. A. 3d Cir. Certiorari denied. *Francis T. Anderson* for petitioners. *Louis Nizer* and *Walter S. Beck* for National Screen Service Corp., *W. Bradley Ward* and *Edward W. Mullinix* for Columbia Pictures Corp. et al., *Abraham L. Freedman* and *Louis J. Goffman* for Warner Bros. Pictures Distributing Corp., respondents. Reported below: 270 F. 2d 146.

No. 559, Misc. MILLER *v.* TOWN OF SUFFIELD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 267 F. 2d 783.

No. 563, Misc. BROWN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 575, Misc. HILL *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *John R. Snively* for petitioner. Reported below: 17 Ill. 2d 112, 160 N. E. 2d 779.

No. 580, Misc. BAILLEAUX *v.* OREGON. Supreme Court of Oregon. Certiorari denied. Reported below: 218 Ore. 356, 343 P. 2d 1108.

No. 603, Misc. WILFONG *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 17 Ill. 2d 373, 162 N. E. 2d 256.

No. 691, Misc. WATSON *v.* DICKSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 704, Misc. GALLOWAY *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 221 Md. 611, 157 A. 2d 284.

No. 719, Misc. JOHNSON *v.* GEORGIA. Supreme Court of Georgia. Certiorari denied. *James M. Lester* and *William M. Lester* for petitioner. *Eugene Cook,* Attorney General of Georgia, *George Hains,* Solicitor General, and *John T. Ferguson,* Deputy Assistant Attorney General, for respondent. Reported below: 215 Ga. 448, 111 S. E. 2d 45.

No. 10, Misc. RUEDA *v.* COLORADO. Petition for writ of certiorari to the Supreme Court of Colorado denied in the light of the representations by respondent that petitioner has been furnished free transcripts of the lower court proceedings for use in the Supreme Court of Colorado. Petitioner *pro se. Duke W. Dunbar,* Attorney General of Colorado, and *John W. Patterson* and *Gerald Harrison,* Assistant Attorneys General, for respondent. Reported below: 141 Colo. 504, 348 P. 2d 958.

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No. 587, Misc. FILICE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for the United States. Reported below: 271 F. 2d 782.

No. 589, Misc. JOHNSON, ADMINISTRATOR, *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for the United States. Reported below: 270 F. 2d 488.

No. 590, Misc. HILL *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 591, Misc. NEVILLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Donald McKay* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 272 F. 2d 414.

No. 597, Misc. SKIBA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 271 F. 2d 644.

No. 628, Misc. CONERLY *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 669, Misc. BELL *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 *Kirby W. Patterson* for the United States.

No. 661, Misc. ARMSTRONG *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 272 F. 2d 577.

No. 670, Misc. UNITED STATES EX REL. PELIO *v.* MARTIN, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 674, Misc. ELKSNIS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 700, Misc. ADAMS *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 716, Misc. MILLER *v.* TEXAS ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 718, Misc. MAJOR *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Petitioner *pro se*. *George R. Davis* for respondent.

Rehearing Denied.

No. 585. RICHARDSON *v.* BRUNNER, *ante*, p. 902; and No. 626. FIANO *v.* UNITED STATES, 361 U. S. 964. Petitions for rehearing denied.

MARCH 28, 1960.

Miscellaneous Orders.

No. 405, Misc. HALL *v.* ELLIS, GENERAL MANAGER, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. Motion for leave to file petition for writ of habeas corpus denied.

No. 818, Misc. DELEVAY *v.* BRYAN, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of prohibition and other relief denied.

No. 366, Misc. DEVANEY *v.* COCHRAN, DIRECTOR, DIVISION OF CORRECTIONS OF FLORIDA; and

No. 831, Misc. BYRD *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. 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. Petitioners *pro se*. *Richard W. Ervin*, Attorney General of Florida, and *B. Clarke Nichols*, Assistant Attorney General, for respondent in No. 366, Misc. Reported below: No. 831, Misc., 222 Md. 597, 158 A. 2d 120.

Certiorari Granted. (*See also No. 135, Misc., ante, p. 308, and No. 488, Misc., ante, p. 309.*)

No. 703. WILKINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. *Nanette Dembitz* for petitioner. *Solicitor General Rankin, Assistant Attorney General Yeagley* and *George B. Searls* for the United States. Reported below: 272 F. 2d 783.

No. 712. MONROE ET AL. *v.* PAPE ET AL. C. A. 7th Cir. Certiorari granted. *Morris L. Ernst, Charles Liebman* and *John W. Rogers* for petitioners. *John C. Melaniphy* and *Sydney R. Drebin* for respondents. Reported below: 272 F. 2d 365.

No. 697. WATERMAN STEAMSHIP CORP. *v.* DUGAN & MCNAMARA, INC. C. A. 3d Cir. Certiorari granted. *Thomas F. Mount* and *J. Welles Henderson* for petitioner. *George E. Beechwood* for respondent. Reported below: 272 F. 2d 823.

Certiorari Denied. (*See also Misc. Nos. 366 and 831, supra.*)

No. 684, Misc. BURD *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 179. GENERAL OUTDOOR ADVERTISING CO., INC., *v.* UNITED STATES. Court of Claims. Certiorari denied. *Spaulding Glass* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Heffron, I. Henry Kutz* and *George F. Lynch* for the United States. Reported below: 145 Ct. Cl. —, 169 F. Supp. 947.

No. 687. HUDSON, ADMINISTRATRIX, *v.* TRANSOCEAN AIR LINES ET AL. C. A. 9th Cir. Certiorari denied. *Joseph Edward Smith* for petitioner. *Jesse H. Steinhart* for Transocean Air Lines, respondent. Reported below: 272 F. 2d 397.

No. 690. PORTER ET AL. *v.* OKLAHOMA BACONE COLLEGE TRUST ET AL. Supreme Court of Oklahoma. Certiorari denied. *John W. Porter, Jr.* for petitioners. *Julian B. Fite* for respondents. Reported below: 346 P. 2d 328, 335.

No. 695. SILLIFANT *v.* SHERIFF OF THE CITY OF NEW YORK. Court of Appeals of New York. Certiorari denied. *Lawrence Peirez* for petitioner. Reported below: 6 N. Y. 2d 487, 160 N. E. 2d 890.

No. 701. SMITH & WESSON, INC., *v.* COSPER. Supreme Court of California. Certiorari denied. *Albert E. Brault* and *Denver H. Graham* for petitioner. *Vincent P. Di Giorgio* for respondent. Reported below: 53 Cal. 2d 77, 346 P. 2d 409.

No. 694. CATO BROTHERS, 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, Samuel D. Slade* and *John G. Laughlin, Jr.* for the United States. Reported below: 273 F. 2d 153.

No. 686. KING, ADMINISTRATRIX, *v.* PAN AMERICAN WORLD AIRWAYS. C. A. 9th Cir. Certiorari denied. *Joseph Edward Smith* for petitioner. *Jesse H. Steinhart* for respondent. Reported below: 270 F. 2d 355.

No. 692. UNITED STATES *v.* WOLFF. C. A. 3d Cir. Certiorari denied. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. *George Gershenfeld* for respondent. Reported below: 270 F. 2d 422.

No. 698. CHAPMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *G. Seals Aiken* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 271 F. 2d 593.

No. 707. HARRIS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Charles A. Bellows* for petitioner. Reported below: 17 Ill. 2d 446, 161 N. E. 2d 809.

No. 708. MILLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Charles William Tessmer* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 273 F. 2d 279.

No. 710. AMANA REFRIGERATION, INC., *v.* COLUMBIA BROADCASTING SYSTEM, INC. C. A. 7th Cir. Certiorari denied. *L. M. McBride* and *John P. Ryan, Jr.* for petitioner. *Bruce Bromley, Ralph L. McAfee* and *Hammond E. Chaffetz* for respondent. Reported below: 271 F. 2d 257.

No. 662. MURPHY ET AL. *v.* BUTLER, AREA SUPERVISOR, PLANT PEST CONTROL DIVISION OF THE AGRICULTURAL RESEARCH SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL. The motion to substitute a party respondent is withdrawn pursuant to stipulation of counsel. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Roger Hinds* and *Frank C. Mebane, Jr.* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for Butler, and *Louis J. Lefkowitz,* Attorney General of New York, and *Paxton Blair,* Solicitor General, for the Commissioner of Agriculture and Markets of the State of New York, respondents. Reported below: 270 F. 2d 419.

MR. JUSTICE DOUGLAS, dissenting.

In my view the issues involved in this case are of such great public importance that I record my dissent to the denial of certiorari.

The petitioners in this case are residents of a heavily populated suburban area in Long Island, New York, who brought an action in 1957 to enjoin respondents, federal and state officials, from carrying out a threatened program of aerial spraying of their lands, homes, gardens and orchards with a mixture of DDT and kerosene designed to eradicate the gypsy moth, an insect injurious to forests. The program is part of a campaign embarked in 1956 by the Department of Agriculture to spray more than 3,000,000 acres of land in 10 States.

Petitioners alleged in their complaint that the threatened spraying was unauthorized by statute and so injurious to health and property as to violate the Fifth and Fourteenth Amendments.

The District Court denied a motion for preliminary injunction on May 24, 1957. 151 F. Supp. 786. Pending trial petitioners' homes, persons and lands received the spray. Respondents then contended that, because

they had completed the spraying, the request for an injunction had become moot.

At the trial numerous experts testified to the public need for the spraying and the feasible methods available for the eradication of the gypsy moth. Petitioners attempted to adduce evidence that the use of multi-engine airplanes was unnecessary, that their property had not been infested with the moths, and that the use of ground spraying equipment and helicopters was a feasible means of avoiding uninfested areas with the spray.

Expert witnesses testified that the spraying of pastures with the mixture, which consisted of one pound of DDT in one gallon of kerosene base solvent, applied at the rate of one gallon per acre, inevitably produces measurable quantities of DDT in milk from cattle which feed on the pastures, and that crops [1] which have been sprayed by DDT should not be fed to cattle. Nevertheless, dairy farms, pastures, homes, gardens, orchards, swimming pools, and fish ponds received the spray; and in some cases, it seems, they received substantially more than the planned one gallon per acre.

There was evidence that one of the petitioners who sells milk from her dairy had measurable contamination in the milk as late as five months after the spraying, which made its sale illegal under both federal and state regulations.

There was evidence that the vegetables grown by one of the petitioners for family use were rendered inedible and the leaves on some of his vines turned brown, rotted and fell off as a result of the spraying. Another petitioner, who spent $13,000 developing her land for chemical-free food production, testified that after the planes came over her plants were damaged and the fruit was withered, making it inedible. Several other petitioners complained that their fruits, vegetables and berries were made unfit to eat.

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[1] See Grass, Yearbook of Agriculture, 1948, U. S. D. A., p. 278.

Fish owned by two of the petitioners were said to have been killed by the spray; and dead birds were also reported. Predatory insects were also said to have been destroyed and as a result the quantity of red spiders and other pests increased. There was evidence that clothing was spotted and even ruined and that children coughed from the spraying and their eyes watered.

The extent of the danger of DDT to human health was a matter of sharp dispute among the numerous expert witnesses in the case. The testimony on many facets of this issue was extensive and elaborate. Yet the District Court made only one finding on the subject. It found: "The spraying program, which is the subject of this action, at the rate of one pound of DDT per gallon of solvent per acre, is not injurious to human health." No more specific findings were made on the matter and *the court refused to make any findings on the spray's effect on milk, fruits, vegetables or other crops or products.* Its only other finding on the issue of injury was that the spray "does not cause any considerable loss of birds, fish, bees or beneficial insects."

The complaint was dismissed on the ground, *inter alia,* that there was no proof of damages or that further spraying with airplanes was a likelihood. 164 F. Supp. 120.

The Court of Appeals, without reaching the merits, vacated the decision of the District Court with directions to dismiss on the ground of mootness. 270 F. 2d 419. It held that respondents' evidence that another wholesale spraying operation was unlikely precluded the petitioners from obtaining an injunction.[2] The respondents did

[2] The Court of Appeals remarked that in the event of a possible recurrence of spraying in the area, "it would seem well to point out the advisability for a district court, faced with a claim concerning aerial spraying or any other program which may cause inconvenience and damage as widespread as this 1957 spraying appears to have caused, to inquire closely into the methods and safeguards of any proposed procedures so that incidents of the seemingly unnecessary

not, however, give positive assurance that they would not spray the area again if it became necessary. In fact, it was indicated that if studies reveal that the eradication was not complete, respondents will resort to further poisoning, though perhaps only local in nature and possibly with different equipment. The program clearly was not abandoned.

In other cases we have held that the cessation of the activity complained of did not render the case moot, *e. g., United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632, and if future activity of the nature complained of is feared, the courts are not impotent to fashion a remedy which minimizes any injury from a recurrence of the practice.

The public interest in this controversy is not confined to a community in New York. Respondents' spraying program is aimed at millions of acres of land throughout the Eastern United States. Moreover, the use of DDT in residential areas and on dairy farms is thought by many to present a serious threat to human health as evidenced by the record in this case as well as alarms sounded by others on the problem. The need for adequate findings on the effect of DDT is of vital concern not only to wildlife conservationists and owners of domestic animals but to all who drink milk or eat food from sprayed gardens.

We are told by the scientists that DDT is an insoluble that cows get from barns and fields that have been sprayed with it. The DDT enters the milk and becomes stored by people in the fatty tissues of the body.[3] Because it is a potential menace to health the Food and Drug

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and unfortunate nature here disclosed, may be reduced to a minimum, assuming, of course, that the government will have shown such a program to be required in the public interest." 270 F. 2d, at 421, n. 1.

[3] See Marth and Ellickson, Insecticide Residues in Milk and Milk Products, 22 J. Milk and Food Technology, 112, 145, 179. For an extensive bibliography see *id.*, pp. 148–149, 181.

Administration maintains that any DDT in milk in interstate commerce is illegal.[4]

The effect of DDT on birds and on their reproductive powers and on other wildlife,[5] the effect of DDT as a factor in certain types of disease in man such as poliomyelitis, hepatitis, leukemia and other blood disorders,[6] the mounting sterility among our bald eagles[7] have led to increasing concern in many quarters[8] about the wisdom

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[4] There has been no formal regulation governing DDT in milk. By informal rulings however there can be no DDT in milk. For proposed regulations on other pesticide chemicals see 23 Fed. Reg. 324 (Jan. 1958); 23 Fed. Reg. 976 (Feb. 1958).

[5] DeWitt, H-Bomb in the Garden Patch, No. Car. Wildlife, Sept. 1957, p. 4; Springer, Insecticides, Boon or Bane? 58 Audubon Mag. 128, 176; Strother, Backfire in the War Against Insects, Reader's Digest, June 1959, p. 64.

[6] Biskind, Public Health Aspects of the New Insecticides, 20 Am. J. Digestive Diseases (1953), p. 331; Longgood, Pesticides Poison Us, American Mercury, July 1958, p. 33.

[7] N. Y. Times, Sept. 13, 1958, p. 21.

[8] See the comments by Congressman Lee Metcalf, Cong. Rec. App., March 18, 1959, A2375, Sept. 2, 1959, pp. 16300–16301. Congressman Metcalf said:

"We all know of plant or wildlife loss from chemical controls—such as the death of fish in Montana trout streams in areas sprayed by DDT; the virtual wiping out of quail and rabbit populations in two areas treated with heptachlor in the South. Considerable damage to valuable fish and wildlife resources has occurred unnecessarily because chemicals were applied without sufficient knowledge of accepted procedures or without full regard to the consequences."

Rachel Carson wrote in The Washington Post, April 10, 1959, p. A12:

"During the past 15 years, the use of highly poisonous hydrocarbons and of organic phosphates allied to the nerve gases of chemical warfare has built up from small beginnings to what a noted British ecologist recently called 'an amazing rain of death upon the surface of the earth.' Most of these chemicals leave long-persisting residues on vegetation, in soils, and even in the bodies of earthworms and other organisms on which birds depend for food.

"The key to the decimation of the robins, which in some parts of

of the use of this and other insecticides. The alarms that many experts and responsible officials have raised about the perils of DDT underline the public importance of this case.

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the country already amounts to virtual extinction, is their reliance on earthworms as food. The sprayed leaves with their load of poison eventually fall to become part of the leaf litter of the soil; earthworms acquire and store the poisons through feeding on the leaves; the following spring the returning robins feed on the worms. As few as 11 such earthworms are a lethal dose, a fact confirmed by careful research in Illinois.

"The death of the robins is not mere speculation. The leading authority on this problem, Professor George Wallace of Michigan State University, has recently reported that 'Dead and dying robins, the latter most often found in a state of violent convulsions, are most common in the spring, when warm rains bring up the earthworms, but birds that survive are apparently sterile or at least experience nearly complete reproductive failure.'

"The fact that doses that are sub-lethal may yet induce sterility is one of the most alarming aspects of the problem of insecticides. The evidence on this point, from many highly competent scientists, is too strong to question. It should be weighed by all who use the modern insecticides, or condone their use.

"I do not wish to leave the impression that only birds that feed on earthworms are endangered. To quote Professor Wallace briefly: 'Tree-top feeders are affected in an entirely different way, by insect shortages, or actual consumption of poisoned insects . . . . Birds that forage on trunks and branches are also affected, perhaps mostly by the dormant sprays.' About two-thirds of the bird species that were formerly summer residents in the area under Professor Wallace's observation have disappeared entirely or are sharply reduced.

"To many of us, this sudden silencing of the song of birds, this obliteration of the color and beauty and interest of bird life, is sufficient cause for sharp regret. To those who have never known such rewarding enjoyment of nature, there should yet remain a nagging and insistent question: If this 'rain of death' has produced so disastrous an effect on birds, what of other lives, including our own?"

The article by Dr. George J. Wallace referred to is Insecticides and Birds, Audubon Mag. Jan.-Feb. 1959, p. 10. See also The Halogenated Hydrocarbons Toxicity and Potential Dangers (U. S. Dept. Health, Education and Welfare 1955) pp. 335 *et seq.*

I express no views on the merits of this particular controversy. Nor do I now take a position on the issue of mootness. But I do believe that the questions tendered are extremely significant and justify review by this Court.

No. 713. VASSOS *v.* SOCIETA TRANS-OCEANICA CANOPUS, S. A., ET AL. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *Victor S. Cichanowicz* for respondents. Reported below: 272 F. 2d 182.

No. 716. MACRIS *v.* SOCIEDAD MARITIMA SAN NICOLAS, S. A., ET AL. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *John H. Dougherty* for respondents. Reported below: 271 F. 2d 956.

No. 696. FEDERAL BROADCASTING SYSTEM, INC., *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. The motion for leave to use prior record is granted. The motion to perfect the record and petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. *Charles F. O'Neall* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon, John L. FitzGerald, Max D. Paglin* and *Ruth V. Reel* for the Federal Communications Commission, *Thomas H. Wall* for WHEC, Inc., and *Frank U. Fletcher* for Veterans Broadcasting Co., Inc., respondents. Reported below: 106 U. S. App. D. C. 162, 270 F. 2d 914.

No. 370, Misc. YORK *v.* FLORIDA. District Court of Appeal of Florida, First Appellate District. Certiorari denied. Petitioner *pro se*. *Richard W. Ervin,* Attorney General of Florida, *George R. Georgieff* and *Joseph Nesbitt,* Assistant Attorneys General, for respondent. Reported below: 114 So. 2d 448.

No. 732. LOCAL UNIONS NOS. 189, 262, 320, 546, 547, 571 AND 638, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO, ET AL. *v.* JEWEL TEA CO., INC. C. A. 7th Cir. Certiorari denied. *Lester Asher, Bernard Dunau* and *Robert C. Eardley* for petitioners. *George B. Christensen* for respondent. Reported below: 274 F. 2d 217.

No. 704. CAUDLE *v.* UNITED STATES; and

No. 705. CONNELLY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. MR. JUSTICE CLARK and MR. JUSTICE WHITTAKER took no part in the consideration or decision of these applications. *John J. Hooker, Eugene Gressman* and *C. Arthur Anderson* for petitioner in No. 704. *Jacob M. Lashly, John H. Lashly, Paul B. Rava* and *Alan Y. Cole* for petitioner in No. 705. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Kirby W. Patterson* for the United States. Reported below: 271 F. 2d 333.

No. 502, Misc. SHAPIRO *v.* JOSEPHSON ET AL. Supreme Court of New York, New York County. Certiorari denied.

No. 574, Misc. JAKALSKI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 267 F. 2d 609.

No. 671, Misc. NANCE *v.* WARDEN, MARYLAND PENITENTIARY, ET AL. Court of Appeals of Maryland. Certiorari denied.

No. 513, Misc. JOHNSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 270 F. 2d 721.

No. 584, Misc. MCGLOIN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Lawrence Speiser* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States.

No. 422, Misc. LONGSTRETH *v.* MCGEE, DIRECTOR OF CORRECTIONS, ET AL. Supreme Court of California. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Arthur L. Johnson* for petitioner.

Rehearing Denied.

No. 40. PHILLIPS CHEMICAL CO. *v.* DUMAS INDEPENDENT SCHOOL DISTRICT, 361 U. S. 376;

No. 43. FORMAN *v.* UNITED STATES, 361 U. S. 416;

No. 633. WRIGHT *v.* OHIO, 361 U. S. 964;

No. 648. CHAN WING CHEUNG, ALIAS BILL WOO, *v.* HAGERTY, OFFICER IN CHARGE, U. S. IMMIGRATION AND NATURALIZATION SERVICE, *ante*, p. 911;

No. 490, Misc. RYAN *v.* TINSLEY, WARDEN, 361 U. S. 538;

No. 538, Misc. FLORES *v.* ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL., 361 U. S. 972; and

No. 649, Misc. COLLINS *v.* DICKSON, WARDEN, 361 U. S. 957. Petitions for rehearing denied.

APRIL 1, 1960.

Dismissal Under Rule 60.

No. 213. LEGERLOTZ *v.* ROGERS, ATTORNEY GENERAL. Certiorari, 361 U. S. 808, to the United States Court of Appeals for the District of Columbia Circuit. Writ of certiorari dismissed pursuant to stipulation of counsel under Rule 60 of the Rules of this Court. *Robert H. Reiter* for petitioner. *Solicitor General Rankin* for respondent. Reported below: 105 U. S. App. D. C. 256, 266 F. 2d 457.

APRIL 4, 1960.

Miscellaneous Orders.

No. 208. RICHARDSON *v.* FEDERAL POWER COMMISSION. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The motion to substitute John B. Connally, Perry R. Bass, and Howell E. Smith, Independent Executors of the Estate of S. W. Richardson, deceased, as the party petitioners in the place of S. W. Richardson is granted. *Gene M. Woodfin* on the motion. Reported below: 266 F. 2d 233.

No. 631. POLITES *v.* UNITED STATES. Certiorari, 361 U. S. 958, to the United States Court of Appeals for the Sixth Circuit. The motion of the petitioner for leave to proceed further herein *in forma pauperis* is granted. *Geo. W. Crockett, Jr.* for petitioner. Reported below: 272 F. 2d 709.

No. 629, Misc. KENNELLY *v.* CALIFORNIA ET AL.; and No. 709, Misc. STURDEVANT *v.* SETTLE, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 297. GREAT NORTHERN RAILWAY CO. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the District of Minnesota. (Probable jurisdiction noted, 361 U. S. 860.) Upon the joint motion of counsel suggesting mootness the judgment of the District Court is vacated and the case is remanded to that Court with instructions to dismiss the complaint as moot. *Solicitor General Rankin, Robert W. Ginnane, Louis E. Torinus, Jr.* and *Samuel J. Wettrick* were on the joint motion. Reported below: 172 F. Supp. 705.

Certiorari Granted. (*See also No. 316, ante, p. 329.*)

No. 650. UNITED STATES *v.* MISSISSIPPI VALLEY GENERATING CO. Court of Claims. Certiorari granted. *Solicitor General Rankin, Oscar H. Davis* and *Samuel D. Slade* for the United States. *John T. Cahill, William C. Chanler* and *Robert G. Zeller* for respondent. Reported below: —— Ct. Cl. ——, 175 F. Supp. 505.

No. 664. REINA *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Allen S. Stim* and *Menahem Stim* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Robert S. Erdahl* and *J. F. Bishop* for the United States. Reported below: 273 F. 2d 234.

No. 752. CALLANAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari granted. *Morris A. Shenker* and *Sidney M. Glazer* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 274 F. 2d 601.

No. 733. THOMAS, EXECUTOR, *v.* VIRGINIA. Circuit Court of Arlington County, Virginia. Certiorari granted. *Cornelius Doherty* for petitioner. *A. S. Harrison, Jr.*, Attorney General of Virginia, and *John W. Knowles*, Assistant Attorney General, for respondent.

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Certiorari Denied.

No. 57. INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE 942, AFL–CIO, *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Plato E. Papps* and *Bernard Dunau* for petitioner. *Solicitor General Rankin, Jerome D. Fenton, Thomas J. McDermott, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 263 F. 2d 796.

No. 711. McMILLON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Bernard A. Golding* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 272 F. 2d 170.

No. 714. ERICKSON, DOING BUSINESS AS ERICKSON HAIR AND SCALP SPECIALISTS, *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. *Frank E. Gettleman* and *Arthur Gettleman* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon, Daniel J. McCauley, Jr.* and *Alan B. Hobbes* for respondent. Reported below: 272 F. 2d 318.

No. 715. THOMPSON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Bernard A. Golding* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 272 F. 2d 919.

No. 718. SPARRENBERGER, TRUSTEE IN BANKRUPTCY, *v.* NATIONAL CITY BANK OF EVANSVILLE, INDIANA. C. A. 7th Cir. Certiorari denied. *William L. Mitchell* for petitioner. *Isidor Kahn* for respondent. Reported below: 272 F. 2d 696.

No. 723. ROSE ET AL. *v.* HARRIETT COTTON MILLS ET AL. Supreme Court of North Carolina. Certiorari denied. *Benjamin Wyle* and *W. M. Nicholson* for petitioners. *Bennett H. Perry, Charles P. Green* and *Robert G. Kittrell, Jr.* for respondents. Reported below: 251 N. C. 218, 231, 248, 254, 335; 111 S. E. 2d 457, 465, 467, 480, 484.

No. 724. SEABOARD MACHINERY CORP. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Leo L. Foster, Charles M. Trammell* and *Bert B. Rand* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for the United States. Reported below: 270 F. 2d 817.

No. 725. POLICE JURY OF PLAQUEMINES PARISH ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Leander H. Perez* for Police Jury of Plaquemines Parish, and *Henry B. Curtis* for National Surety Corporation, petitioners. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for the United States. Reported below: 272 F. 2d 827.

No. 727. KENNEDY *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. *George S. Fitzgerald* for petitioner.

No. 728. R. P. FARNSWORTH & CO., INC., *v.* TRI-STATE CONSTRUCTION CO. ET AL. C. A. 5th Cir. Certiorari denied. *R. Emmett Kerrigan* for petitioner. *William H. Schroder* for Tri-State Construction Co., and *John B. Miller* for American Houses, Inc., respondents. Reported below: 271 F. 2d 728.

No. 459, Misc. COOKE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* for respondent.

No. 745. INSULL *v.* NEW YORK WORLD-TELEGRAM CORP. ET AL. C. A. 7th Cir. Certiorari denied. *Floyd E. Thompson* and *John J. Crown* for petitioner. *Howard Ellis, Don H. Reuben* and *Perry S. Patterson* for respondents. Reported below: 273 F. 2d 166.

No. 755. RIEDEL *v.* ATLAS VAN LINES, INC., ET AL. C. A. 8th Cir. Certiorari denied. *Dick H. Woods* for petitioner. *Frank C. Mann* and *John R. Caslavka* for respondents. Reported below: 272 F. 2d 901.

No. 428, Misc. BURGOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Daniel H. Greenberg* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 269 F. 2d 763.

No. 588, Misc. KITCHENS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Rice* and *Meyer Rothwacks* for the United States. Reported below: 272 F. 2d 757.

No. 600, Misc. WHITTINGTON *v.* PEGELOW, SUPERINTENDENT, DISTRICT OF COLUMBIA REFORMATORY, ET AL. C. A. 4th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Acting Assistant Attorney General Ryan* and *Harold H. Greene* for respondents. Reported below: 271 F. 2d 416.

No. 737, Misc. ROSS *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 750. VAUGHN *v.* ST. LOUIS-SAN FRANCISCO RAILWAY CO. Supreme Court of Mississippi. Certiorari denied. *Frank E. Everett, Jr.* for petitioner. *C. R. Bolton, D. W. Houston, Sr., James L. Homire* and *Walter W. Dalton* for respondent. Reported below: 237 Miss. 371, 115 So. 2d 62.

No. 304, Misc. BRANDON *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* and *Philip R. Monahan* for the United States. Reported below: 106 U. S. App. D. C. 118, 270 F. 2d 311.

No. 413, Misc. WRIGHT *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. 426, Misc. RICE *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 *Theodore George Gilinsky* for the United States. Reported below: 106 U. S. App. D. C. 135, 270 F. 2d 328.

No. 465, Misc. LYLES *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 *Robert G. Maysack* for the United States. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

No. 568, Misc. WHALEN *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 607, Misc. BRATTON *v.* DOWD, WARDEN. Supreme Court of Indiana. Certiorari denied. Reported below: —— Ind. ——, 162 N. E. 2d 444.

No. 609, Misc. DEFREESE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Arthur D. Herrick* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *William J. Risteau* for the United States. Reported below: 270 F. 2d 737.

No. 610, Misc. DEFREESE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *William J. Risteau* for the United States. Reported below: 270 F. 2d 730.

No. 626, Misc. WILLIAMS *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 675, Misc. JANIEC *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 539, Misc. JONES *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 Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 106 U. S. App. D. C. 228, 271 F. 2d 494.

Rehearing Denied.

No. 60. ARNOLD *v.* BEN KANOWSKY, INC., 361 U. S. 388;

No. 613. THE DEUTSCH COMPANY *v.* NATIONAL LABOR RELATIONS BOARD, 361 U. S. 963;

No. 627. MONDAY *v.* UNITED STATES, 361 U. S. 965; and

No. 635. SLUSARZ *v.* CYGAN, 361 U. S. 964. Petitions for rehearing denied.

APRIL 18, 1960.

Miscellaneous Orders.

No. 8. SCALES *v.* UNITED STATES. The order of June 29, 1959, 360 U. S. 924, setting this case for reargument is amended so as to allot one hour to each side for oral argument.

No. 342. NOSTRAND ET AL. *v.* BALMER ET AL., AS THE BOARD OF REGENTS OF THE UNIVERSITY OF WASHINGTON, ET AL. Appeal from the Supreme Court of Washington. (Probable jurisdiction noted, 361 U. S. 873.) The motion to substitute Herbert Little as a party appellee in the place of Thomas Balmer, deceased, is granted. *John J. O'Connell,* Attorney General of Washington, on the motion.

No. 537. COMMUNIST PARTY OF THE UNITED STATES *v.* SUBVERSIVE ACTIVITIES CONTROL BOARD. The order of February 5, 1960, 361 U. S. 951, granting the petition for writ of certiorari is amended so as to allot two hours to each side for oral argument.

No. 592, Misc. LARSEN *v.* HALBERT, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus and other relief denied.

No. 765. McNeal *v.* Culver, State Prison Custodian. Certiorari, 362 U. S. 910, to the Supreme Court of Florida. The motion of the petitioner for the appointment of counsel is granted and it is ordered that *Sam Daniels, Esquire,* of Miami, Florida, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 697, Misc. Whitener *v.* Manning, Warden; and

No. 705, Misc. Livesay *v.* Ellis, Director, Texas Department of Corrections. Motions for leave to file petitions for writs of habeas corpus denied. *James P. Harrelson, Alex Akerman, Jr.* and *Roscoe Pickett* for petitioner in No. 697, Misc.

No. 581, Misc. LeRea *v.* Cochran, Director, Division of Corrections;

No. 652, Misc. Whiting *v.* Sacks, Warden; and

No. 692, Misc. Duke *v.* Ellis, Director, Texas Department of Corrections. 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. *Richard W. Ervin,* Attorney General of Florida, and *Reeves Bowen,* Assistant Attorney General, for respondent in No. 581, Misc. Reported below: 115 So. 2d 545.

No. 823, Misc. Ritter, Chief Judge, U. S. District Court, *v.* Murrah, Chief Judge, et al., Constituting the Judicial Council of the Tenth Circuit of the United States. Motion for leave to file petition for writ of certiorari or alternatively for a writ of mandamus denied. *Frederick Bernays Wiener, Norman M. Littell, Dennis McCarthy* and *Charles J. Alexander* for petitioner. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *Harold S. Harrison* for respondents. Reported below: 273 F. 2d 30.

No. 542, Misc. BLACK *v.* UNITED STATES ET AL.;

No. 586, Misc. MCDANIEL *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO ET AL.;

No. 637, Misc. MCDANIEL *v.* CALIFORNIA ADULT AUTHORITY ET AL.; and

No. 648, Misc. IN RE WILSON. Motions for leave to file petitions for writs of mandamus denied. *Stanley Mosk*, Attorney General of California, and *Doris H. Maier*, Deputy Attorney General, for the Controller of the State of California, respondent in No. 648, Misc.

Certiorari Granted. (*See also No. 760, ante, p. 401, and No. 504, Misc., ante, p. 402.*)

No. 757. UNITED STATES *v.* VIRGINIA ELECTRIC & POWER CO. C. A. 4th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *Harold S. Harrison* for the United States. *George D. Gibson, Ralph H. Ferrell, Jr.* and *Francis V. Lowden, Jr.* for respondent. Reported below: 270 F. 2d 707.

No. 758. EASTERN RAILROAD PRESIDENTS CONFERENCE ET AL. *v.* NOERR MOTOR FREIGHT, INC., ET AL. C. A. 3d Cir. Certiorari granted. *C. Brewster Rhoads, Philip Price, Hugh B. Cox, Cornelius C. O'Brien, Jr., Arthur Littleton, Henry S. Drinker, Charles J. Biddle, Harry E. Sprogell, Lewis M. Stevens, T. W. Pomeroy, Jr., Paul Maloney, Carl E. Glock, R. Sturgis Ingersoll* and *Powell Pierpoint* for petitioners. *Aaron M. Fine* and *Harold E. Kohn* for respondents. Reported below: 273 F. 2d 218.

No. 729. SMALL BUSINESS ADMINISTRATION *v.* MCCLELLAN, TRUSTEE. C. A. 10th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for petitioner. *John Q. Royce* for respondent. Reported below: 272 F. 2d 143.

No. 748. FEDERAL POWER COMMISSION *v.* TRANSCONTINENTAL GAS PIPE LINE CORP. ET AL.; and

No. 749. NATIONAL COAL ASSOCIATION ET AL. *v.* TRANSCONTINENTAL GAS PIPE LINE CORP. ET AL. Petitions for writs of certiorari to the United States Court of Appeals for the Third Circuit granted. Cases consolidated and a total of two hours allotted for oral argument. The motion of the Southern California Gas Company et al. for leave to file brief, as *amici curiae,* in No. 748 is granted. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, Willard W. Gatchell, Howard S. Wahrenbrock, Robert L. Russell* and *David J. Bardin* for petitioner in No. 748. *Jerome J. McGrath, Robert M. Landis, Robert E. Lee Hall* and *Welly K. Hopkins* for petitioners in No. 749. *Richard J. Connor, John T. Miller, Jr., James B. Henderson* and *William N. Bonner, Jr.* for Transcontinental Gas Pipe Line Corp., *Seymour B. Quel* and *Francis I. Howley* for the City of New York, and *Randall J. LeBoeuf, Jr.* for Consolidated Edison Co., respondents. Briefs of *amici curiae,* in support of the petition in No. 748, were filed by *William M. Bennett* for the State of California and the Public Utilities Commission of the State of California, and by *T. J. Reynolds, Harry P. Letton, Jr., L. T. Rice, Henry F. Lippitt 2d, Milford Springer, Joseph R. Rensch* and *J. David Mann, Jr.* for the Southern California Gas Co. et al. Reported below: 271 F. 2d 942.

No. 756. SYSTEM FEDERATION No. 91, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO, ET AL. *v.* WRIGHT ET AL. C. A. 6th Cir. Certiorari granted. MR. JUSTICE STEWART took no part in the consideration or decision of this application. *Robert E. Hogan* and *Richard R. Lyman* for petitioners. *John P. Sandidge, H. G. Breetz, W. L. Grubbs* and *Joseph L. Lenihan* for respondent

Louisville & Nashville Railroad Co., and *Marshall P. Eldred* for other respondents. Reported below: 272 F. 2d 56.

No. 596, Misc. GREEN *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit granted limited to question No. 3 presented by the petition which reads as follows:

"3. Whether the judgment was invalidated where the court did not offer the petitioner an opportunity to speak before sentence was imposed."

Case transferred to the appellate docket.

Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 273 F. 2d 216.

Certiorari Denied. (See also No. 772, Misc., ante, p. 403, and Misc. Nos. 581, 652 and 692, supra.)

No. 632. BJORSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Hayden C. Covington* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 272 F. 2d 244.

No. 688. IN RE CROW. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *Phillip K. Folk* for respondents.

No. 730. KICAK *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *Thomas Beil* for respondent.

No. 731. CARLIN, ADMINISTRATRIX, *v.* IOVINO ET AL. C. A. 2d Cir. Certiorari denied. *John R. Sheneman* for petitioner. Reported below: 274 F. 2d 41.

No. 734. WOLFE ET AL. *v.* NATIONAL LEAD CO. C. A. 9th Cir. Certiorari denied. *Carl Hoppe* and *Robert B. Harmon* for petitioners. *Robert E. Burns, Milton Handler* and *John B. Henrich* for respondent. Reported below: 272 F. 2d 867.

No. 736. TUCKER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *John R. Snively* for petitioner. Reported below: 18 Ill. 2d 103, 163 N. E. 2d 510.

No. 737. STEIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *William H. Neblett* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 271 F. 2d 895.

No. 738. KIEKHAEFER CORPORATION *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *James I. Poole* and *Herbert P. Wiedemann* for petitioner. Reported below: 273 F. 2d 314.

No. 739. HERTZBERG, TRUSTEE, *v.* ASSOCIATES DISCOUNT CORP. C. A. 6th Cir. Certiorari denied. *Richard L. Wolk* for petitioner. *John L. Carey* for respondent. Reported below: 272 F. 2d 6.

No. 746. HELMIG *v.* JONES ET AL. C. A. 3d Cir. Certiorari denied. *Paul Ginsburg* for petitioner. Reported below: 271 F. 2d 414.

No. 761. RITTER, CHIEF JUDGE, U. S. DISTRICT COURT, *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Norman M. Littell, Frederick Bernays Wiener, Dennis McCarthy* and *Charles J. Alexander* for petitioner. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *Harold S. Harrison* for the United States. Reported below: 273 F. 2d 30.

No. 747. HORNE *v.* WOOLEVER. Supreme Court of Ohio. Certiorari denied. *Thomas F. Butler, Jr.* and *Milton Boesel* for petitioner. Reported below: 170 Ohio St. 178, 163 N. E. 2d 378.

No. 754. WILLIAMS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *William H. Neblett* for petitioners. Reported below: 273 F. 2d 781.

No. 759. JOHNSON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Wayne E. Ripley* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 273 F. 2d 33.

No. 762. BURTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* and *Arthur Sherman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 272 F. 2d 473.

No. 773. J. A. EDWARDS & CO., INC., *v.* PETER REISS CONSTRUCTION CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. *Irving Levine* for petitioner. *David Morgulas* for respondents. Reported below: 273 F. 2d 880.

No. 774. J. A. EDWARDS & CO., INC., *v.* THOMPSON CONSTRUCTION CORP. ET AL. C. A. 2d Cir. Certiorari denied. *Irving Levine* for petitioner. *Joseph Edward Davey, Jr.* for respondents. Reported below: 273 F. 2d 873.

No. 787. CITY OF EAST DETROIT ET AL. *v.* DETROIT EDISON CO. C. A. 6th Cir. Certiorari denied. *Robert E. Childs* for petitioners. *Harvey A. Fischer* for respondent. Reported below: 272 F. 2d 410.

No. 771. WALDER ET AL. *v.* PARAMOUNT PUBLIX CORP. ET AL. C. A. 2d Cir. Certiorari denied. *Claudia Pearlman* and *Edgar A. Buttle* for petitioners. *John F. Caskey, Myles J. Lane, E. Compton Timberlake* and *Leonard Kaufman* for respondents. Reported below: 272 F. 2d 349.

No. 776. CAIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Grove Stafford* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 274 F. 2d 598.

No. 793. SINCLAIR OIL & GAS CO. *v.* MASTERSON ET AL. C. A. 5th Cir. Certiorari denied. *Nat J. Harben* and *Angus A. Davidson* for petitioner. *D. H. Culton* for respondents. Reported below: 271 F. 2d 310.

No. 536, Misc. HULETT *v.* SIGLER, WARDEN. Supreme Court of Nebraska. Certiorari denied. Petitioner *pro se. Clarence S. Beck,* Attorney General of Nebraska, and *Clarence A. H. Meyer,* Deputy Attorney General, for respondent.

No. 543, Misc. COSTNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 271 F. 2d 261.

No. 554, Misc. SIIRONEN *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se. Will Wilson,* Attorney General of Texas, and *Riley Eugene Fletcher* and *Houghton Brownlee, Jr.,* Assistant Attorneys General, for respondent.

No. 436, Misc. JEFFERSON *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se*. *W. W. Barron,* Attorney General of West Virginia, and *Fred H. Caplan,* Assistant Attorney General, for respondent.

No. 489, Misc. NOLAN *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se*. *John M. Dalton,* Attorney General of Missouri, and *Calvin K. Hamilton,* Assistant Attorney General, for respondent.

No. 508, Misc. MUMMIAMI *v.* NEW YORK STATE BOARD OF PAROLE. Court of Appeals of New York. Certiorari denied. *Martin Brickman* for petitioner. Reported below: 7 N. Y. 2d 756, 162 N. E. 2d 757.

No. 512, Misc. IN RE BLAKESLEE. Supreme Court of Montana. Certiorari denied. Petitioner *pro se*. *Forrest H. Anderson,* Attorney General of Montana, *William F. Crowley,* First Assistant Attorney General, and *Thomas J. Hanrahan,* Assistant Attorney General, for the State of Montana, respondent. Reported below: 135 Mont. 603, 343 P. 2d 564.

No. 569, Misc. ROBERTS *v.* PEPERSACK, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 221 Md. 576, 155 A. 2d 891.

No. 611, Misc. WHITTINGTON *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 *Robert G. Maysack* for the United States.

No. 601, Misc. DOBSON *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Petitioner *pro se.* *C. Ferdinand Sybert,* Attorney General of Maryland, and *James H. Norris, Jr.,* Special Assistant Attorney General, for respondent. Reported below: 220 Md. 689, 154 A. 2d 921.

No. 612, Misc. MCCORMICK *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 613, Misc. ZIZZO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 614, Misc. SMITH ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioners *pro se.* *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 272 F. 2d 228.

No. 617, Misc. FAUBERT *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied.

No. 621, Misc. BANKS *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.

No. 622, Misc. MORRISON *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se.* *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Joseph J. Rose,* Assistant Attorney General, for respondents.

No. 634, Misc. UNITED STATES EX REL. HELWIG *v.* MARONEY, SUPERINTENDENT, WESTERN STATE PENITENTIARY. C. A. 3d Cir. Certiorari denied. Reported below: 271 F. 2d 329.

No. 616, Misc. SIMS *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 619, Misc. EPHRAIM *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 17 Ill. 2d 527, 162 N. E. 2d 431.

No. 620, Misc. HOLLOWAY *v.* CONNECTICUT. Supreme Court of Errors of Connecticut. Certiorari denied. Reported below: 147 Conn. 22, 156 A. 2d 466.

No. 623, Misc. KILDARE *v.* JACKSON, WARDEN, ET AL. 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 respondents. Reported below: 8 App. Div. 2d 876, 187 N. Y. S. 2d 70.

No. 624, Misc. HORTON *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Reported below: —— Ind. ——, 158 N. E. 2d 288.

No. 638, Misc. WHITE *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 *Kirby W. Patterson* for the United States.

No. 656, Misc. PLATER *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. Court of Appeals of Maryland. Certiorari denied. Reported below: 220 Md. 673, 154 A. 2d 811.

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No. 630, Misc. FAIOLA *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Petitioner *pro se*. *Bertram Polow* for respondent.

No. 640, Misc. HEADS *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 681, Misc. NEW YORK EX REL. STANLEY *v.* JOHNSTON, DIRECTOR, DANNEMORA STATE HOSPITAL. 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. 688, Misc. TARPLEY *v.* WILKINS, WARDEN, ET AL. 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 respondents.

No. 886, Misc. STURDIVANT *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. *Gregory J. Costano* for petitioner. Reported below: 31 N. J. 165, 155 A. 2d 771.

No. 699, Misc. WHITING *v.* CHEW, DIRECTOR PAROLE BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 273 F. 2d 885.

Rehearing Denied.

No. 63. FEDERAL POWER COMMISSION *v.* TUSCARORA INDIAN NATION, *ante,* p. 99; and

No. 66. POWER AUTHORITY OF THE STATE OF NEW YORK *v.* TUSCARORA INDIAN NATION, *ante,* p. 99. Petitions for rehearing denied.

No. 640. TILLMAN, ADMINISTRATRIX, *v.* ANDERSON, SECRETARY OF THE TREASURY, ET AL., *ante*, p. 903;

No. 658. COLLINS *v.* UNITED STATES, *ante*, p. 911;

No. 310, Misc. TAG *v.* ROGERS, ATTORNEY GENERAL, ET AL., *ante*, p. 904; and

No. 455, Misc. EARNSHAW *v.* UNITED STATES, *ante*, p. 921. Petitions for rehearing denied.

APRIL 20, 1960.

Dismissal Under Rule 60.

No. 867, Misc. OVERTON *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Petition dismissed pursuant to Rule 60 of the Rules of this Court. *Robert C. Barnard* for petitioner. Reported below: 107 U. S. App. D. C. 233, 275 F. 2d 897.

APRIL 25, 1960.

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 petition of intervention of the United States and the answer of the State of Illinois and the Metropolitan Sanitary District of Greater Chicago are referred to the Special Master. *Solicitor General Rankin, Assistant Attorney General Morton, David R. Warner* and *Walter Kiechel, Jr.* for the United States. *Grenville Beardsley*, Attorney General of Illinois, *William C. Wines*, Assistant Attorney General, *Lawrence J. Fenlon, Peter G. Kuh, George A. Lane, Joseph B. Fleming, Joseph H. Pleck* and *Thomas M. Thomas* for the State of Illinois and the Metropolitan Sanitary District of Greater Chicago.

No. 12, Original. ILLINOIS *v.* MICHIGAN ET AL. The petition of intervention of the United States and the answer of the State of Illinois are referred to the Special Master. *Solicitor General Rankin, Assistant Attorney General Morton, David R. Warner* and *Walter Kiechel, Jr.* for the United States. *Grenville Beardsley,* Attorney General of Illinois, *William C. Wines,* Assistant Attorney General, *George E. Billett, Charles A. Bane* and *Calvin D. Trowbridge,* Special Assistant Attorneys General, for the State of Illinois.

No. 495. STUART ET AL. *v.* WILSON, ATTORNEY GENERAL OF TEXAS, ET AL. Appeal from the United States District Court for the Northern District of Texas. The motion to recall and amend the judgment is granted. The order of January 11, 1960, 361 U. S. 232, is vacated and the motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. *James L. McNees, Jr.* for appellants.

No. 541. SHELTON ET AL. *v.* MCKINLEY ET AL. Appeal from the United States District Court for the Eastern District of Arkansas. (Probable jurisdiction noted, 361 U. S. 947.) The joint motion to substitute John E. Fox as a party appellee in the place of Ralph Mitchell, Jr., and to name Charles V. Kalkbrenner as a party appellee instead of J. C. Langley is granted. The motion to substitute Everett Tucker, Jr., as President of the Board of Directors of the Little Rock Special School District, and J. H. Cottrell, B. F. Mackey and W. C. McDonald as parties appellee in the place of Ed I. McKinley, Jr., Ben D. Rowland and Robert W. Laster is granted. *J. R. Booker* for appellants, and *Louis L. Ramsay, Jr.* for appellees, on the joint motion. *Robert L. Carter* for appellants, on the motion to substitute Tucker et al. for McKinley et al. Reported below: 174 F. Supp. 351.

No. 513. UNITED STATES *v.* CANNELTON SEWER PIPE Co. Certiorari, 361 U. S. 923, to the United States Court of Appeals for the Seventh Circuit. The motion of the National Coal Association for leave to file brief, as *amicus curiae,* is granted. *Robert E. Lee Hall* and *Richard L. Hirshberg* for the National Coal Association. Reported below: 268 F. 2d 334.

No. 685, Misc. SMITH *v.* UNITED STATES. Motion for leave to file petition for writ of habeas corpus denied.

No. 812, Misc. TRI-CONTINENTAL FINANCIAL CORP. ET AL. *v.* UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT. Motion for leave to file petition for writ of mandamus and other relief denied. *Mathias F. Correa* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for respondent.

No. 813, Misc. TRI-CONTINENTAL FINANCIAL CORP. *v.* UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT. The motion of petitioner for leave to file supplementary appendix is granted. Motion for leave to file petition for writ of mandamus and other relief denied. *Mathias F. Correa* for petitioner. *Solicitor General Rankin* filed a memorandum for the United States, as *amicus curiae.*

Probable Jurisdiction Noted.

No. 438. MCGOWAN ET AL. *v.* MARYLAND. Appeal from the Court of Appeals of Maryland. Probable jurisdiction noted. *Harry Silbert, A. Jerome Diener* and *Sidney Schlachman* for appellants. Reported below: 220 Md. 117, 151 A. 2d 156.

No. 532. GALLAGHER, CHIEF OF POLICE OF THE CITY OF SPRINGFIELD, MASSACHUSETTS, ET AL. *v.* CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC., ET AL. Appeal from the United States District Court for the District of Massachusetts. The motion of George Michaels et al. for leave to intervene is denied. Probable jurisdiction noted. *Edward J. McCormack, Jr.*, Attorney General of Massachusetts, *Joseph H. Elcock, Jr.* and *John Warren McGarry*, Assistant Attorneys General, and *S. Thomas Martinelli* for appellants. *Herbert B. Ehrmann* and *Samuel L. Fein* for appellees. *George Michaels* on the motion for leave to intervene. Reported below: 176 F. Supp. 466.

No. 699. TWO GUYS FROM HARRISON-ALLENTOWN, INC., *v.* MCGINLEY, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA, ET AL. Appeal from the United States District Court for the Eastern District of Pennsylvania. Probable jurisdiction noted. *Harold E. Kohn, William T. Coleman, Jr., Louis Levinthal, Harry A. Kalish* and *Oscar Brown* for appellant. *Anne X. Alpern*, Attorney General of Pennsylvania, and *Harry J. Rubin* for appellees. *Lawrence Speiser* and *Jacob S. Richman* filed a brief for the American Civil Liberties Union, as *amicus curiae*, in support of appellant. Reported below: 179 F. Supp. 944.

Certiorari Granted.

No. 779. BRADEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. *John M. Coe, Leonard B. Boudin, Victor Rabinowitz* and *Conrad J. Lynn* for petitioner. *Solicitor General Rankin, Assistant Attorney General Yeagley* and *Kevin T. Maroney* for the United States. Reported below: 272 F. 2d 653.

Certiorari Denied.

No. 510. MacKay *v.* McAlexander, Acting District Director, Immigration and Naturalization Service. C. A. 9th Cir. Certiorari denied. *Reuben Lenske* and *Nels Peterson* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Julia P. Cooper* for respondent. Reported below: 268 F. 2d 35.

No. 700. Two Guys from Harrison-Allentown, Inc., *v.* McGinley, District Attorney, County of Lehigh, Pennsylvania, et al. C. A. 3d Cir. Certiorari denied. *Harold E. Kohn, William T. Coleman, Jr., Louis E. Levinthal, Harry A. Kalish* and *Oscar Brown* for petitioner. *Anne X. Alpern,* Attorney General of Pennsylvania, and *Harry J. Rubin* for respondents. Reported below: 273 F. 2d 954.

No. 702. Mills *v.* Panama Canal Co. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for respondent. Reported below: 272 F. 2d 37.

No. 717. Flegenheimer *v.* Caley. Supreme Court of Wisconsin. Certiorari denied. *Werner Galleski* and *Arnold Davis* for petitioner. *Michael J. Anuta* for respondent. Reported below: 8 Wis. 2d 72, 98 N. W. 2d 473.

No. 741. Tri-Continental Financial Corp. et al. *v.* United States et al. C. A. 2d Cir. Certiorari denied. *Mathias F. Correa* and *Irwin Schneiderman* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for the United States. Reported below: —— F. 2d ——.

No. 753. BENEDICT ET AL. *v.* HAMILTON COUNTY BOARD OF REVISION. Supreme Court of Ohio. Certiorari denied. *Charles F. Hartsock* and *Irving Harris* for petitioners. *C. Watson Hover* for respondent. Reported below: 170 Ohio St. 62, 162 N. E. 2d 479.

No. 769. GEMEX CORPORATION *v.* A. C. BECKEN CO. C. A. 7th Cir. Certiorari denied. *Edward A. Haight* for petitioner. *Edward P. Morse* for respondent. Reported below: 272 F. 2d 1.

No. 770. MAYO ET AL., TRUSTEES IN BANKRUPTCY, *v.* PIONEER BANK & TRUST CO. C. A. 5th Cir. Certiorari denied. *Richard H. Switzer* and *Cleve Burton* for petitioners. Reported below: 270 F. 2d 823.

No. 775. LOCAL 600, HIGHWAY & CITY FREIGHT DRIVERS, DOCKMEN & HELPERS, *v.* NATIONAL LABOR RELATIONS BOARD; and

No. 794. SPECTOR FREIGHT SYSTEM, INC., *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. *Harry H. Craig* for petitioner in No. 775. *Malcolm Frank* for petitioner in No. 794. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Herman M. Levy* for respondent. Reported below: 273 F. 2d 272.

No. 778. LOCAL 1377, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, *v.* HEIN-WERNER CORP. ET AL. Supreme Court of Wisconsin. Certiorari denied. *Robert E. Gratz* for petitioner. Reported below: 8 Wis. 2d 264, 99 N. W. 2d 132, 100 N. W. 2d 317.

No. 780. DAVIES-YOUNG SOAP CO. *v.* NU-PRO MANUFACTURING CO. C. A. 8th Cir. Certiorari denied. *Harry A. Toulmin, Jr.* and *George W. Stengel* for petitioner. Reported below: 273 F. 2d 454.

No. 783. SURFCOMBER HOTEL CORP. *v.* DESOTO HOTEL CORP. Supreme Court of Florida. Certiorari denied. *Roland W. Granat* for petitioner. Reported below: 117 So. 2d 496.

No. 784. MARCONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Frances Kahn* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 275 F. 2d 205.

No. 796. LYONS, TEMPORARY ADMINISTRATRIX, *v.* UNITED FRUIT CO. ET AL. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *Frank A. Bull* for respondents. Reported below: 273 F. 2d 317.

No. 799. STOCKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Robert Weiner* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 273 F. 2d 754.

No. 1, Misc. GARCIA *v.* BROWNELL, ATTORNEY GENERAL, ET AL. C. A. 9th Cir. Certiorari denied. *David C. Marcus* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondents. Reported below: 236 F. 2d 356.

No. 317, Misc. KREMER *v.* CLARKE, TRUSTEE. C. A. 6th Cir. Certiorari denied. *Louis Lusky* and *Marvin H. Morse* for petitioner. *Oldham Clarke* for respondent. *Solicitor General Rankin, Thomas G. Meeker, David Ferber* and *Arthur Blasberg, Jr.* for the Securities and Exchange Commission in opposition. Reported below: 268 F. 2d 170.

No. 742. TRI-CONTINENTAL FINANCIAL CORP. *v.* GLENMORE ET AL. The motion of petitioner for leave to file supplementary appendix is granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Mathias F. Correa* and *Irwin Schneiderman* for petitioner. *William E. Haudek* and *Julius Levy* for Glenmore et al., respondents. *Solicitor General Rankin* filed a memorandum for the United States, as *amicus curiae*. Reported below: —— F. 2d ——.

No. 353, Misc. PERNO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: —— F. 2d ——.

No. 393, Misc. SMITH *v.* CALIFORNIA. Appellate Department, Superior Court of California, County of Los Angeles. Certiorari denied. Petitioner *pro se*. *Roger Arnebergh* and *Philip E. Grey* for respondent.

No. 395, Misc. GRESHAM *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* and *Beatrice Rosenberg* for the United States.

No. 547, Misc. WILLIS *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 Cooper* for the United States. Reported below: 106 U. S. App. D. C. 211, 271 F. 2d 477.

No. 537, Misc. BREWER *v.* WEST VIRGINIA. Circuit Court of Mingo County, West Virginia. Certiorari denied. *Zane Grey Staker* for petitioner. *W. W. Barron,* Attorney General of West Virginia, and *Fred H. Caplan,* Assistant Attorney General, for respondent.

No. 540, Misc. PATTERSON *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 662, 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 Wilkey, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States.

No. 742, Misc. SCHMIDT *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied. *Abraham Ziegler* for petitioner. *Arthur W. Wilson* in opposition.

No. 853, Misc. MACKIEWICZ *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. *Franz O. Willenbucher* for petitioner. Reported below: 114 So. 2d 684.

No. 942, Misc. CHESSMAN *v.* DICKSON, WARDEN. The application for stay of execution presented to MR. JUSTICE DOUGLAS and by him referred to the Court is denied. Petition for writ of certiorari to the Supreme Court of California denied. THE CHIEF JUSTICE took no part in the consideration or decision of these applications. *George T. Davis, Rosalie S. Asher* and *A. L. Wirin* for petitioner. *Stanley Mosk,* Attorney General of California, and *Arlo E. Smith,* Deputy Attorney General, for respondent.

No. 3, Misc. CHAPMAN *v.* WILSON, WARDEN, ET AL. The motion to substitute Fred Dickson in the place of Lawrence E. Wilson is denied. Petition for writ of certiorari to the Supreme Court of California denied. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, *Clarence A. Linn*, Chief Assistant Attorney General, and *Arlo E. Smith*, Deputy Attorney General, for respondents.

No. 665, Misc. MOSES *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Thos. H. Dent* for petitioner. *Will Wilson*, Attorney General of Texas, *Riley Eugene Fletcher*, Assistant Attorney General, and *Carl E. F. Dally* for respondent. Reported below: 168 Tex. Cr. R. —, 328 S. W. 2d 885.

Rehearing Denied.

No. 575, Misc. HILL *v.* ILLINOIS, *ante*, p. 922. Petition for rehearing denied.

APRIL 27, 1960.

Miscellaneous Orders.

No. —. CHESSMAN *v.* TEETS, WARDEN. The application for stay of execution presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, is denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Joseph Kadans* for the applicant.

No. —. MOSS *v.* KENTUCKY. The application for a stay of execution presented to MR. JUSTICE STEWART, and by him referred to the Court, is granted pending the timely filing and disposition of a petition for writ of certiorari. *Lloyd C. Emery* for the applicant. *John B. Breckinridge*, Attorney General of Kentucky, in opposition.

MAY 2, 1960.

Miscellaneous Orders.

No. 326. METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, *v.* EGAN, GOVERNOR OF ALASKA, ET AL.; and

No. 327. ORGANIZED VILLAGE OF KAKE ET AL. *v.* EGAN, GOVERNOR OF ALASKA. Appeals from the District Court for Alaska. The motion of the Solicitor General for leave to participate in oral argument, as *amicus curiae,* is granted and one-half hour is allowed for that purpose. *Solicitor General Rankin* on the motion. Reported below: 18 Alaska —, 174 F. Supp. 500.

No. 838, Misc. KORHOLZ *v.* UNITED STATES. Motion for leave to file petition for writ of habeas corpus denied. *Morris Lavine* and *Samuel Yorty* for petitioner.

No. 663, Misc. DUNBAR *v.* MCNEILL, SUPERINTENDENT, MATTEAWAN STATE HOSPITAL. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se. Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Joseph J. Rose,* Assistant Attorney General, for respondent.

No. 778, Misc. SPARKS, ALIAS HOWLERY, *v.* CLERK OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted.

No. 709. NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. *v.* HENAGAN. C. A. 1st Cir. Certiorari granted. *Noel W. Deering* for petitioner. *Daniel J. Hanlon* for respondent. Reported below: 272 F. 2d 153.

No. 801. IN RE ANASTAPLO. Supreme Court of Illinois. Certiorari granted. Reported below: 18 Ill. 2d 182, 163 N. E. 2d 429.

No. 842, Misc. BULLOCK *v.* SOUTH CAROLINA. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of South Carolina granted. Case transferred to the appellate docket. Petitioner *pro se*. *Daniel R. McLeod,* Attorney General of South Carolina, and *Wm. H. Smith, Jr.,* Assistant Attorney General, for respondent. Reported below: 235 S. C. 356, 111 S. E. 2d 657.

Certiorari Denied. (*See also No. 663, Misc., supra.*)

No. 792. MOLITOR *v.* KANELAND COMMUNITY UNIT DISTRICT No. 302 ET AL. Supreme Court of Illinois. Certiorari denied. *William C. Murphy* and *Frank R. Reid, Jr.* for petitioner. *David Jacker* for District No. 302, respondent. Reported below: 18 Ill. 2d 11, 163 N. E. 2d 89.

No. 657, Misc. AMATO *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied. *Abraham Ziegler* for petitioner. *Charles J. Miller* in opposition.

No. 683, Misc. JACKSON *v.* RAGEN, WARDEN. Circuit Court of Peoria County, Illinois. Certiorari denied. Petitioner *pro se*. *Grenville Beardsley,* Attorney General of Illinois, for respondent.

No. 814. DANIELS ET AL., DOING BUSINESS AS DANIELS CONSTRUCTION CO., *v.* WOODMONT, INC., ET AL. C. A. 10th Cir. Certiorari denied. *Allan E. Mecham* for petitioners. *C. C. Parsons* for respondents. Reported below: 274 F. 2d 132.

No. 679. TRANS WORLD AIRLINES, INC., *v.* DELTA AIR LINES, INC., ET AL.; and

No. 777. EASTERN AIR LINES, INC., *v.* CIVIL AERONAUTICS BOARD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Charles Pickett* and *Warren E. Baker* for petitioner in No. 679. *E. Smythe Gambrell, W. Glen Harlan* and *Harold L. Russell* for petitioner in No. 777. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon, Franklin M. Stone* and *O. D. Ozment* for the Civil Aeronautics Board. *Robert E. Redding* and *Dick L. Lansden* for the City of Nashville et al., *Dorothy F. Fardon* for the City of Kansas City, Missouri, and *Aloys P. Kaufmann* and *Thomas J. Neenan* for the City of St. Louis et al., respondents, in support of the petition in No. 679. *Joseph J. O'Connell, Jr.* and *Robert Reed Gray* for Delta Air Lines, Inc., *Howard C. Westwood* and *Peter S. Craig* for American Airlines, Inc., and *Richard A. Fitzgerald* for National Airlines, Inc., in opposition to the petitions for certiorari. Reported below: 107 U. S. App. D. C. 174, 275 F. 2d 632.

No. 800. NORWICH, CONNECTICUT PRINTING SPECIALTIES AND PAPER PRODUCTS UNION, LOCAL NO. 494, ET AL. *v.* LEEDOM ET AL., CONSTITUTING THE NATIONAL LABOR RELATIONS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Warren Woods* for petitioners. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondents. Reported below: 107 U. S. App. D. C. 170, 275 F. 2d 628.

No. 818. WOOLLEY *v.* EASTERN AIR LINES, INC. C. A. 5th Cir. Certiorari denied. *William Gresham Ward* for petitioner. *E. Smythe Gambrell* and *W. Glen Harlan* for respondent. Reported below: 273 F. 2d 615.

No. 785. EASTERN AIR LINES, INC., *v.* CIVIL AERONAUTICS BOARD; and

No. 786. CAPITOL AIRWAYS, INC., *v.* CIVIL AERONAUTICS BOARD. The motions of Northwest Airlines, Inc., and Delta Air Lines, Inc., to be named parties respondent and for leave to file briefs in opposition to the petitions for certiorari are granted. The motion of Capital Airlines, Inc., to be named a party respondent and for leave to file brief in opposition to the petition for certiorari in No. 785 is granted. Petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit denied. *E. Smythe Gambrell, W. Glen Harlan* and *Harold L. Russell* for petitioner in No. 785. *Coates Lear* and *Jerrold Scoutt, Jr.* for petitioner in No. 786. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon, Franklin M. Stone* and *O. D. Ozment* for respondent. *C. Frank Reavis* and *C. Edward Leasure* for Northwest Airlines, Inc. *Robert Reed Gray* for Delta Air Lines, Inc. *Charles H. Murchison, Robert B. Hankins, Macon M. Arthur* and *James H. Bastian* for Capital Airlines, Inc. Reported below: 271 F. 2d 752.

No. 518, Misc. RAMSEY *v.* HAND, WARDEN. Supreme Court of Kansas. Certiorari denied. Petitioner *pro se. John Anderson, Jr.,* Attorney General of Kansas, and *J. Richard Foth,* Assistant Attorney General, for respondent. Reported below: 185 Kan. 350, 343 P. 2d 225.

No. 583, Misc. SEWELL *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* and *Beatrice Rosenberg* for the United States. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

No. 803. GIDDINS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solomon A. Klein* and *Louis Bender* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 273 F. 2d 843.

No. 739, Misc. PENNSYLVANIA EX REL. JACKSON *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 745, Misc. PATTERSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 751, Misc. COWAN *v.* CLERK OF THE CIRCUIT COURT OF LAKE COUNTY, ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 754, Misc. DEVINE *v.* WARDEN, KANSAS STATE PENITENTIARY. Supreme Court of Kansas. Certiorari denied.

No. 761, Misc. EDWARDS *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied.

No. 762, Misc. PEREZ *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 776, Misc. GIST *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 787, Misc. IN RE STARK. Supreme Court of California. Certiorari denied.

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No. 779, Misc. INGRAM *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. Court of Appeals of Maryland. Certiorari denied.

Rehearing Denied.

No. 492, October Term, 1957. FLORA *v.* UNITED STATES, *ante*, p. 145; and

No. 559, Misc. MILLER *v.* TOWN OF SUFFIELD ET AL., *ante*, p. 922. Petitions for rehearing denied.

MAY 16, 1960.

Miscellaneous Orders.

No. 4, Original. NEW YORK *v.* ILLINOIS ET AL. The response of the United States and the answer of the State of Illinois and the Metropolitan Sanitary District of Greater Chicago to the supplemental and amended complaint of the State of New York are referred to the Special Master. *Solicitor General Rankin* for the United States. *Grenville Beardsley*, Attorney General of Illinois, *William C. Wines*, Assistant Attorney General, *Lawrence J. Fenlon, Peter G. Kuh, George A. Lane, Joseph B. Fleming, Joseph H. Pleck* and *Thomas M. Thomas* for the State of Illinois and the Metropolitan Sanitary District of Greater Chicago, respondents. *Louis J. Lefkowitz*, Attorney General of New York, *Paxton Blair*, Solicitor General, *Richard H. Shepp*, Assistant Attorney General, and *Randall J. Le Boeuf, Jr.*, Special Assistant Attorney General, for complainant.

No. 52. RIOS *v.* UNITED STATES. Certiorari, 359 U. S. 965, to the United States Court of Appeals for the Ninth Circuit. The motion for the appointment of counsel is granted and *Harvey M. Grossman, Esquire*, of Los Angeles, California, a member of the Bar of this Court, is appointed *nunc pro tunc* to serve as counsel for petitioner in this case. Reported below: 256 F. 2d 173.

No. 720. McGrath et al. *v.* Rhay, Superintendent of Washington State Penitentiary. Certiorari, 361 U. S. 959, to the Supreme Court of Washington. The motion for the appointment of counsel is granted and it is ordered that *Stanley C. Soderland, Esquire,* of Seattle, Washington, be, and he is hereby, appointed to serve as counsel for petitioners in this case. Reported below: 54 Wash. 2d 508, 342 P. 2d 607.

No. 870. Green *v.* United States. Certiorari, *ante,* p. 949, to the United States Court of Appeals for the First Circuit. The motion for appointment of counsel is granted and it is ordered that *James Vorenberg, Esquire,* of Boston, Massachusetts, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case. Reported below: 273 F. 2d 216.

Certiorari Granted. (*See also No. 813, ante, p. 605, and No. 645, Misc., ante, p. 607.*)

No. 789. United States *v.* Lucchese, alias Luckese, alias Lucase, alias Arra, alias Luchese; and

No. 802. Costello *v.* United States. Petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit granted. The motion to amend the petition for certiorari in No. 802 is assigned for hearing and consolidated with the argument on the merits in No. 789. *Solicitor General Rankin* for the United States in No. 789. *Edward Bennett Williams, Agnes A. Neill* and *Morris Shilensky* for petitioner in No. 802. *Richard J. Burke* and *Myron L. Shapiro* for respondent in No. 789. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States in No. 802. Reported below: No. 802, 275 F. 2d 355.

No. 820. JAMES *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted. *Richard E. Gorman* for petitioner. *Solicitor General Rankin* and *Assistant Attorney General Rice* for the United States. Reported below: 273 F. 2d 5.

Certiorari Denied.

No. 735. EVOLA ET AL. *v.* UNITED STATES;
No. 763. SANTORA *v.* UNITED STATES;
No. 772. LESSA ET AL. *v.* UNITED STATES;
No. 807. CAPECE *v.* UNITED STATES;
No. 812. DIPALERMO *v.* UNITED STATES; and
No. 817. GENOVESE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Maurice Edelbaum* for petitioners in No. 735. *Osmond K. Fraenkel* and *Herbert S. Siegal* for petitioner in No. 763. *Nathan W. Math* for petitioners in No. 772. *Albert J. Krieger* for petitioners in Nos. 807 and 812. *Bennett Boskey* and *Wilfred L. Davis* for petitioner in No. 817. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 274 F. 2d 179.

No. 808. CERTAIN INTERESTS IN PROPERTY IN CHAMPAIGN COUNTY, ILLINOIS, ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Samuel Goldstein, M. Robert Goldstein, Arthur D. Goldstein* and *Herbert Monte Levy* for petitioners. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *Harold S. Harrison* for the United States. Reported below: 271 F. 2d 379.

No. 828. ODEKIRK *v.* SEARS ROEBUCK & CO. ET AL. C. A. 7th Cir. Certiorari denied. *Joseph H. Hinshaw* and *Oswell G. Treadway* for petitioner. *Charles D. Snewind* for respondents. Reported below: 274 F. 2d 441.

No. 751. KELLY *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: —— Ct. Cl. ——, —— F. Supp. ——.

No. 767. TAXIN ET AL., DOING BUSINESS AS JOHN TAXIN CO., *v.* WOOD, U. S. DISTRICT JUDGE, ET AL. C. A. 3d Cir. Certiorari denied. *Lester J. Schaffer* for petitioners. *Harry Shapiro* and *Hirsh W. Stalberg* for respondents. Reported below: 280 F. 2d 227.

No. 815. MORRIS *v.* UNITED STATES. Court of Claims. Certiorari denied. *Samuel C. Klein* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Alan S. Rosenthal* and *Seymour Farber* for the United States. Reported below: —— Ct. Cl. ——, —— F. Supp. ——.

No. 827. ARKANSAS PUBLIC SERVICE COMMISSION ET AL. *v.* ARKANSAS POWER & LIGHT CO. Supreme Court of Arkansas. Certiorari denied. *Tom Gentry* for petitioners. *Willis H. Holmes* for respondent. Reported below: —— Ark. ——, 330 S. W. 2d 51.

No. 830. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Herbert S. Thatcher, David Previant* and *Robert S. Cahoon* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 275 F. 2d 610.

No. 643, Misc. RAY *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 832. I. A. Dress Co., Inc., *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. *Michael Kaminsky* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Melva M. Graney* and *Melvin L. Lebow* for respondent. Reported below: 273 F. 2d 543.

No. 833. Berry, Administratrix, *v.* Atlantic Coast Line Railroad Co. et al. C. A. 4th Cir. Certiorari denied. *William E. Chandler, Jr.* and *James P. Mozingo III* for petitioner. *David W. Robinson* and *A. Y. Arledge* for respondents. Reported below: 273 F. 2d 572.

No. 835. Wyoming Construction Co. et al. *v.* Western Casualty & Surety Co. et al. C. A. 10th Cir. Certiorari denied. *Joseph T. Enright* and *Norman Elliott* for petitioners. *William H. Brown* and *Edward E. Murane* for respondents. Reported below: 275 F. 2d 97.

No. 839. Smoot Sand & Gravel Corp. *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: 274 F. 2d 495.

No. 647, Misc. Cepero *v.* Rincon de Gautier, Manager, City Government. C. A. 2d Cir. Certiorari denied. Reported below: 270 F. 2d 648.

No. 651, Misc. Goldberg *v.* New York et al. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Daniel Cohen* for Sullivan, respondent. Reported below: 270 F. 2d 648.

No. 826. COMMISSARIAT À L'ENERGIE ATOMIQUE *v.* WATSON, COMMISSIONER OF PATENTS. Court of Customs and Patent Appeals. Certiorari denied. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this application. *David Ginsburg, James L. Morrisson* and *Eugene Gressman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Morton Hollander* and *John G. Laughlin, Jr.* for respondent. Reported below: 47 C. C. P. A. (Pat.) 722, 270 F. 2d 954.

No. 641, Misc. EDMONDS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Edward J. Skeens* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 106 U. S. App. D. C. 373, 273 F. 2d 108.

No. 668, Misc. JACKSON *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Reported below: 53 Cal. 2d 89, 346 P. 2d 389.

No. 693, Misc. UNITED STATES EX REL. ESCALONA *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, and *Paxton Blair,* Solicitor General, for respondent. Reported below: —— F. 2d ——.

No. 694, Misc. LAWYER *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for the United States. Reported below: —— Ct. Cl. ——, —— F. Supp. ——.

No. 653, Misc. ADRIANO *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 433, Misc. MURPHY *v.* CALIFORNIA. Appellate Department of the Superior Court of California, County of San Francisco. Certiorari denied. *Kurt W. Melchior* for petitioner. *Stanley Mosk,* Attorney General of California, *Arlo E. Smith* and *John S. McInerny,* Deputy Attorneys General, for respondent.

No. 571, Misc. KANE *v.* MCNEILL, SUPERINTENDENT OF MATTEAWAN STATE HOSPITAL. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied. Petitioner *pro se. Louis J. Lefkowitz,* Attorney General of New York, and *Paxton Blair,* Solicitor General, for respondent.

No. 633, Misc. MARTIN *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 *Robert G. Maysack* for the United States.

No. 655, Misc. BURGESS *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. Court of Appeals of Maryland. Certiorari denied.

No. 660, Misc. UNITED STATES EX REL. SMITH *v.* DOWD, WARDEN. C. A. 7th Cir. Certiorari denied. *Alan W. Boyd* for petitioner. Reported below: 271 F. 2d 292.

No. 676, Misc. HAAGENSEN ET AL. *v.* MOE ET AL., CO-EXECUTORS, ET AL. District Court of Winneshiek County, Iowa. Certiorari denied. Petitioners *pro se. Frank R. Miller* for respondents.

No. 678, Misc. IN RE BROCK. Supreme Court of New Jersey. Certiorari denied.

No. 679, Misc. CLARK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 273 F. 2d 68.

No. 686, Misc. STAFFORD *v.* SUPERIOR COURT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 272 F. 2d 407.

No. 695, Misc. FINLEY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioners *pro se. Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 271 F. 2d 777.

No. 696, Misc. IVEY *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 698, Misc. STULTZ *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Acting Assistant Attorney General Ryan* and *Harold H. Greene* for the United States.

No. 706, Misc. DAVIS *v.* OHIO ET AL. Supreme Court of Ohio. Certiorari denied.

No. 710, Misc. BARTOLILLO *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 721, Misc. LONG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 273 F. 2d 30.

No. 715, Misc. MONROE *v.* LAVALLEE, 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. Reported below: 9 App. Div. 2d 795, 192 N. Y. S. 2d 507.

No. 720, Misc. MORGAN *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 723, Misc. IN RE BARDE. Supreme Court of Michigan. Certiorari denied.

No. 725, Misc. O'ROURKE *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Third Judicial Department. Certiorari denied.

No. 726, Misc. HYMES *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 727, Misc. ECKERT *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 731, Misc. MAHLER *v.* MICHIGAN. Circuit Court for Branch County, Michigan. Certiorari denied.

No. 741, Misc. BUCHANAN *v.* COCHRAN, DIRECTOR OF DIVISION OF CORRECTIONS. Supreme Court of Florida. Certiorari denied.

No. 743, Misc. MARTIN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 757, Misc. NUNEMAKER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 722, Misc. McKenna *v.* Tinsley, Warden. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John F. Brauer,* Assistant Attorney General, for respondent. Reported below: 141 Colo. 63, 346 P. 2d 584.

No. 752, Misc. Goetz *v.* Hand, Warden. Supreme Court of Kansas. Certiorari denied. Reported below: 185 Kan. 788, 347 P. 2d 349.

No. 758, Misc. Drake *v.* United States. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 274 F. 2d 611.

No. 771, Misc. Whittle *v.* Munshower, Superintendent, Maryland State Police. Court of Appeals of Maryland. Certiorari denied. Reported below: 221 Md. 258, 155 A. 2d 670.

No. 775, Misc. Sally *v.* Illinois. Supreme Court of Illinois. Certiorari denied. Reported below: 17 Ill. 2d 578, 162 N. E. 2d 396.

No. 829, Misc. White *v.* Indiana. Supreme Court of Indiana. Certiorari denied. Reported below: —— Ind. ——, 159 N. E. 2d 388.

No. 866, Misc. Leggett *v.* Kirby, Judge. Supreme Court of Arkansas. Certiorari denied. *Kenneth Coffelt* for petitioner. Reported below: —— Ark. ——, 331 S. W. 2d 267.

No. 750, Misc. DiPalermo *v.* United States;
No. 792, Misc. Polizzano *v.* United States;
No. 793, Misc. Polizzano *v.* United States; and
No. 840, Misc. Barcellona *v.* United States. C. A. 2d Cir. Certiorari denied. *Robert R. Kaufman* and *Rudolph Stand* for petitioner in No. 750, Misc. *Allen S. Stim* for petitioner in No. 792, Misc. *Allen S. Stim* and *David Schwartz* for petitioner in No. 793, Misc. *Thomas R. Farrell, Jr.* for petitioner in No. 840, Misc. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 274 F. 2d 179.

No. 760, Misc. Pruitt *v.* Smyth, Superintendent, Virginia State Penitentiary. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 770, Misc. Vassar *v.* Raines, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 274 F. 2d 369.

No. 777, Misc. Watts *v.* United States. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 273 F. 2d 10.

No. 783, Misc. Brown *v.* Pepersack, Warden. Court of Appeals of Maryland. Certiorari denied. Reported below: 221 Md. 582, 155 A. 2d 648.

No. 786, Misc. Smart *v.* New York. Court of Appeals of New York. Certiorari denied.

No. 788, Misc. Turnbaugh *v.* Illinois. Supreme Court of Illinois. Certiorari denied.

No. 784, Misc. HARTY *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 790, Misc. STANCAVAGE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States. Reported below: 271 F. 2d 592.

No. 791, Misc. BAKER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States.

No. 795, Misc. SPADER *v.* MYERS, SUPERINTENDENT, STATE PENITENTIARY. Supreme Court of Pennsylvania. Certiorari denied.

No. 800, Misc. SWEENEY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 803, Misc. COVINGTON *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* and *Beatrice Rosenberg* for the United States.

No. 807, Misc. ROOT *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 809, Misc. HARRIS *v.* ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 810, Misc. ECKERT *v.* OKLAHOMA. Court of Criminal Appeals of Oklahoma. Certiorari denied. Reported below: 348 P. 2d 870.

No. 817, Misc. BARRETT *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 819, Misc. WILLIS *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Reported below: 328 S. W. 2d 593.

No. 982, Misc. BUTLER *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. *Sam Weiss* for petitioner.

Rehearing Denied.

No. 2. ABEL, ALIAS MARK, ALIAS COLLINS, ALIAS GOLDFUS, *v.* UNITED STATES, *ante*, p. 217; and

No. 690. PORTER ET AL. *v.* OKLAHOMA BACONE COLLEGE TRUST ET AL., *ante*, p. 927. Petitions for rehearing denied.

No. 100. ORDER OF RAILROAD TELEGRAPHERS ET AL. *v.* CHICAGO & NORTH WESTERN RAILWAY CO., *ante*, p. 330. The motion of the Bureau of Information of the Eastern Railways et al. for leave to file brief, as *amici curiae*, in support of petition for rehearing is granted. Petition for rehearing denied.

Dismissal Under Rule 60.

No. 465. RODRIGUEZ *v.* NEW YORK. Certiorari, 361 U. S. 812, to the Appellate Division of the Supreme Court of New York, First Judicial Department. Writ of certiorari dismissed pursuant to stipulation of counsel under Rule 60 of the Rules of this Court. *Walter Gellhorn* for petitioner. *Frank S. Hogan* for respondent.

MAY 23, 1960.

Miscellaneous Orders.

No. 59. THOMPSON *v.* CITY OF LOUISVILLE ET AL., *ante,* p. 199. The motion to tax costs is denied. *Louis Lusky* and *Marvin H. Morse* for petitioner. *John B. Breckinridge,* Attorney General of Kentucky, and *Troy D. Savage,* Assistant Attorney General, for respondents.

No. 436. CORY CORPORATION ET AL. *v.* SAUBER. Certiorari, 361 U. S. 899, to the United States Court of Appeals for the Seventh Circuit. The motions of the petitioners and respondent for leave to file supplemental memoranda are granted. *Edwin A. Rothschild* and *Stanford Clinton* for petitioners. *Solicitor General Rankin* for respondent. Reported below: 266 F. 2d 58, 267 F. 2d 802.

No. 23, Misc. IN RE DISBARMENT OF ALKER. It having been reported to the Court that Harry J. Alker, Jr., of Philadelphia, Pennsylvania, has been disbarred from the practice of the law by the Supreme Court of Pennsylvania; and this Court by order of June 15, 1959 [360 U. S. 908], having suspended the said Harry J. Alker, Jr., from the practice of the 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 Harry J. Alker, Jr., be, and he is hereby, disbarred, and that his name be stricken from the roll of attorneys admitted to practice in this Court. *William J. Woolston* for respondent.

No. 46, Misc. RAMIREZ *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL.;

No. 728, Misc. SPADER *v.* MYERS, SUPERINTENDENT OF STATE PENITENTIARY; and

No. 821, Misc. GERALDON *v.* UNITED STATES. Motions for leave to file petitions for writs of habeas corpus denied. Petitioners *pro se*. *Solicitor General Rankin, Acting Assistant Attorney General Ryan, Harold H. Greene* and *William A. Kehoe, Jr.* for respondents in No. 46, Misc.

No. 884, Misc. IN RE PERALES. 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. 788. SAM FOX PUBLISHING CO., INC., ET AL. *v.* UNITED STATES 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. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Charles A. Horsky* for appellants. *Solicitor General Rankin, Acting Assistant Attorney General Bicks* and *Charles H. Weston* for the United States, and *Arthur H. Dean, Howard T. Milman, Herman Finkelstein, Lloyd N. Cutler* and *David H. Horowitz* for the American Society of Composers, Authors and Publishers, appellees. Reported below: —— F. Supp. ——.

Probable Jurisdiction Noted.

No. 781. UNITED STATES *v.* E. I. DU PONT DE NEMOURS & CO. ET AL. Appeal from the United States District Court for the Northern District of Illinois. Probable jurisdiction noted. MR. JUSTICE CLARK and MR. JUSTICE HARLAN took no part in the consideration or decision of

this case. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Philip Elman, John F. Davis* and *Charles H. Weston* for the United States. *John Lord O'Brian, Hugh B. Cox, Charles A. Horsky* and *Daniel M. Gribbon* for E. I. du Pont de Nemours and Co., *Leo F. Tierney, Robert L. Stern, Henry M. Hogan* and *Robert A. Nitschke* for General Motors Corp., *Wilkie Bushby* and *Philip C. Scott* for Christiana Securities Co. et al., appellees. Reported below: 177 F. Supp. 1.

No. 810. POE ET AL. *v.* ULLMAN, STATE'S ATTORNEY; and

No. 811. BUXTON *v.* ULLMAN, STATE'S ATTORNEY. Appeals from the Supreme Court of Errors of Connecticut. Probable jurisdiction noted. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of these cases. *Fowler V. Harper* for appellants. Reported below: 147 Conn. 48, 156 A. 2d 508.

No. 845. BRAUNFELD ET AL. *v.* GIBBONS, COMMISSIONER OF POLICE OF THE CITY OF PHILADELPHIA, ET AL. Appeal from the United States District Court for the Eastern District of Pennsylvania. Probable jurisdiction noted. *Stephen B. Narin* and *Marvin Garfinkel* for appellants. *David Berger* for Gibbons et al., and *Arthur Littleton* for the Pennsylvania Retailers' Association, appellees. Reported below: 184 F. Supp. 352.

Certiorari Granted. (*See also No. 295, ante, p. 628.*)

No. 961, Misc. ATCHLEY *v.* CALIFORNIA. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of California granted. Case transferred to the appellate docket. The execution of the sentence of death imposed on the petitioner is stayed pending the decision of this Court and the issuance of the mandate thereon. *Rosalie S. Asher* for petitioner. *Stan-*

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ley Mosk, Attorney General of California, and *Doris H. Maier,* Deputy Attorney General, for respondent. Reported below: 53 Cal. 2d 160, 346 P. 2d 764.

Certiorari Denied. (*See also No. 884, Misc., supra.*)

No. 678. Roschuni et al. *v.* Commissioner of Internal Revenue. C. A. 5th Cir. Certiorari denied. *Llewellyn A. Luce* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott* for respondent. Reported below: 271 F. 2d 267.

No. 782. Air Line Stewards and Stewardesses Association, International, AFL–CIO, *v.* Trans World Airlines, Inc. C. A. 2d Cir. Certiorari denied. *Ruth Weyand* for petitioner. *Edward R. Neaher* for respondent. Reported below: 273 F. 2d 69.

No. 831. Eule *v.* Eule. Supreme Court of Wisconsin. Certiorari denied. *William E. Glassner, Jr.* for petitioner. *John A. Wittig* for respondent. Reported below: 9 Wis. 2d 115, 100 N. W. 2d 554.

No. 836. Augus, Administratrix, et al. *v.* Stichman, Trustee. C. A. 2d Cir. Certiorari denied. *Joseph S. Lord III* and *Seymour I. Toll* for petitioners. *William W. Golub* for respondent. Reported below: 273 F. 2d 707.

No. 838. Bucciferro *v.* United States. C. A. 7th Cir. Certiorari denied. *Maurice J. Walsh* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 274 F. 2d 540.

No. 843. Fowler *v.* Smiser et al. C. A. 10th Cir. Certiorari denied. *Ruth E. Moran, John C. Moran, Edith G. McKinney* and *James R. McKinney* for petitioner. Reported below: 274 F. 2d 335.

No. 844. SORKIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jacob W. Friedman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 275 F. 2d 330.

No. 847. JAMES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *T. Eugene Thompson* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 275 F. 2d 332.

No. 849. GARCIA *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. Supreme Court of New Mexico. Certiorari denied. *Rolando J. Matteucci* for petitioner. *James T. Paulantis* for respondent. Reported below: 66 N. M. 339, 347 P. 2d 1005.

No. 851. UNITED STATES *v.* CUNNINGHAM ET AL. C. A. 4th Cir. Certiorari denied. *Solicitor General Rankin, Assistant Attorney General Morton, Daniel M. Friedman* and *Roger P. Marquis* for the United States. *Claude C. Pierce* for respondents. Reported below: 270 F. 2d 545.

No. 855. NATIONAL LATEX PRODUCTS CO. ET AL. *v.* SUN RUBBER CO. C. A. 6th Cir. Certiorari denied. *Walter J. Blenko, Wm. C. McCoy, Wm. C. McCoy, Jr.* and *Albert H. Oldham* for petitioners. *Everett R. Hamilton* for respondent. Reported below: 274 F. 2d 224.

No. 856. LEWIS ET AL. *v.* MYHALYK. Supreme Court of Pennsylvania. Certiorari denied. *John J. Wilson, A. E. Kountz* and *Val J. Mitch* for petitioners. *Charles E. McKissock* for respondent. Reported below: 398 Pa. 395, 158 A. 2d 305.

No. 850. UNITED STATES *v.* HALL, CHIEF JUDGE, U. S. DISTRICT COURT. C. A. 9th Cir. Certiorari denied. *Solicitor General Rankin, Assistant Attorney General Morton, Daniel M. Friedman* and *Roger P. Marquis* for the United States. *Robert M. Adams, Jr.* for respondent. *Conrad J. Moss* and *James C. Hollingsworth* filed a brief for Edith H. Hoffman et al., as *amici curiae,* in opposition to the petition. Reported below: 274 F. 2d 856.

No. 860. SCHLOTHAN *v.* TERRITORY OF ALASKA. C. A. 9th Cir. Certiorari denied. *Philip Barnett* and *Rodney Robertson* for petitioner. *Ralph E. Moody,* Attorney General of Alaska, and *John L. Rader* for respondent. Reported below: 276 F. 2d 806.

No. 871. MOORE-MCCORMACK LINES, INC., *v.* ARMCO STEEL CORP. ET AL.; and

No. 904. ARMCO STEEL CORP. ET AL. *v.* MOORE-MCCORMACK LINES, INC. C. A. 2d Cir. Certiorari denied. *Eugene Underwood* and *Hervey C. Allen* for Moore-McCormack Lines, Inc. *Henry N. Longley* and *Leonard J. Matteson* for Armco Steel Corp. et al. Reported below: 272 F. 2d 873.

No. 857. LEWIS ET AL. *v.* PAVLOVSCAK. Motion of respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied. *John J. Wilson, A. E. Kountz* and *Val J. Mitch* for petitioners. *Jerome M. Libenson* for respondent. Reported below: 274 F. 2d 523.

No. 801, Misc. JACKSON *v.* JUSTICES OF THE SUPREME COURT, APPELLATE DIVISION, FOURTH DEPARTMENT, ET AL. C. A. 2d Cir. Certiorari denied.

No. 507, Misc. POLLINO *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied. Petitioner *pro se*. *Isidore Dollinger* for respondent.

No. 749, Misc. GAITHER *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Caryl Warner* for petitioner. *Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Philip C. Griffin,* Deputy Attorney General, for respondent.

No. 824, Misc. DEAL *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. Court of Appeals of Maryland. Certiorari denied.

No. 636, Misc. DANIELS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Melvin M. Feldman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 106 U. S. App. D. C. 324, 272 F. 2d 553.

No. 593, Misc. CROSS *v.* STATE BAR OF CALIFORNIA. Supreme Court of California. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. Petitioner *pro se*. *Alan B. Aldwell* for respondent.

No. 711, Misc. HICKS *v.* NEW YORK. Petition for writ of certiorari to the Appellate Division of the Supreme Court of New York, Second Judicial Department, and other relief, denied.

Rehearing Denied.

No. 696. FEDERAL BROADCASTING SYSTEM, INC., *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL., *ante*, p. 935;

No. 736. TUCKER *v.* ILLINOIS, *ante*, p. 950;

No. 614, Misc. SMITH ET AL. *v.* UNITED STATES, *ante*, p. 954;

No. 634, Misc. UNITED STATES EX REL. HELWIG *v.* MARONEY, SUPERINTENDENT, WESTERN STATE PENITENTIARY, *ante*, p. 954;

No. 652, Misc. WHITING *v.* SACKS, WARDEN, *ante*, p. 946;

No. 705, Misc. LIVESAY *v.* ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *ante*, p. 946; and

No. 853, Misc. MACKIEWICZ *v.* FLORIDA, *ante*, p. 965. Petitions for rehearing denied.

Dismissal Under Rule 60.

No. 467. MOUNSEY *v.* NEW YORK. Certiorari, 361 U. S. 812, to the Court of Appeals of New York. Writ of certiorari dismissed upon stipulation of counsel pursuant to Rule 60 of the Rules of this Court. *Walter Gellhorn* for petitioner. *Louis Lefkowitz*, Attorney General of New York, for respondent.

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